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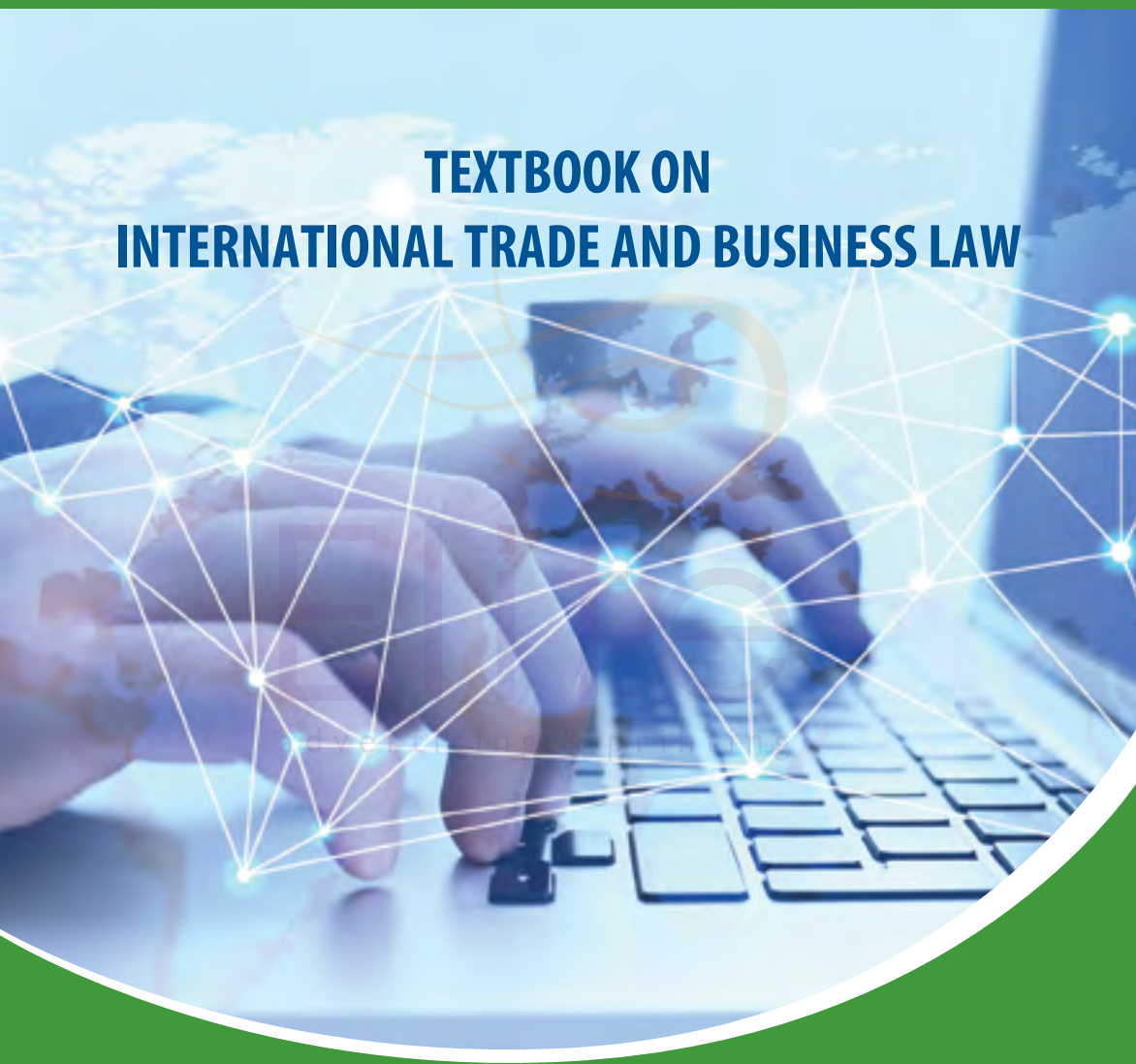
TEXTBOOK ON INTERNATIONAL TRADE AND BUSINESS LAW



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TEXTBOOK ON INTERNATIONAL TRADE AND BUSINESS LAW

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INTRODUCTION TO THE THIRD EDITION

The European Trade Policy and Investment Support Project (EU-MUTRAP) and Hanoi Law University (HLU) decided to proceed with the publication of the third edition of the Textbook following the great success of the first two editions, published respectively in 2011 and 2014. All the main universities in Viet Nam adopted the Textbook as the main academic material. Moreover, law firms, think tanks and State agencies largely made use of the Textbook as an important instrument supporting their daily work. This third edition of the Textbook, like the first two, has been prepared with the financial and expertise contributions of an European Union funded Project (EU-MUTRAP). Indeed, the EU-MUTRAP recruited international and local academics for the revision and the update of the Textbook, taking into consideration the evolution of the trade policy of Viet Nam of the last few years.

European Trade Policy and Investment Support Project (EU-MUTRAP) and Hanoi Law University (HLU) would like to introduce the third republication of the Textbook on International Trade and Business Law to our valued readers.

Bui Huy Son

Project Director
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FOREWORD

This Textbook has been prepared with the support of the Multilateral Trade Assistance Project III (EU-Viet Nam MUTRAP III) funded by the European Union, and it is the result of the contribution of national and international academics and trade law experts. The cooperation between Vietnamese and international experts testifies the definitive integration of Vietnam in the international cultural system. The trade and economic world integration of Vietnam achieved with the accession to the WTO in 2007 contributed in a decisive manner to the full participation of Vietnamese experts and academics in the world scientific and cultural community. Indeed, a growing number of Vietnamese students and academics which are involved in international exchange programmes and this Textbook are the evidence of this phenomenon.

With the support of EU-Viet Nam MUTRAP III Project and other development cooperation programmes, the curricula of the main universities in Vietnam have been updated to take into consideration the rapid evolutions of the trade and economic situation. This Textbook, mainly directed to bachelor students, provides a picture of the legal aspects of the most relevant international trade issues. While recognizing the differences between the international 'public' and the 'private' trade law, the editor and contributors of the Textbook recognized that the two different disciplines cannot be studied separately. Lawyers and legal experts must have a thorough knowledge of all the aspects involving an international transaction, from the competent jurisdiction to settle any pathologic aspect of an international contract to the market access' rights protected by the WTO in a third country. Besides that, the Textbook is also a combination of global (WTO, Vienna Convention of the International Sales of Goods), regional (EU, NAFTA and ASEAN), bilateral (the agreements between Vietnam and some trading partners) and Vietnamese relevant rules. The Textbook benefited from the contribution of experts and academics combining the technical to the geographical expertise: for example, an US contributor wrote the section on NAFTA while an European drafted the section dedicated to the EU, while Vietnamese authors focused on the domestic relevant trade aspects. The result is a Textbook which captures different views regarding the law regulating international trade. This Textbook is a good example of what the Vietnamese lawyers and legal experts will have to face once they will start their professional life: a world characterized by harmonized international rules, common rules of legal interpretation but different attitudes regarding the practical implementation of the day-by-day commercial operations. The need to improve the trade relations, particularly important for an open economy like Viet Nam, requires the ability to understand these different attitudes and, when possible, to identify the best international practices which could be reproduced into the domestic legal framework.

The Textbook is also a good instrument for government officials daily confronted with a dynamic international arena and eager to know the basic information regarding various aspect of international trade law.

This Textbook is really a small reproduction of the real world Vietnamese lawyers and legal experts will have to face and it is an excellent starting point for all those interested in having a basic knowledge of the complex set of rules dealing with international trade.

Nguyen Thi Hoang Thuy

Project Director
EU-Viet Nam MUTRAP III

PREFACE

International Trade and Business Law is about empowering states in some areas and facilitating their business or other transactions with other states and entities - while restraining their activities in other areas for the greater good of the individual and the society, both national and international. This body of law aims to lay down the rules of fair play in the conduct of international economic relations to ensure a fairer society for all. In other words, the role of International Trade and Business Law is to ensure a level playing field for all states in order to enable them to maximize their potential and/or to optimize their unique selling points. Each and every individual is gifted with some unique qualities or strengths; the legal system of any state should be designed to enable these individuals to fulfill their potential without harming or undermining the interests of others in the society. The objective is for individuals to pursue their dreams - whatever these may mean to them. Some people are happy to become millionaires or even billionaires, while some others are happy to become nuns or monks, or to work for charitable organizations.

The same is true of nation-states: basically, a collection of individuals bound by certain common characteristics and objectives. Therefore, International Trade and Business Law, is designed to enable states to offer to the international community what they have; this is in return for what other states have to offer to them. Thus, the element of reciprocity and the promotion of national interests lie at the heart of human behaviour, and states are no exception. This is especially the case with International Trade and Business Law.

Dissimilarly to other specific areas of international law, International Trade and Business Law is directly relevant to the economy and prosperity of a nation. In other words, it concerns directly the basic economic interests of a nation. Hence, each and every state is careful in accepting the rules governing international trade and business. Every state knows, however, that without accepting certain basic principles of international law of trade and business it would not be able to trade with other states or otherwise to engage in other business activities.

The irony in the world of international trade is that every state wishes other states to open their doors as widely as possible by pursuing policies of trade and economic liberalization; conversely, states may also try to close their own doors as tightly as possible by pursuing protectionist policies. Here, indeed, is where the law is needed: to intervene to ensure fair play, and fairly to settle disputes in the case of foul play. The role of the law may be described as akin to that of a referee or an umpire in a sports match whose sole purpose is to ensure fair play. Associated with the idea of fair play is the creation of a level playing field for the business participants of the day.

Trade is one of the early attributes of human activity. The very word 'trade' signifies an economic activity that is voluntary and is based on reciprocity. Starting with the barter system in antiquity, humans began, when forms of money were invented, to trade in goods for cash. In fact, it was trade that contributed to the invention of money. As this voluntary reciprocal economic activity began to grow both geographically and in volume, it was regulated, initially by the traders themselves and then by the authorities, such that trade was fair; that it was free from distortions.

Much of human civilization has developed with and around the expansion of trade and the desire firstly, to survive and subsequently, to create wealth through trade. Early attempts to regulate trade were designed to facilitate trade by providing the basic code of conduct for those engaged in international trade. This code of conduct was developed in due course under both public and private international law to cater for the growth in trade and business activities. Accordingly, one of the visions of the new world order conceived towards the end of World War II was the liberalization of international trade to stimulate economic growth through the establishment of an International Trade Organization ('ITO').

Although the ITO never came into existence, its fundamental concept of the liberalization of international trade was pursued through the GATT and some other international legal instruments; many of these eventually became part of the WTO law when this world trade organization was established in 1995, following the conclusion of the Uruguay Round of Multilateral Trade Negotiations between 1986 and 1994. There have been a number of developments within private international law, too, since the end of World War II. These were designed to facilitate as well as to regulate international trade and business. Consequently, there is now a considerable body of public and private international law dealing with international trade and business, and this

Textbook entitled, *International Trade and Business Law,* is an attempt to provide a comprehensive yet succinct overview of this body of law.

The Textbook covers a wide range of topics in International Trade and Business Law pertaining to both public and private international law. It is the result of an ambitious project designed to produce a comprehensive tool of study for Vietnamese students, government officials, lawyers and scholars.

Vietnam adopted a new economic reform policy, known as 'Doi Moi', in order to usher the country along the road to economic liberalization and economic reform in 1986. As part of that drive, Vietnam made an application to join the WTO and was in 2007 duly admitted to this world trade organization. Since the introduction of 'Doi Moi' and membership of the WTO, in particular, Vietnam has witnessed a massive growth in international trade and business activity, requiring new laws, regulations and policies to regulate such activities.

Vietnam's membership of the WTO was a catalyst for a number of new developments in the legal system of the country, because Vietnam had to undertake a number of new commitments to join the WTO. Complying with these commitments required enacting new laws and adopting new policies. Vietnam's membership of the WTO has transformed the legal landscape in the country. Consequently, Vietnam is now not only a fully-fledged member of the WTO; it is also a thriving market economy with a socialist political system. The country has in the recent past attracted a huge amount of foreign investment and has become one of the world's fastest-growing economies. Parallel to such opportunities come the responsibilities to operate within agreed international rules. There has, for Vietnam's success, to be a well-educated or-trained human resource capable of interacting with other global actors and promoting and protecting the national interests of the country.

Vietnam's interaction with the actors in the field of international trade and business has increased a great deal. The Vietnamese legal system has responded and is still responding to the challenges stimulated by these changes in the sphere of international economic and legal activity. Therefore, there is a need to prepare a new generation of Vietnamese lawyers and government officials who can understand and handle appropriately the matters raised by these phenomenal changes taking place nationally and internationally; they must help the people of the country to maximize the benefits resulting from these changes. For this, they need good academic material - and this Textbook on International Trade and Business Law is designed to meet that need and demand.

It includes chapters authored by both Vietnamese and foreign authors dealing with both international legal and Vietnamese legal issues pertaining to both public and private international trade and business law. Such an inclusive approach provides the students with both international and Vietnamese perspectives into these areas of law.

The various contributors provide a comprehensive treatment of the topics selected for inclusion in the Textbook. These range from WTO law, including the trade in goods and services, and intellectual property protection, to international commercial dispute resolution, including international commercial arbitration, regional trading arrangements or regional economic integration schemes such as NAFTA, EU and ASEAN, and e-commerce. The chapters are both informative and analytical and are contributed by academics, practitioners, government officials and researchers of both older and younger generation most of whom carry a wealth of expertise and experience in the areas concerned.

Since this Textbook is designed primarily for law students, government officials, researchers and lawyers in Vietnam, the approach is obviously a legalistic one based on the analysis of national and international legal instruments, case law or jurisprudence and established customs and norms of behaviour. An attempt has been made to make it as reader- or student-friendly as possible. All chapters end with a list of questions for reflection by students and other readers in order to stimulate their thinking and analysis. Similarly, all chapters provide a list of further reading for those willing to develop further their understanding of a given area of law. Although the length and the style of presentation vary from one chapter to another, as is quite natural for a collection of this nature, consisting as it does of contributions by many people with their own different legal, practical and scholarly backgrounds, an attempt has been made to achieve uniformity and consistency throughout the text in order to present it as a cohesive Textbook. All in all, it is hoped that this Textbook would prove to be a valuable academic material and source of reference for those interested in International Trade and Business Law and in its application and ramifications in Vietnam.

It has been a pleasure for me to work with the Coordinating Committee of the Action of the Hanoi Law University (HLU) on this Textbook and I wish to thank them for their excellent cooperation.

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TABLE OF ABBREVIATIONS

AAA	American Arbitration Association
AANZFTA	ASEAN-Australia-New Zealand Free Trade Area
ABAC	APEC Business Advisory Council
ACFA	Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China
ACFTA	ASEAN-China Free Trade Area
ACIA	ASEAN Comprehensive Investment Agreement
ACP	African, Caribbean and Pacific Countries
AD	Anti-dumping
ADA	Anti-dumping Agreement
ADR	Alternative Dispute Resolution
AEC	ASEAN Economic Community
AFAS	ASEAN Framework Agreement on Services
AFT	ASEM Fund of Trust
AFTA	ASEAN Free Trade Area
AHTN	ASEAN Harmonized Tariff Nomenclature
AIA	ASEAN Investment Area
AITIG	ASEAN-India Trade in Goods
AJCEP	ASEAN-Japan Comprehensive Economic Partnership
AKAI	ASEAN-Korea Agreement on Investment
AKFA	ASEAN-Korea Framework Agreement on Comprehensive Economic Cooperation
AKTIG	ASEAN-Korea Trade in Goods Agreement
AKTIS	ASEAN-Korea Trade in Services Agreement
AMS	Aggregate Measurement of Support
APEC	Asia-Pacific Economic Cooperation
APEC-MRA	Mutual Recognition Agreement within the APEC
ASEAN	Association of South-east Asian Nations
ASEM	Asia-Europe Meetings
ATC	Agreement on Textiles and Clothing
ATIGA	ASEAN Trade in Goods Agreement

BC	Before Christ
BDC	Beneficiary Developing Country
BFTAs	Bilateral Free Trade Agreements
BIT	Bilateral Investment Treaty
BTA	Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations
BTAs	Bilateral Trade Agreements
CAP	Common Agricultural Policy
CDB	Convention on Biodiversity
CEPEA	Comprehensive Economic Partnership in the East Asia
CEPT	Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area
CFI	Court of First Instance
CFR	Cost and Freight (formerly known as C&F)
CIETAC	Chinese International Economic and Trade Arbitration Commission
CIF	Cost, Insurance and Freight
CIP	Carriage and Insurance Paid to
CISG	United Nations Convention on Contracts for International Sales of Goods 1980; or Vienna Convention 1980
CJ	Court of Justice (formerly known as ECJ - European Court of Justice)
CJEU	Court of Justice of the European Union
CLMV	Cambodia, Laos, Myanmar and Vietnam
CM	Common Market
COMESA	Common Market of Eastern and Southern Africa
CPC	United Nations Central Product Classification
CPT	Carriage Paid to
CTG	Council for Trade in Goods
CTS	Council for Trade in Services
CU	Customs Union
CVA	WTO's Agreement on Customs Valuation
DAP	Delivered at Place
DAT	Delivered at Terminal
DCs	Developing Countries
DDP	Delivered Duty Paid
DSB	WTO's Dispute Settlement Body
DSU	WTO's Dispute Settlement Understanding
EAFTA	East Asia Free Trade Area
EC	European Communities; or European Commission
ECB	European Central Bank
ECJ	European Court of Justice (it is now CJ - Court of Justice)
ECSC	European Coal and Steel Community
EDI	Electronic Data Interchange
EEC	European Economic Community
EFTA	European Free Trade Association
EMU	Economic and Monetary Union
EP	Export Price
EPAs	Economic Partnership Agreements
EU	European Union
EURATOM	European Atomic Energy Community
EXW	Ex Works
FAS	Free Alongside Ship
FCA	Free Carrier
FDI	Foreign Direct Investment
FIOFA	Federation of Oils, Seeds and Fats Association
FOB	Free on Board
FOR	Free on Rail
FOT	Free on Truck
FPI	Foreign Portfolio Investment
FSIA	US Foreign Sovereign Immunities Act of 1976
FTAs	Free Trade Agreements
GAFTA	Grain and Feed Trade Association
GATS	WTO General Agreement on Trade in Services
GATT	WTO General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GSP	Generalized System of Preferences

HFCS	High Fructose Corn Sweetener
IACAC	Inter-American Commercial Arbitration Commission
IAP	Individual Action Plan
IBRD	International Bank for Reconstruction and Development
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	World Bank's International Centre for the Settlement of Investment Disputes
IEG	Investment Experts Group
IGA	ASEAN Agreement for the Promotion and Protection of Investments
IL	Inclusion List
ILO	International Labour Organization
ILP	WTO Agreement on Import Licensing Procedures
IMF	International Monetary Fund
INCOTERMS	International Commercial Terms
IPAP	Investment Promotion Action Plan
IPRs	Intellectual Property Rights
ISBP	International Standard Banking Practice
ISP	Rules on International Standby Credit Practices
ITO	International Trade Organization
LCIA	London Court of International Arbitration
LDCs	Least-developed Countries
LMAA	London Maritime Arbitration Association
LME	London Metal Exchange
MA	Market Access
M&A	Merger and Acquisition
MAC	Maritime Arbitration Commission
MERCOSUR	Southern Common Market ('*Mercado Común del Sur*' in Spanish)
MFN	Most Favoured Nation
MMPA	Marine Mammal Protection Act
MNCs	Multinational Corporations
MTO	Multimodal Transport Operators
MUTRAP	EU-Viet Nam Multilateral Trade Assistance Project funded by the EU
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Area
NGOs	Nongovernmental Organizations
NME	Nonmarket Economy
NT	National Treatment
NTBs	Nontariff Barriers
NTR	Normal Trade Relations
NV	Normal Value
PCA	Partnership and Cooperation Agreement
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts
PNTR	Permanent Normal Trade Relation
PPM	Process and Production Method
PSI	WTO Agreement on Preshipment Inspection
PTAs	Preferential Trade Arrangements
ROK	Republic of Korea
RoO	WTO Agreement on Rules of Origin
RTAs	Regional Trade Agreements
S&D	Special and Differential Treatment
SA	WTO Agreement on Safeguard
SAA	Statement of Administrative Action
SCC	Stockholm Chamber of Commerce
SCM	WTO Agreement on Subsidies and Countervailing Measures
SMEs	Small and Medium-sized Enterprises
SMEWG	APEC's Small and Medium-sized Enterprise Working Group
SOMs	Senior Officials Meetings
SPS	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
SSG	Special Safeguard

TBT	WTO Agreement on Technical Barriers to Trade
TEC	Treaty of the European Communities
TEL	Temporary Exclusion List
TEU	Treaty of the European Union
TFAP	Trade Facilitation Action Plan
TFEU	Treaty of Functioning of the European Union
TIFA	Trade and Investment Framework Agreement
TIG	Trade In Goods
TNC	Trade Negotiations Committee; or Transnational Coorporations
TPP	Transpacific Economic Strategic Partnership Agreement
TPRB	WTO Trade Policy Review Body
TPRM	WTO Agreement on Trade Policy Review Mechanism
TRIMs	WTO Agreement on Trade-related Investment Measures
TRIPS	WTO Agreement on Trade-related Intellectual Property Rights
TRQs	Tariff-rate Quotas
UCC	US Uniform Commercial Code
UCP	ICC Uniform Customs and Practice for Documentary Credits
UNCITRAL	United Nations Commission for International Trade Law
UNIDROIT	International Institute for Unification of Private Law
URDG	Uniform Rules for Demand Guarantees
USDOC	US Department of Commerce
WCO	World Customs Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

CONTENTS

Textbook on

INTERNATIONAL TRADE AND BUSINESS LAW

INTRODUCTORY PART

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CHAPTER ONE.
GENERAL INTRODUCTION

Section One. INTERNATIONAL TRADE AND BUSINESS AND RELATED TRANSACTIONS

1. Historical Development of International Trade and Business Transactions

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

International trade in Europe in the pre-mediæval period experienced a depression arising from the collapse of the Roman Empire. Later, during the Middle Ages, Arabian merchants continued the tradition of international trade, creating broad trade networks around the Persian Gulf, Africa, India and South-east Asia. In that period, the international trade between China and India, Malaysia and South-east Asia also developed.

Seasonal fairs were created in the European cities in the Middle Ages. These were places where merchants brought goods from different countries for sale. Since then, emperors, such as the Emperor of Lombardy (Italy) in the eleventh century, had the policy of imposing a sales tax applicable in fairs and tariffs on goods transported to fairs.

During the late Middle Ages, the regional trade networks had developed considerably in Europe, such as the region along the coast

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

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

A new international economic order began to appear when the World War II was coming to an end. At the Bretton Woods Conference of 1944, the global economic organizations the International Monetary Fund (hereinafter the 'IMF') and the International Bank for Reconstruction and Development (hereinafter the 'IBRD' which is known as the World Bank) were born. A proposal for a global trade organization also appeared in the Havana Conference of 1948, i.e., the International Trade Organization (hereinafter the 'ITO'). However, the ITO did not come into existence ; the rules of international trade were then included in a 'provisional' mechanism governing international trade in goods, i.e., the General Agreement on Tariffs and Trade 1947 (hereinafter the 'GATT 1947'). This 'provisional' Agreement governed the global trade in goods for nearly 50 years, until the creation of the World Trade Organization (hereinafter the 'WTO') in 1995 (*see* Chapter Two of the Textbook).

Since the end of World War II, the global trade system, which has continuously developed over more than 65 years, is now standing in the multi-route crossroads. Where the WTO will head, together with global commitments to the liberalization of trade in goods; trade in services; protection and enforcement of intellectual property rights (hereinafter the 'IPRs'), and international investment issues, among other issues, remains to be seen. To overcome the relative ineffectiveness of the commitments to the liberalization of global trade, regional economic integration is now becoming an alternative foreign trade policy planned by most states. The models of regional economic integration, such as the European Union (hereinafter the 'EU'), the North American Free Trade Area (hereinafter the 'NAFTA'), and ASEAN Free Trade Area (hereinafter the 'AFTA'), to name but a few, have become familiar topics in many basic textbooks and casebooks of international trade law (*see* Chapter Three of the Textbook). Bilateral trade and investment agreements (hereinafter the 'BTAs') will also play an important role (*see* Chapter Four of the Textbook).

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

A. *International Trade and Trade Policy*

1. Why Do States Trade?

There are two main reasons advanced for why states trade with each other, such as (a) economic reasons; and (b) political reasons.

(a) Economic reasons

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

According to Adam Smith,

> … [T]he tailor does not attempt to make his own shoes, but he buys them from the shoemaker. The shoemaker does not attempt to make his own clothes, but employs a tailor.… [W]hat is prudence in the conduct of every private family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it… [w]e have some advantage.[1]

Adam Smith's arguments, mentioned above, regarding 'specialization' and 'absolute advantage' in international trade, were

[1] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (1776), edited by E. Cannan, University of Chicago Press, (1976), vol. 1, at 478-479.

further developed by David Ricardo who, in his book '*The Principles of Political Economy and Taxation*' of 1817, offered the theory of 'comparative advantage'. 'Comparative advantage' is a concept central to international trade theory; it holds that a country should specialize in the production and export of those goods, and should concurrently import those goods in which it has a comparative disadvantage. This theory formed the basis for increasing the economic welfare of a country through international trade. The theory usually favours specialized production in which the country is relatively well endowed, such as raw materials, fertile land, skilled labour, or accumulation of physical capital. The comparative advantage theory is the explanation for why developed and developing countries can and do benefit from international trade. Following this theory, even the poorest countries with little or no absolute advantage can participate in international trade and benefit, on the basis of its comparative advantages. It seems not excessive to say that David Ricardo is the 'architect' of the current WTO. Economists in the nineteenth and twentieth centuries have endeavoured to refine the models of David Ricardo, such as Heckscher-Ohlin, Paul Samuelson, and Joseph Stiglitz, etc.

Economists through the ages saw so clearly, the citizens of a state benefit from getting as large a volume of imports as possible in return for its exports or, equivalently, from exporting as little as possible to pay for its imports. Openness to trade and investment promotes growth in a number of ways, including:[2] it encourages economies to specialize and produce in areas where they have a comparative advantage over other economies; trade expands the markets to where domestic producers can access; trade diffuses new technologies and ideas, increasing domestic workers' and managers' productivity; eliminating tariffs on imports gives consumers access to cheaper products, increasing their purchasing power and living standards, and gives producers access to cheaper inputs, reducing their production costs and boosting their competitiveness.[3]

Liberalized trade and rapid growth, in not few countries, are responsible for much of the poverty reduction, such as China, India, Thailand, and Viet Nam.[4]

[2] Simon Lester *et al.*, *World Trade Law - Text, Materials and Commentary*, Hard Publishing, Oxford and Portland, Oregon, (2008), at 12-13.

[3] AusAid, 'Trade, Development and Poverty Reduction', http://www.ausaid.gov.au/publications/pdf/trade_devel_poverty.pdf

[4] D. Dollar and A. Kraay, 'Trade, Growth and Poverty', *World Bank Policy Research Working Paper*, (2001).

(b) Political reasons

It is often stated that '*if goods do not cross frontiers, soldiers will*'.[5] In reality, trade protectionism is frequently a source of conflict. In 1947, representatives from 23 countries met in Geneva (Switzerland) to negotiate the GATT aiming at lowering import tariffs under the nondiscrimination principle and the rule of law, since they understood all too clearly that the 'beggar-thy-neighbour' protectionist policies of the 1930s had been truly an economic disaster of the humanity, even one of reasons led to World War II. Therefore, international trade becomes one of the most important foreign policies of most states today. The thinking is that countries which trade with each other are less likely to declare war against each other; the risk of armed conflict is reduced.

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

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

2. Why Do States Restrict International Trade?

The reasons for international trade restrictions are multiple, including both economic and political. There are trade theorists who think that 'free trade does not provide the best solution in economic terms. Protectionism and unfair trade practice are seen as providing greater economic benefit to a country'.[6]

Since the fifteenth century, economists have been advising that states should follow policies aimed at promoting international trade in their own interest on the basis of their comparative advantage; however politicians, do not always appreciate this advice as they have various reasons to pursue a protectionist policy.[7] The *first* is the 'national security'

[5] Peter Van den Bossche, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, Cambridge, Cambridge University Press, 2nd edn., (2008), at 19.

[6] Indira Carr, *International Trade Law*, Cavendish Publishing, 3rd edn., (2005), at 1xxxvii.

[7] Simon Lester *et al.*, *supra*, at 23-24; Peter Van den Bossche, *supra*, at 20-24.

and 'self-sufficiency' arguments. These arguments serve the United States Government (hereinafter the 'US') to protect its steel industry and agricultural products. A thriving domestic steel industry is needed for the US national defense. The *second* is the 'infant industry' argument. Sometimes states need to protect a domestic industry and employment, including an 'infant industry', from competition generated by imports and foreign services or service suppliers. A potential industry that, if once established and assisted during its growing pains, could compete on equal terms in the world markets. The *third* is 'beggar-thy-neighbour' argument (*see* above). In practice, this nationalistic international trade policy is highly likely to promote retaliation by other countries. Besides, public morals, public health, consumer safety, environment, cultural identity and other societal values would become reasons for protectionism. Governments are influenced by interest group pressures or national interests, and may determine various and sophisticated forms of protectionism, if necessary. This kind of protectionist decision, in quite a lot of cases, would be good politics for many governments of both developed and developing countries.

3. What Is the States' Decision?

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

4. What Is International Trade Law?

Quite simply, it is the law governing international trade. The questions remain: (a) what is international trade? (b) in addition to states and international economic organizations which are main subjects, who are also the actors/subjects/players of international trade? Finally, (c) what are international trade rules?

(a) What is international trade?

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

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

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

It is not wrong to say that large countries and large economies still dominate the world trade. But international trade is also important for DCs and least developed countries (hereinafter the 'LDCs'). The US, the EU and Japan remain key players but their domination is weakening. 'Emerging powers', like China, India and Brazil, have played increasingly important role in international trade. They are emerging as key subjects in the production of manufactured goods and provision of services on the international markets, then are setting a new trend for other DCs to follow. Although having an inconsiderable amount of total global trade, LDCs as a whole are major producers of primary products, fuels, clothing and food products. It notes that their economic capacity varies widely depending upon a number of factors, including political stability and trade policy.

International economic organizations involve strongly in international trade relations, notable among these are the WTO, IMF, WB, EU, ASEAN, etc. Although the WTO is not the only international trade organization, but it is the most prominent trade organization with very board comprehensive powers and functions, and it does to some extent govern regional and bilateral trade agreements though the fundamental trade rules enshrined in WTO agreements.

The potential expansion of regional economic integration is clear. Greater Asian regionalism would have global implications, reinforcing a trend toward three trade areas that could become quasi-blocs: North America, Europe and East-Asia (*see* Chapter Three of the Textbook). The creation of such quasi-blocs would have implications for the ability to achieve future global WTO agreements. *Regional economic integrations* also become important actors in international trade relations, together with traditional subjects which are states.

Non-state actors, such as *businesses*, are now a growing influence on the trade agreements which are states' 'scene'. *For example*, the Trade-related Intellectual Property Rights Agreement (hereinafter the 'TRIPS Agreement') that promotes stricter IPRs protection were clearly a response to lobbying by Western companies that owned and developed IPRs, such as pharmaceutical, entertainment and software companies.[8] The *territories* which are not states, such as Hong Kong and Macau, are now in a position equal to that of other actors in international trade. Hong Kong and Macau, together with China, are full members of the WTO.[9]

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

(c) What are international trade rules?

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

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

The WTO agreements are almost fully global treaties on the international trade matter. They provide a binding set of rules on a wide range of international trade-related topics (*see* Sections One and Two - Chapter Two of the Textbook). In addition to the WTO agreements, there are numerous regional and bilateral trade treaties, and all these constitute a system of multilateral trade rules (*see* Part One of the Textbook). The most prominent of the regional trade treaties are the EU (*see* Section Two - Chapter Three of the Textbook), the NAFTA (*see* Section Three - Chapter Three of the Textbook), MERCOSUR (the Southern Common Market[10]), and the ASEAN Free Trade Area (hereinafter the 'AFTA') (*see* Section Four - Chapter Three of the Textbook). Having increased in large numbers in recent years, bilateral trade treaties are gaining in importance in the trade policy of many countries in the world, including Viet Nam (*see* Chapter 4 of the Textbook for understanding bilateral agreements between Viet Nam and its certain trading partners, such as the EU, US and China).

Traditionally, international investment treaties have taken the form of bilateral investment treaties (hereinafter the 'BITs'). Yet recently, investment provisions have been now incorporated in many bilateral and regional trade agreements, thus both trade and investment have been combined into a single agreement. *For example*, Viet Nam-US bilateral trade agreement (*see* Section Two - Chapter Four of the Textbook); and NAFTA (*see* Section Three - Chapter Three of the Textbook).

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

Thus, what is the role of rules governing international trade? How do international trade rules allow states to realize the gains of international trade? According to Bossche, there are basically four reasons explaining why there is a need for international trade rules.[11] *Firstly*, international trade rules *restrain* countries from taking trade-restrictive measures and help to avoid an escalation of trade-restrictive measures taken by states. *Secondly*, these rules satisfy the need of traders and investors for a degree of *security and predictability* which will encourage trade and investment. *Thirdly*, these rules help states *cope with the challenges presented by economic globalization*, such as public health, clean environment, cultural identity and minimum labour standards, etc. *Fourthly*, it is the need to achieve a greater measure of equity in international economic relations.

[8] Simon Lester *et al.*, *supra*, at 42.

[9] WTO, http://www.wto.org.

[10] MERCOSUR is the abbreviation of Spanish words *Mercado Común del Sur*.

[11] Peter Van den Bossche, *supra*, at 33-35.

B. *International Business Transactions*

1. Why Does A Business Expand Abroad?

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

2. What Is International Business Law?

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

(a) What are international business transactions?

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

A business may decide to produce its products abroad instead of producing these in its home country then exporting to foreign countries. It is the case that a business decides to license its IPRs to other businesses abroad and to allow this foreign business to produce and sell its products. The *international transfer of IPRs* is one of several effective business activities, and creates opportunities internationally to disseminate their IPRs.

There are various forms of IPRs transfer, such as the licensing of objects of industrial property rights (e.g., patents or trademarks), licensing of copyright, technology transfer, or franchising (*see* Section One - Chapter Six of the Textbook). A Dutch pharmaceutical company may license its patent on a specific drug to a Vietnamese company producing pharmaceutical products i.e., the Dutch company allows the Vietnamese pharmaceutical company use the patent owned by the Dutch pharmaceutical company to produce this drug and sell it in Viet Nam. Similarly, an US movies company may license the copyright of a film to a French company for the duplication and sale of this film in EU markets. Besides, many companies, such as KFC, McDonald, and Pizza Hut are very successful in international franchising.

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

Besides, there are many other international business transactions and related transactions, such as *international logistics*, including international transport (*see* Section Two - Chapter Six of the Textbook), lending, leasing, employment, foreign portfolio investment (hereinafter the 'FPI'), international banking transactions, and international financial transactions (such as international taxation, international insurance), etc.

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

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

i) The main subjects are *traders* who one trades (*for example*, sales of goods, provision of services, FDI), including both *individuals* and *businesses*. The concept of 'trader' is not defined completely the same by different domestic laws. According to Article 6(1) of the Commercial Law of Viet Nam 2005, 'Traders are including economic organizations which are legally established, and individuals who trade independently and regularly and get business registration certificate'. Recently, multinational corporations (hereinafter the 'MNCs') have increasingly demonstrated their important role in international business transactions. MNCs have showed their role as intermediary of capital movement in the international investment relation.

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

UNCITRAL has moved towards formulating model laws which provide a legal framework for states to adopt and adapt to suit their own needs. For example, the Model Law on Electronic Commerce (*see* Section Three - Chapter Six of the Textbook). ICC also plays a dominant role in ensuring a level of harmonization through the formulation of rules for incorporation by those engaged in international business transactions (*see* Section Two - Chapter One of the Textbook below). International Federation of Freight Forwarders Association (hereinafter the 'FIATA') plays an important role in the harmonization of rules through the promotion and use of standard forms such as the FIATA Multimodal Transport Bill of Lading.

iii) *States* involve in international business transactions also, yet as a 'special' subject and sometimes do not behave as equally as other subjects, since this subject is the beneficiary of 'jurisdictional immunity'.

Thus, what is the State's 'jurisdictional immunity'? Why a State becomes a 'special' subject involving in international business transactions?

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

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

'Absolute' immunity was supported by the principle of the equality of States' sovereignty and the 'Act of State' Doctrine. The 'Act of State' Doctrine originated from an US Court. The doctrine says that a nation is sovereign within its own borders, and its domestic actions may not be questioned in the courts of another nation. The 'Act of State' Doctrine was declared in the case *Underhill v. Hernandez* [1897] in which the New York Court reasoned: '… [E]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory'.[12]

In 1964, the US Supreme Court applied the 'Act of State' Doctrine to the famous case *Banco Nacional de Cuba v. Sabbatino* [1964]. The case arose when Cuba nationalized its sugar industry, taking control of sugar refineries and other companies in the wake of the Cuban revolution. A large number of Americans who had invested in those companies lost their investments without compensation when the Cuban government assumed control. However, despite the losses suffered by US nationals, the Supreme Court upheld the 'Act of State' Doctrine by assuming the validity of Cuba's domestic action and therefore rejected the claim of US nationals against Cuba for their lost investments.[13]

Besides, an argument supporting 'restrictive immunity' was found long ago in the Belgian case law, following that 'jurisdictional immunity' could be offered to a foreign State only for its acts of sovereignty (acts accomplished '*jure imperii*'), not for its acts of private management, such as commercial (acts accomplished '*jure gestionis*'). On 17 July 1878, for the first time, a Belgian tribunal refused to accept the 'jurisdictional immunity' of a foreign State in a civil case, in which the Government of Peru claimed its immunity in litigation concerning a transaction of the sale of guano. Following this judgment, the case related to commercial contract, therefore Government of Peru must accept jurisdiction of the Belgian commercial tribunal.[14] 'Jurisdictional immunity' has relevance in only domestic jurisdictions, and none in international jurisdictions. '…[T]he distinction between '*acta jure imperii*' and '*acta jure gestionis*'… [h]as no relevance in a public international forum, with respect to a state or to any other international actor which is subject to its jurisdiction'.[15]

Justifications of 'restrictive' immunity are multiple. In the context of modern international trade and business transactions, the maintenance of 'absolute' immunity leads the State to a position more favoured than others. This is difficult to accept, since it affects fair competition in

[12] *Underhill v. Hernandez*, 168 U.S. 250 [1897].

[13] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 [1964].

[14] *Rau, Vanden Abeele et Cie c/ Duruty, Pas.*, 1879, II, 175; BJ, [1880], 222.

[15] Sent. Arb. Reineccius *et al*. v/ BIS, Partial Award, 22 November 2002, # 123, www.pca-cpa.org.

international trade and international business transactions.

Following the point of view on 'restrictive' jurisdictional immunity, a State may itself restrict its jurisdictional immunity in order to act the same as other actors. This view was incorporated into the legislation of some States, particularly the US, and in some treaties. The US Foreign Sovereign Immunities Act of 1976 ('FSIA') was codified in the 28 USC Chapter 97 - Jurisdictional Immunities of Foreign States 1976, amended 2008. Following the US view,

> … [T]he determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign States and litigants in United States courts. Under international law, States are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this Chapter.[16]

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

[16] 2008 - Pub. L. 110-181, div. A, title X, Sec. 1083(a)(2), 28 January 2008, 122 Stat. 341, added item 1605A; http://uscode.house.gov; http://us-code.vlex.com

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

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

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

The rules concerning the rights and obligations of the subjects/actors entering into international business transactions need to be clear and certain. The lack of legal certainty has the potential to act as an impediment to do international business.

These rules take on the task of addressing various legal aspects affecting international business transactions, such as international sales of goods contracts, carriage of goods, agency agreements, distribution agreements, international IPRs transfer, international logistics (including international transport), international payment, FDI transactions, international insurance, e-commerce, resolution of international commercial disputes, etc (*see* Part Two of the Textbook).

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

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

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

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

Section Two. SOURCES OF THE INTERNATIONAL TRADE AND BUSINESS LAW

There are some problems, as follows:

Problem 1:

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

- In order to arrive in Italy, the Vietnamese trader should have a passport issued by the Vietnamese authorities and a visa of entry into the EU.
- whether the sale of clothes contract between the traders could be governed by United Nations Convention on Contracts for the International Sales of Goods 1980 ('CISG')?
- whether the Laws on Customs of both Viet Nam and Italy have some connection with the WTO agreements?
- in the case where the Vietnamese trader considered that the goods sold by the Italian partner are 'out of fashion' suits, what is the law traders can apply, and what is the forum with the competence to solve their dispute?
- Vietnamese law, Italian law, or what law could be applicable to this business transaction?
- can contracting parties choose the law applicable?
- what are the criteria governing the choice of law?
- in the case where the Italian trader loses the lawsuit following the Italian tribunal's judgment, will this judgment have legal effect and be enforceable in Viet Nam?

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

Problem 2:

The State A imposed anti-dumping (hereinafter the 'AD') duties on coffee imported from the State B from 2005. The Department of Commerce of the State A (hereinafter the 'DOC') initiated the original investigation in January 2004, issued an AD duty order in February 2005, and has since undertaken periodic reviews and a 'sunset review'. The DOC calculated the margin of dumping based on a comparison of normal value (hereinafter the 'NV') and export price (hereinafter the 'EP') or 'constructed export price'. The NV in question involving a non-market economy (hereinafter the 'NME') was based on the producer's factors of production, which included individual inputs for raw materials, labour, and energy, based on the actual production experience of the individual respondent. The DOC relied on 'surrogate' values to determine the price at which the factors of production would be acquired in a market setting, relying on a specific 'surrogate' country for this exercise. In the case of the State B, this 'surrogate' country has been State C. The DOC then applied ratios for the overheads, selling, general and administrative expenses, and profits into the calculation of the NV of coffee imported from the State B. The resulting NV was compared to the EP, which is the price at which the product was first sold to an unaffiliated purchaser.

In investigations, the DOC utilized 'zeroing practice' usually aplied in the State A, following which any instances of negative dumping are set to zero, as opposed to allowing the negative dumping to offset the positive dumping.

In this case, questions for legal experts are several:

- Whether the DOC's 'zeroing practice' is consistent with the State A's WTO's obligations and with the WTO's Anti-Dumping Agreement (hereinafter the 'ADA')?
- whether 'Zeroing' had no impact on the margins of dumping determined by the DOC?
- whether the State B's claim regarding 'Zeroing' has merit?
- what are the legal sources parties may use in this case? the ADA and/or WTO's cases?
- what cases are pertinent? *US-Zeroing (Japan)* [2009]? *US-Zeroing (EC)* [2009]*?* Or others?

- who bears the burden of proof?
- in those cases where there is an infringement of the obligations assumed under a covered agreement, what is the legal consequence?

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

1. Domestic Law

A. *Various Sources of Domestic Law*

Domestic law is very important in international legal practice. Domestic law in question, as separate from international law, includes law of foreign countries. In reality, the understanding and application of laws of other countries are always a 'nightmare' for both international traders and lawyers.

The sources of domestic law are various and it could focus on some followings.

1. Legislation

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

In general, domestic rules applying to domestic business transactions would concurrently apply to international business transactions. Besides, since states need to protect its national interests in international trade and business transactions, it should regulate policy such as on trade in goods, and on trading partners. Concretely, which goods/technologies would fall into the lists of prohibited import-export or restricted import-export? Which trading partners would not be beneficiaries of preferential treatment? Should it strictly regulate the strong foreign currency transfers abroad? In which sectors should it restrict FDI?

An important source of domestic law concerning the international trade and business law consists in trade law statutes. *For example*, in the US legal system, the US Tariff Act 1930, US Trade Act 1974, US Trade Agreements Act 1979, US Uniform Commercial Code (hereinafter the 'US UCC') and others are very important sources of international trade and business law. Besides, various statutes concerning contract law, civil law, and civil procedure law, etc and included in the domestic law of countries are also truly pertinent legal sources. In terms of domestic law, the key areas covered are the so-called 'trade remedies' and customs law. Regulations on 'trade remedies' (mainly consisting of AD, countervailing duty and safeguard measures) are truly 'legal' trade barriers to both fair trade and unfair competition. Also important are customs regulations, under which governments collect import-export duties and regulate import-export.

In the current legal system of Viet Nam, it should note the important statutes which are the source of international trade and business law, such as Civil Code 2015, Commercial Law 2005, Civil Procedure Code 2015; Law on Enterprise 2014; Intellectual Property Law 2005 (amended and complemented in 2009); Commercial Arbitration Law 2010; Law on Foreign Trade Management 2017, etc. and regulations.

2. Domestic Case Law

Another source of domestic law concerning international trade and business transactions is case law. Many are highly significant for legal experts, such as the Belgian case of 1878 concerning the 'restrictive' jurisdictional immunity (*see* Section One - Chapter One of the Textbook); or the case *United City Merchants (Investments) Ltd v. Royal Bank of Canada* [1983] passed by an UK tribunal clarified the fraud exception of the principle of autonomy of the credit in the field of international payment, while the UCP 600 does not stipulate this kind of exception (*see* Section Four - Chapter Five of the Textbook);[17] and *Banco National de Cuba v. Manhattan Bank* [1981] related to the application of the 'Act of State' Doctrine by the US Court.[18]

3. Other Sources of Domestic Law

Domestic law includes *national mercantile customs and usages* as well as *general principles 'in foro domestico'*. These are the general principles

[17] *United City Merchants (Investments) Ltd v. Royal Bank of Canada*, The American Accord, [1983], 1 AC 168, House of Lords.

[18] *Banco National de Cuba v. Manhattan Bank*, 658 F. 2d 875 (2nd Cir. [1981]).

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

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

The effect of the domestic law of a state is usually limited to governing acts done by subjects who are its citizens and performed in its territory. The determination of a MNC's nationality becomes very important and complex in the case where government needs to protect the interest of its MNC in international business activities.[19]

The limit of domestic law in governing international trade and business transactions sometimes conflicts with the issue of the extra-territoriality of jurisdiction. The extra-territoriality of jurisdiction of a state is the competence to govern by law:

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

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

[19] International Court of Justice (ICJ), *Barcelona Traction, Belgium v. Spain* [1970], http://www.icj-cij.org.

2. International Law

A. *International Mercantile Customs and Usages*

1. Concept of International Mercantile Customs and Usages

International mercantile customs and usages are a very significant legal source of International Business Law. Traders, driven by economic goals, have always spoken in a common language, that of international mercantile customs and usages.

International mercantile customs and usages could be understood as a whole of unwritten rules generated from the acts/behaviours of merchants and were considered as 'the law' by them. *For example*, International Commercial Terms (hereinafter the 'INCOTERMS') (*see* Section Two - Chapter Five of the Textbook); Uniform Customs and Practice for Documentary Credits (hereinafter the 'UCP') (*see* Section Four - Chapter Five of the Textbook); or International Standard Banking Practice (hereinafter the 'ISBP') (*see* Section Four - Chapter Five of the Textbook).

2. Lex mercatoria ('Merchant Law')

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

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

partnerships, bankruptcy, mergers, and trademarks. It emphasized freedom of contract and freedom of alienability of movable property.

> '… [T]heir disputes would be settled by special local courts, such as the courts of the fairs and boroughs and the staple courts, where judge and jury would be merchants themselves. These merchant courts would decide cases quickly and apply the *lex mercatoria* as opposed to the local law'.[20]

Most significantly of all, it was speedily administered by merchant courts that avoided legal technicalities and often decided cases '*ex aequo et bono*' (in equity). The *lex mercatoria* derived its authority from voluntary acceptance by the merchants whose conduct it sought to regulate. The *lex mercatoria* really suited merchants' needs during that period.

As the centre of European commercial life, Italy had pride place in the development of *lex mercatoria* in the Middle Ages. Its merchants and lawyers were creative in the development of maritime and commercial instruments, such as the bill of lading and the bill of exchange, all of which gave rise to a corpus of substantive rules based on mercantile usage. The influence of the Italian merchants was felt throughout Europe, such that even the great fairs of the Champagne region (France) were dominated by Italian traders.[21]

Later, when emperors gained wider powers, and more nation-states were created in the late Middle Ages in Europe, *lex mercatoria* tended to be integrated into domestic legal systems. *For example*, in the UK, *lex mercatoria* was a part of the UK law applied by commercial tribunals. The *lex mercatoria* was fully incorporated into the common law and this was largely done through the work of Sir John Holt (Chief Justice from 1689 to 1710) and Lord Mansfield (Chief Justice from 1756 to 1788).[22] However, most *lex mercatoria* changed through being applied by tribunals of different countries.

From the nineteenth century, States started to conclude treaties relating to international trade and business transactions. Subsequently, *lex mercatoria* seems to remain of only historical significance. However, *lex mercatoria*, which is sometimes complemented by *lex maritima* ('the law for merchants of the sea'),[23] still has an impact on the development of modern international trade and business law concerning the international sale of goods, international payment, and international transport of goods.

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

The ICC is an international non-governmental organization serving world business. The ICC plays a dominant role in ensuring harmonization through the compilation of international mercantile usages for incorporation by those engaged in international business transactions. The ICC has produced numerous uniform rules, adopted by incorporation into contracts. These fall broadly into three groups: banking and insurance, international trade and international transport.[24]

Many of these rules are based on what the merchants may have adopted as customs or standard practices over time for their own convenience. *For example*, International Commercial Terms ('INCOTERMS') (*see* Section Two - Chapter Five of the Textbook); Uniform Customs and Practice for Documentary Credits ('UCP') (*see* Section Four - Chapter Five of the Textbook); International Standard Banking Practice ('ISBP') (*see* Section Four - Chapter Five of the Textbook); International Standby Practices ('ISP') (*see* Section Four - Chapter Five of the Textbook); or the UNCTAD/ICC Rules for Multimodal Transport Documents. Bankers throughout the world have adopted the UCP, now used almost universally in documentary credit transactions.

B. *Treaties*

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

At the global level, good examples of international trade and business treaties include WTO agreements (*see* Chapter Two of the Textbook); United Nations Convention on Contracts for the International Sales of Goods 1980 ('CISG') (*see* Section Three - Chapter

[20] L. S. Sealy and R. J. A. Hooley, *Commercial Law, Text, Cases, and Materials*, Oxford University Press, 4th edn., (2009), at 14.

[21] *Good on Commercial Law*, Edited and fully revised by Ewan McKendrick, Penguin Books, 4th edn., (2010), at 5.

[22] L. S. Sealy and R. J. A Hooley, *supra*, at 15.

[23] http://en.wikipedia.org/wiki/International_trade_law

[24] *Good on Commercial Law*, *supra*, at 15.

Five of the Textbook); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter the 'New York Convention') (*see* Section Three and Section Four - Chapter Seven of the Textbook); The Hague-Visby Rules and the Hamburg Rules (*see* Section Two - Chapter Six of the Textbook), etc.

Within the framework of the WTO agreements, there are 'plurilateral' trade agreements. These are agreements voluntarily concluded by some WTO members, thus came into effect for these members only. Plurilateral agreements are not binding on other WTO members who do not conclude them. On the date from when WTO entered into force (1 January 1995), there were four plurilateral trade agreements: the Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Agreement, and the International Bovine Meat Agreement. The Information Technology Agreement 1996 was a recent plurilateral agreement. In late 1997, the International Dairy Agreement and International Bovine Meat Agreement were terminated. The conclusion of plurilateral agreements aims at allowing smaller groups of WTO's members to move forward, outside the single undertaking, on issues important to them.[25]

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

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

C. *International Cases*

WTO cases and decisions/judgments passed by international jurisdictions, such as international courts, international arbitrations, are very important in the legal source system. *For example*, the WTO's case *Japan-Alcoholic Beverage* [1996] clarified the concept 'like product' in litigation concerning the application of the principle of national treatment, a cornerstone principle of international trade law, while WTO agreements cannot do this (*see* Section Two - Chapter Two of the Textbook).[26]

Besides, international cases in the FDI's field are very important. In the case *Factory at Chorzow* [1927] decided by the Permanent Court of International Justice (hereinafter the 'PCIJ'), the expropriation, nationalization and compensation standards were clearly explained.[27] Similarly, the case *Barcelona Traction* [1970] decided by the International Court of Justice (hereinafter the 'ICJ') showed the rule on determination of the MNC's nationality.[28]

The European Court of Justice's cases (it is now Court of Justice which is a part of the Court of Justice of the European Union, *see* Section Two - Chapter Three of the Textbook) form a substantive body of law binding EU institutions and its member States. The leading case *Van Gend en Loos* [1963] [29] is an example.

The final dispute settlement panel determinations within NAFTA have made significant contributions to the jurisprudence of international trade law, and to investor-state arbitration law in particular. We may look at two cases, *Metalclad v. Mexico*[30] and *Thunderbird v. Mexico*, within the framework of NAFTA.[31] (*see* Section Three - Chapter Three of the Textbook).

D. *Other Sources*

General principles of international law are significant for issues such as those relating to State responsibility, or to fair and just compensation within the FDI's field. One of these is the principle of good faith, which controls the

[25] WTO, http://www.wto.org.

[26] WTO, http://www.wto.org.

[27] Permanent Court of International Justice (PCIJ), *Factory at Chorzow* (Germ. v. Pol.), [1927] P.C.I.J. (ser. A) No 9 (26 July 1927), http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow.htm

[28] International Court of Justice (ICJ), *Barcelona Traction, Belgium v. Spain* [1970], http://www.icj-cij.org.

[29] ECJ, Case 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen*.

[30] NAFTA, *Metalclad Corporation v. The United Mexican States,* Award of 30 August 2000, (Case No. ARB(AF)/97/1) reproduced in [2001] 16 *ICSID Review-Foreign Investment Law Journal* 168.

[31] NAFTA, *International Thunderbird Gaming Corp. v. Mexico*, Award of 26 January 2006 (UNCITRAL/NAFTA). Available at: www.italaw.com/documents/ThunderbirdAward.pdf.

exercise of rights by States. General principles of international law are, in principle, binding on all states.

Pursuant to Article 38(1) of the Statute of the International Court of Justice ('ICJ'), the '*teachings of the most highly qualified publicist*' are subsidiary means for the determination of rules of international law.

'*Soft law*' is popularly mentioned by academics. 'Soft law' is rules which are not legally binding, but which in practice will normally be adhered to by those who subscribe to them. Examples include, most Resolutions and Declarations of United Nations General Assembly, legal doctrines, Model Rules, Codes of Conduct, Action Plan, etc. It should list some interesting 'soft law' as follows: UNGAOR, Res. 1803 Supp. (No.17), 115, UN Doc. 5217 (1962) concerning permanent sovereignty on natural resources; UNGA, Res. 3201 (S-VI), UN Doc. A/9559 dated 1 May 1974 concerning new world economic order; OECD, Declaration 1976 on international investment and MNCs; 'Act of State' Doctrine (*see* Section One - Chapter One of the Textbook), and the Calvo and Drago Doctrines.

The 'Calvo Doctrine' is a foreign policy doctrine which holds that jurisdiction in international investment disputes lies with the country in which the investment is located. The Calvo Doctrine thus proposed to prohibit 'diplomatic protection' practice or armed intervention by the investor's home country of the investor. An investor, under this doctrine, has to use the local courts, rather than those of their home country. The Doctrine, named after Carlos Calvo, an Argentine jurist, has been declared since the nineteenth century and applied throughout Latin America and other areas of the world. The 'Drago Doctrine' is a narrower application of Calvo's wider principle.[32]

Other 'soft law' in the field of international business law which should be known is UNIDROIT Principles of International Commercial Contracts (hereinafter the 'PICC') (*see* Section Three - Chapter Five of the Textbook); the Principles of European Contract Law (hereinafter the 'PECL') prepared by the Commission on European Contract Law (*see* Section Three - Chapter Five of the Textbook); and UNCITRAL Model Law on Electronic Commerce (*see* Section Three - Chapter Six of the Textbook).

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

[32] http://en.wikipedia.org

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

Summary of Chapter One

International trade and business transactions and the law governing them have experienced a long history, since the beginning of recent civilization. The revolutions of science and technology through the ages have strongly influenced the development of global trade.

Both international trade involved in mainly by States and public entities, and international business transactions involved mainly by traders, are complex, governed as they are by both domestic law and international law.

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

Academics worldwide - as well as of Viet Nam - have various points of view on this field of law. Scholars verbalize a whole or a part of content of this field of law as 'international trade law', 'world trade law', 'global trade law', 'international trade regulations', 'international commercial law', 'international business law', 'international economic law', 'droit economic international', 'droit de commerce international', 'droit international de commerce', and many other names. However, the importance is that this field of law governs both issues relating to: (i) the State's foreign trade *policy* (such as tariff and non-tariff barriers, customs valuation, dumping, or subsidies), and (ii) *acts* done by subjects/actors (including States and public entities as well as private entities) in the international business transactions (such as international sales of goods contracts, international payment, international transport of goods). International trade and business law should be viewed as the totality of the law's response to the needs and practices of the trade relations between States and the mercantile community.

A regulatory framework that promotes free trade seems insufficient to stimulate growth in trade. It needs an adequate legal framework in fields that affect international trade and business, such as transportation, banking, marketing, or communication.

International trade and business law link more closely to economics than almost any other area of the law, as their rules are the expression of trade policy. Besides, international trade and business transactions as well as the law governing them would not be developed if politicians fail to see the interests generating from international trade and business transactions. If an issue looks legally simple, it may still be diplomatically difficult and require long negotiations. The commercial interests of traders could depend on the political interests of States, as in the case *Barcelona Traction* [1970]: when politicians lose interest, investors could lose money. Therefore, before deciding to conduct international business, a trader should fully evaluate the impact of treaties as well as domestic law of the foreign country on his/her business transactions, such as regulations on protection of corporate ownership (including IPRs); ineffectiveness of a treaty, or the complexity of different legal systems. Thus, international trade and business law needs a multi-disciplinary approach, such as economics, politics, diplomacy, inter-cultural communication, and obviously mainly law approach, including public international law and domestic law, including private international law.

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

In the context of Viet Nam, an agricultural and developing country in the early stages of the process of international economic integration, the learning of the complicated knowledge of international trade and business law is not easy, yet is necessary to the economic development of the countr and integration of Viet Nam into the world economy.

QUESTIONS/EXERCISES

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

REQUIRED/SUGGESTED/FURTHER READINGS

1. Peter Van den Bossche, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, Cambridge University Press, Cambridge, 2nd edn., (2008).
2. Raj Bhala, *International Trade Law: Interdisciplinary Theory and Practice*, LexisNexis, 3rd edn., (2008).
3. Folsom *et al.*, *International Business Transactions*, 9th edn., (2006).
4. Surya P. Subedi, *International Economic Law*, University of London Press, London, (2006).
5. Simon Lester *et al.*, *World Trade Law - Text, Materials and Commentary*, Hard Publishing, Oxford and Portland, Oregon, (2008).
6. Indira Carr, *International Trade Law*, Cavendish Publishing, 3rd edn., (2005).
7. *Good on Commercial Law*, Edited and fully revised by Ewan McKendrick, Penguin Books, 4th edn., (2010).
8. L. S. Sealy and R. J. A. Hooley, *Commercial Law, Text, Cases, and Materials*, Oxford University Press, 4th edn., (2009).

USEFUL WEBSITES

UN, http://www.un.org

WTO, http://www.wto.org

IMF, http://www.imf.org

WB, http://www.worldbank.org

ICC, http://www.iccwbo.org

EU, http://europa.eu.int

http://www.worldtradelaw.net

Georgetown University, http://www.law.georgetown.edu

Harvard University, http://www.cid.harvard.edu/cidtrade

http://www.commercialdiplomacy.org

http://*www.nafta-sec-alena.org*

ASEAN, http://www.aseansec.org

UNCTAD, http://www.unctad.org

UNCITRAL, http://*www.uncitral.org*

http://uscode.house.gov

http://us-code.vlex.com

http://lexmercatoria.net

PART ONE.
INTERNATIONAL TRADE LAW

INTERNATIONAL TRADE LAW

International integration has become a major foreign policy of Viet Nam in current time, focusing on international economic integration at all global, regional and bilateral levels. The fact that Viet Nam has become a WTO's full member on 11 January 2007 does not imply that it is the starting point or ending point of the 'Doi moi' and international economic integration process of Viet Nam. The regional and bilateral free trade agreements require more open market access than the WTO's commitments. The differences in commitment between trade agreements at all levels mentioned above could create different impacts on trade and investment. In order to understand comprehensively and generally the ground of international trade law at all three levels mentioned above, this Part One of the Textbook introduces three chapters, particularly: *Law of the WTO* which governs global trade relations (*see* Chapter Two of the Textbook); *Rules on the Regional Economic Integration* (*see* Chapter Three of the Textbook); and *Agreements on Bilateral Trade Cooperation between Viet Nam and Some Partners* (*see* Chapter Four of the Textbook).

CHAPTER TWO. LAW OF THE WTO

Section One. INTRODUCTION

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

1. Historical Antecedents

The origins of the WTO date back to the concluding years of World War II, thus in the context of post-war planning negotiations. There was then a strong desire among the post-war planners, led by Churchill (the United Kingdom's Prime Minister) and Roosevelt (the United States' President), to avoid repeating the political and economic disaster partly caused by protectionism between World War I and World War II.[1] Besides the economic rationale explained in Chapter One, the basic assumptions, which have ever since constituted the essential premises for the law of international trade, are clear: it was necessary to encourage cross-border trade by limiting government interference with the movement of goods, conducted primarily by private companies. Upon these assumptions, the discussions between officials from the United Kingdom (hereinafter the 'UK') and United States (hereinafter the 'US') on trade commenced from 1943 and culminated in the so-called 'Proposals for Expansion of World Trade and Employment' in late 1945 (hereinafter the '*Proposals*').[2] The *Proposals* envisaged a code of conduct relating to government restrictions on international trade and the creation of an International Trade Organization (hereinafter the 'ITO') to administer the code.

[1] This came along with the abandonment of isolationism by the US in favour of leadership role in world affairs.

[2] The document was released at a Press Conference of the US Department of State on 6 December 1945. Reproduced in (1945) 13 *US Department of State Bulletin*, at 912-929. Before being publicly disclosed, the *Proposals* were transmitted to the governments of a number of countries.

In early December 1945, after the public release of the *Proposals*, the US invited fifteen states to a negotiation on tariff reductions. Every invited country, except the Soviet Union, had accepted the invitation by January 1946 although the talks did not take place until early 1947.[3]

The US also pursued a second track within the framework of the United Nations, also established in 1945. In its first meeting in February 1946, the Economic and Social Council of the United Nations, at the proposal of the US, adopted a resolution calling for an International Conference on Trade and Employment and appointed a Preparatory Committee to draft a document to be considered at such a conference. The goal of this Conference was not to negotiate tariff reductions; rather, it was to prepare a much *broader* charter for an International Trade Organization ('ITO'). The US had by that time drafted a *Suggested Charter*,[4] a revision of the 1945 *Proposals*, as the basis for the ITO Charter negotiations.

Altogether four meetings were held to negotiate the ITO Charter. The meeting of the Preparatory Committee took place in London in October-November 1946 and produced a first draft of a Charter for the ITO which was revised after a second technical drafting committee meeting held briefly at Lake Success, New York, in early 1947. A third and principal preparatory meeting was held in Geneva from April to October 1947 and was followed by the Plenary Conference on Trade and Development convened by the United Nations in Havana from November 1947 to March 1948 to complete the ITO Charter. Yet, the ITO never entered into force, the principal reason being the lack of support from the US Congress. That the US, the world's leading economy and trading nation, would not be a member of the ITO dissuaded other countries from the establishment of the ITO.

While the ITO was a stillborn, its most important trade liberalising instrument, i.e., the General Agreement on Tariff and Trade (hereinafter the 'GATT 1947'), survived. Initially envisaged as Chapter IV in the US' seven-Chapter *Suggested Charter* for the ITO,[5] the GATT 1947 was drafted in a series of negotiations of the above-mentioned *Preparatory Committee* for the ITO. The first meeting of the *Preparatory Committee*

[3] The fourteen countries that had given their acceptance were Australia, Belgium, Brazil, Canada, China, Cuba, Czechoslovakia, France, India, Luxembourg, the Netherlands, New Zealand, South Africa, and the UK.

[4] The *Suggested Charter* was composed of seven chapters: I - Purposes; II - Membership; III - Employment Provisions; IV - General Commercial Policy; V - Restrictive Business Practices; VI - Intergovernmental Commodity Arrangements; VII - Organization. The provisions of Chapter IV later became the basis for the GATT negotiations.

[5] *Ibid*.

in London discussed GATT 1947 provisions within its wider mandate of preparing articles for 'a Charter of, or Articles of Agreement for an International Trade Organization'.[6] It was at the New York meeting that the GATT 1947 was separated from the larger ITO draft.[7] It was also clear at the New York Meeting that the GATT 1947 would precede the entry into force of the ITO.[8] Few substantive changes were made to the New York GATT 1947 draft at the Geneva meeting. The Geneva meeting was, however, significant as it provided a forum for the first multilateral tariff-cutting negotiation among the US, the fourteen countries to have accepted the US December 1945 invitation[9] and eight other countries subsequently invited by the US.[10] In this first negotiation between April and December 1947, the 23 countries, which later became the GATT 1947's original members, had made no fewer than 123 bilateral agreements covering 45,000 tariff items, affecting roughly 10 billion USD worth of trade[11] or, in other words, about one half of the value of world trade.[12] With the conclusion of both negotiations on the GATT 1947 text and the tariff concessions, the GATT 1947 was opened for signature on 30 October 1947[13] and entered into force *provisionally* through the Protocol on Provisional Application on 1 January 1948.[14] The reason for the GATT 1947's provisional application needs some explanation. In some countries, for the GATT 1947 definitively to enter into force, it must, under their constitutions, be submitted to the parliaments for

6 *See* E/PC/T/33, at 4.

7 The two drafts shared some provisions, most of which appeared in identical terms. The notable exception was the disciplines on subsidies: Article 30 of the New York draft ITO Charter included disciplines on both export and domestic subsidies while Article XIV of the New York GATT 1947 draft included only discipline on the latter.

8 The reason for an early conclusion and implementation of the GATT 1947 was because American negotiators were negotiating under the authority of the US trade legislation which allowed them not to submit the GATT 1947 to Congress; this was set to expire in mid-1948. *See* J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd edn., (1997), at 40.

9 *Ibid*.

10 They were Burma, Ceylon, Chile, Lebanon, Norway, Pakistan, Southern Rhodesia and Syria.

11 WTO, Information and External Relations Division, *Understanding the WTO*, 5th edn., (2011), at 15, available at http://www.wto.org (accessed 14 December 2011).

12 D. A. Irwin *et al.*, *The Genesis of the GATT*, (2008), at 118.

13 55 UNTS 187. The GATT 1947 was concluded after a total of 626 meetings (453 meetings in Geneva, 58 in Lake Success and 150 in London).

14 55 UNTS 308. However, when it transpired that the ITO Charter was not to enter into force, it was still necessary to stick to the provisional application of the GATT 1947 to avoid discrimination across countries that had adopted the GATT 1947 provisionally and those that had done so definitely. *See* Jackson, *World Trade and the Law of the GATT,* (1969), 60 ff, cited in D. A. Irwin *et al.*, *supra*, at 119.

ratification. However, as these countries had also anticipated the need for their respective parliaments' ratification of the ITO Charter once adopted, they feared that 'to spend the political effort required to get the GATT 1947 through the legislature might jeopardise the later effort to get the ITO passed'[15] and hence they preferred to take the GATT 1947 and the ITO Charter to the parliaments as a package.

When the ITO failed to come into being, the GATT 1947, 'provisionally' applied for nearly fifty years, has stood the test of time.[16] Over the years, the GATT 1947 has become a 'de facto' international organization, providing a forum for its members to meet and negotiate reducing tariffs and non-tariff barriers (hereinafter the 'NTBs'). Seven rounds of such negotiations were conducted between 1947 and 1979. While the first five rounds focusing solely on tariff concessions proved to be very successful,[17] negotiations from the sixth round, also known as the Kennedy Round (1964-1967), turned out to be less so when the subject matters were extended to cover also NTBs (which were rapidly becoming a more serious barrier to trade than were tariffs).[18] The Tokyo Round (1973-1979), although arguably producing a more satisfactory result than did the Kennedy Round, had limited impact on global trade because the Tokyo Round agreements were limited as far as their parties are concerned.[19] After the Tokyo Round, the US and a few other countries were in favour of a new round with a very broad agenda, including new subjects such as trade in services and the protection of IPRs, while other countries either objected to a broad agenda or were opposed to a new round altogether. Against that background, the famous Uruguay Round that gave birth to the WTO was conducted.

15 J. H. Jackson, *supra*, at 40.

16 Since its entry into force on 1 January 1948, the GATT was modified and rectified at and right after the Havana Conference, amended during the Review Session of 1955 and Part IV on 'Trade and Development' added in 1965. To date, no subsequent amendments have been recorded.

17 Besides the first Round in Geneva (1947) mentioned above, the four others were in Annecy (1949), Torquay (1951), Geneva (1956), and Dillon (1960-1961).

18 The Kennedy Round indeed produced very few results on NTBs, one reason being the lack of 'sophisticated' institutional framework that such kind of negotiations would require yet the GATT 1947 could not cater for.

19 In fact, it could be argued that the limited number of states being party to these agreements showed the lack of real consensus among the negotiators.

2. Uruguay Round: the Birth of the WTO

In September 1986, trade ministers of the GATT 1947 members met in Punta del Este, Uruguay; after some days of arguments, they agreed to initiate the Eighth Round of Multilateral Trade Negotiations, the so-called Uruguay Round, no later than 31 October 1986. The Punta del Este Declaration also stated that the 'launching, the conduct and implementation of the outcome of the negotiation shall be treated as *part of a single undertaking*'. The Declaration identified some fifteen subjects for negotiation, covering, 'inter alia', trade in goods (agricultural products and textiles), NTBs and, most notably - for the first time in history, trade in services. Most of the negotiations ended in Geneva in December 1993[20] (although some market access talks remained) and the deal was signed on 15 April 1994 at the Ministerial Meeting in Marrakesh, Morocco.[21] About the Uruguay Round, the following comments have been made:

> It took seven and a half years, almost twice the original schedule. By the end, 123 countries were taking part. It covered almost all trade, from toothbrushes to pleasure boats, from banking to telecommunications, from the genes of wild rice to AIDS treatments. It was quite simply the largest trade negotiation ever, and most probably the largest negotiation of any kind in history.[22]

Indeed, the Uruguay Round was by far the most ambitious round of multilateral trade negotiations, covering 'virtually every outstanding trade policy issue'.[23] To the surprise of many, the Uruguay Round had fulfilled much of the goals set out in the Punta del Este Declaration. Moreover, the Uruguay Round went beyond its modest objective in terms of the GATT 1947's institutional reforms by establishing a new international organization for trade, this time called the 'World Trade Organization' ('WTO').[24]

The Marrakesh Agreement Establishing the WTO (WTO Agreement), contained in the Final Act signed at the Marrakesh Ministerial Meeting mentioned above,[25] is the charter of the organization. This agreement is the umbrella that covers all parts of the more detailed and technical texts (including the schedules of commitments). All of the agreements reached at the Uruguay Round are laid out in four annexes of the WTO Agreement. The first three annexes are mandatory (i.e., all members must accept them) while Annex 4 contains optional 'plurilateral agreements'.[26] Annexes 2 and 3 are the 'Dispute Settlement Understanding' and the 'Trade Policy Review', respectively. Annex 1, the backbone of the world trading system, is then sub-divided into three parts that correspond to three major basic agreements, namely, goods (GATT 1994[27] and its related agreements and other texts), services (GATS and its annexes), and trade-related aspects of intellectual property rights (TRIPS).

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

[20] 15 December 1993 became the deadline for the US as 16 April 1994 was the expiry date of the President's 'fast-track' negotiating authority under which if he could submit proposed agreements 120 days in advance the Congress would have to vote, without amendments, either for or against the implementing legislation. On this, *see* A. F. Lowenfeld, *International Economic Law*, 2nd edn., (2008), at 69, n 59.

[21] Other key dates of the Uruguay Round were: December 1988 (Montreal: ministerial mid-term review); April 1989 (Geneva: mid-term review completed); December 1990 (Brussels: 'closing' ministerial meeting ends in deadlock); December 1991 (Geneva: first draft of Final Act completed); November 1992 (Washington: the US and the EU achieve 'Blair House' breakthrough on agriculture); July 1993 (Tokyo: Quad, composed of the US, the EU, Japan and Canada, achieve market access breakthrough at G7 summit).

[22] WTO, *Understanding the WTO*, http://www.wto.org.

[23] WTO, *Understanding the WTO*, http://www.wto.org.

[24] The idea of creating such a new international organization for trade was reportedly floated by the then Italian Trade Minister Renato Ruggiero in February 1990. However, it was Canada that in April 1990 made the formal proposal of and gave the name 'World Trade Organization' to an international organization established to administer the different multilateral trade-related instruments. Similarly, the European Community also submitted a proposal in July 1990, calling for the establishment of a 'Multilateral Trade Organization'. It was however not until December 1993 that the US, then isolated on the matter, formally agreed to the establishment of the new organization on the condition that the Canada's proposed name be adopted.

[25] 1867 UNTS 3.

[26] This runs somewhat counter to the idea of 'single package' in the Punta del Este Declaration. Four plurilateral agreements had been listed in Annex 4: two relating to agricultural products (Dairy and Bovine Meat), which were terminated in 1997, and two others dealing with civil aircraft and government procurement, which might be considered of greater interest to industrial countries than to developing countries.

[27] This includes the GATT 1947 as rectified and amended prior to 1994, protocols and certifications relating to tariff concessions, protocols of accession, decisions of the GATT 1947 members and a number of understandings.

WTO as an international organization in order to set the discussion in context.

3. The WTO as An International Organization

A. *Objectives*

The *raison d'être* and policy objectives of the WTO are set out in the first two Preambular paragraphs of the WTO Agreement, which read:

> *Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,
>
> *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,
>
> …

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

- the increase in the standard of living;
- the attainment of full employment;
- the growth of real income and effective demand; and
- the expansion of production of, and trade in, goods and services.[28]

However, as rightly pointed out by Bossche, the same two paragraphs also stress that these objectives must be realized in a way that is detrimental neither to the environment nor to the needs of DCs.[29] The Appellate Body in *US-Shrimp* pointed out the recognition of the WTO Agreement negotiators of the importance of sustainable economic development.[30]

B. *Functions*

Article 2(1) of the WTO Agreement stipulates the primary function of the WTO as providing 'the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the annexes to [the] Agreement.

To this end, Article III entitled 'Functions' provides for the WTO's five broad functions in the following terms:

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

[28] Peter Van den Bossche, *supra*, at 85.

[29] *Ibid*.

[30] WTO, Appellate Body Report, *US-Shrimp*, para. 153.

*policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Develo*pment and its affiliated agencies.

In addition to the explicit functions referred to in Article III, it is also argued that technical assistance to DC members is undisputedly an important function of the WTO since it allows these members to integrate into the world trading system.[31]

C. *Membership*

The WTO membership is not exclusive to states. Separate customs territories possessing full autonomy with regard to their external commercial relations and other matters covered by the WTO Agreement are also eligible to join the WTO.[32] *For example*, Hong Kong, China (commonly referred to as Hong Kong), Macau, China (commonly referred to as Macau). The European Communities is also a member of the WTO, but this is a special and the only case by virtue of Article XI(1) of the WTO Agreement.[33]

As of 2016, the WTO has 164 WTO members,[34] embracing every significant economy in the world[35] and accounting for 98 per cent of world trade.[36] It is also noted that in 2007 Viet Nam joined the WTO as its 150th member.

[31] See Peter Van den Bossche, *supra*, at 88.

[32] Article XII of the WTO Agreement,.

[33] It should be noted that both the European Communities and all of the member states of the European Union are members of the WTO. This reflects the division of competence between the Communities and the member states in the various areas covered by the WTO Agreement. It is noted further that the European Communities, and not the European Community, is a WTO member. This is because it was not until 15 November 1994 (later than the conclusion of the Uruguay Round) that the European Court of Justice in its *Opinion 1/94* established that among the then three European Communities, namely European Community, European Coal and Steel Community and the European Atomic Energy Community, only the European Community needed to be involved in the WTO.

[34] Liberia and Afghanistan became the 163rd and 164th member of the WTO in 2016. See *WTO Annual Report 2016*, 24, available at https://www.wto.org/english/res_e/publications_e/anrep17_e.htm.

[35] Russian was the last significant economy which joined the WTO as the 156th member after 18 years of negotiations, breaking the record previously held by China whose negotiations had lasted for 15 years.

[36] *WTO Annual Report 2016*, 28, https://www.wto.org/english/res_e/publications_e/anrep17_e.htm.

D. *Institutional Structure*

Article IV of the WTO Agreement provides for the basic institutional structure of the WTO; subordinate committees and working groups have been added to this structure by later decisions. According to a WTO Deputy Director-General, there are, at present, a total of seventy WTO bodies, of which thirty-four are standing ones.[37] At the highest level of the WTO institutional structure stands the Ministerial Conference, the supreme body of the WTO and composed of minister-level representatives from *all* members; it has decision-making power on *all* matters under *any* multilateral WTO agreements.

At the second level are the General Council (which is composed of ambassador-level diplomats), the Dispute Settlement Body ('DSB') and the Trade Policy Review Body ('TPRB'). All these three bodies are actually the same. The General Council is responsible for the continuing, day-to-day management of the WTO and its many activities and exercises, between sessions of the Ministerial Conference, the full powers of the latter. The General Council becomes the DSB when it administers the WTO dispute settlement system. Likewise, the General Council acts as the TPRB when administering the WTO trade policy review mechanism.

At the level below the General Council, the DSB and the TPRB are three so-called specialized councils, namely, the Council for Trade in Goods (CTG), the Council for Trade in Services ('CTS') and the Council for TRIPS. This is envisaged by Article IV(5) of the WTO Agreement. The explicit function of these specialized councils is, according to Article IX(2) of the WTO Agreement, to make recommendation on the basis of which the Ministerial Conference and the General Council adopt interpretations of the multilateral trade agreement in Annex I of the WTO Agreement overseen by these Councils. The specialized councils also, under Articles IX(3) and X(1) of the WTO Agreement, play a role in the procedure for the adoption of waivers and the amendment procedure. The GATS and the TRIPS Agreement also empower their respective overseeing councils specific functions.[38] However, it is submitted that few specific powers have been entrusted to the three specialized councils and it is unsafe to infer from their general oversight function the power to take any decision, be it political or legal.[39] In addition to the specialized councils,

[37] *See* Statement by Miguel Rodriguez Mendoza to the General Council on 13 February 2002, *Minutes of Meeting*, WT/GC/M/73, dated 11 March 2002.

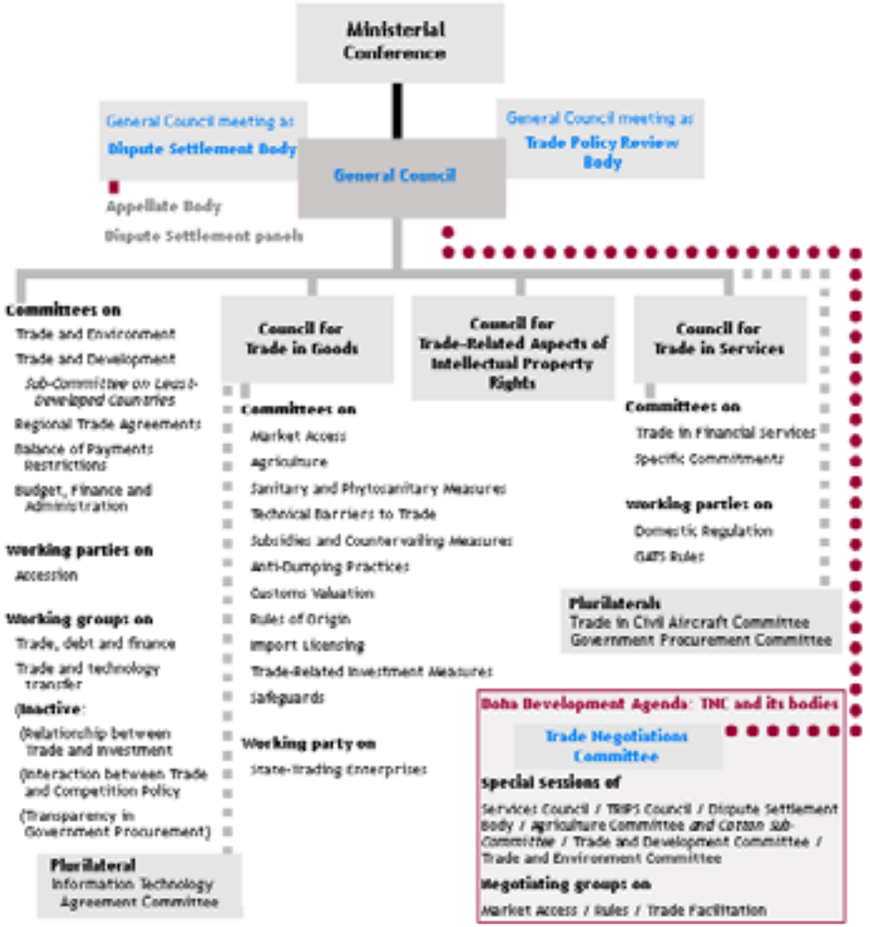
[38] *See* Article VI(4) of the GATS and Article 66(1) of the TRIPS Agreement.

[39] *See* P. J. Kuijper, 'Some Institutional Issues Presently Before the WTO' in D. L. M. Kennedy

there are a number of committees and working parties established to assist the Ministerial Conference and the General Council.

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

Figure 2.1.1. WTO Structure[40]



Key

and J. D. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E Hudec,* (2002) , at 84.

[40] WTO, http://www.wto.org.

Reporting to General Council (or a subsidiary)

Reporting to Dispute Settlement Body

Plurilateral committees inform the General Council or Goods Council of their activities, although these agreements are not signed by all WTO members

Trade Negotiations Committee reports to General Council

Finally, it is typical that an international organization has a secretariat and the WTO is no exception. Article IV of the WTO Agreement provides that the WTO has a Secretariat, which is headed by a Director-General who is, in turn, appointed by the Ministerial Conference. The WTO Secretariat is based in Geneva with more than 600 regular staffs.[41] As in other international organizations, the WTO Secretariat, as an administrative organ, and its Director-General have no autonomous decision-making powers. Rather, they act as a 'facilitator' of the decision-making processes within the WTO.[42] The WTO Secretariat has conceived its own duties as follows:

- To supply technical and professional support for the various councils and committees;
- to provide technical assistance for developing countries;
- to monitor and analyse developments in world trade;
- to provide information to the public and the media and to organize the ministerial conferences;
- to provide some forms of legal assistance in the dispute settlement process; and
- to advise governments wishing to become members of the WTO.[43]

E. *Decision Making in the WTO*

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

[41] *See Overview of the WTO Secretariat*, http://www.wto.org/english/thewto_e/secre_e/intro_e.htm

[42] *See Overview of the WTO Secretariat, supra*. *See* also 'Build Up: The Road to Mexico', Speech by Supachai Panitchpakdi, then WTO's Director-General on 8 January 2003 at Plenary Session XI of the Partnership Summit 2003 in Hyderabad, at http://www.wto.org/english/news_e/spsp_e/spsp09_ e.htm (accessed 14 December 2011).

[43] *See Overview of the WTO Secretariat, supra*.

> The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at *by consensus*, the matter at issue shall be decided *by voting*. At meetings of the Ministerial Conference and the General Council, each member of the WTO shall have one vote... [D]ecisions of the Ministerial Conference and the General Council shall be taken by a *majority of the votes cast*, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement. *(Emphasis added)*

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

In other words, under consensus procedure, no voting takes place and a decision is taken unless *explicitly* objected by a member.

Secondly, when consensus cannot be reached, a voting on a one-country/one-vote basis[44] is needed. In this case, a decision is taken by a majority of votes cast.

However, the WTO Agreement provides for a number of exceptions, which constitute '*lex specialis*' to the general rule (normal procedure) on decision-making. Notable exceptions include decision-making by the DSB, authoritative interpretations, accessions, waivers, amendments and the annual budget and financial regulations. For these questions, the special decision-making procedures vary from consensus only (DSB's decision-making,[45] waivers[46]); three-fourths majority (authoritative interpretations[47]); consensus/two-thirds majority (accessions,[48] amendments[49]); to two-thirds majority comprising more than half of the WTO members (the annual budget and financial regulations[50]).

That said, it should be highlighted that although the WTO Agreement provides for the possibility of adopting a decision by voting, it is exceptional for WTO bodies to do so. The reason for the preference of consensus over voting is not difficult to understand. It is generally believed that decisions taken by the former, i.e., taken collectively, have 'more democratic legitimacy' than those taken by the latter.[51] Of course, sticking to the consensus principle runs the risk of paralyzing the decision-making in the WTO.

Section Two. SOME BASIC PRINCIPLES OF THE WTO AND EXCEPTIONS

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

1. Some Basic Principles of the WTO

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

[44] As both the European Communities and its member states are members of the WTO, Article IX(1) of the WTO Agreement and its footnote provide to the effect that in no case can the number of votes of the European Communities and its member states exceed the total number of the latter. In other words, either the European Communities *or* its member states will participate in a vote.

[45] *See* Footnote 3 to Article IX of the WTO Agreement, which refers to Article 2.4 of the Dispute Settlement Understanding (Annex 2).

[46] Although Article IX(3) of the WTO Agreement envisaged the possibility for a vote by a three-fourths majority, WTO members in 1995 decided not to apply this provision but to continue to take decisions by consensus.

[47] *See* Article IX(2) of the WTO Agreement.

[48] Article XII(2) of the WTO Agreement provides that a decision on accession is to be taken by a two-thirds majority. The General Council, however, agreed on 15 November 1995 that for decisions on accession it would seek to reach consensus first.

[49] *See* Article X(1) of the WTO Agreement.

[50] *See* Article VII(3) of the WTO Agreement.

[51] As Mike Moore, in the capacity of the WTO Director-General, commented: 'the consensus principle which is at the heart of the WTO system - and which is a fundamental democratic guarantee - is not negotiable.' *See* Mike Moore, 'Back on Track for Trade and Development', Keynote address at the UNCTAD X, Bangkok on 16 February 2000, at http://www.wto.org/english/news_e/spmm_e/ spmm24_e.htm (accessed 14 December 2011).

the foundation of the world trading system have been identified, that is: (A) trade without discrimination; (B) freer trade (gradually, through negotiation); (C) predictability (through binding and transparency); (D) promoting fair competition; and (E) encouraging development and economic reform.[52] Principle (A) is embodied in two fundamental non-discrimination principles or obligations, namely the most-favoured-nation treatment ('MFN') and the national treatment ('NT'), while principles (B) and (C) in fact contains a number of rules on market access ('MA') and can be grouped as such. This Section first focuses on the non-discrimination principles and the rules on MA, which are identified in the WTO Agreement's Preamble as the two main means to attain the WTO's objectives.

Besides the non-discrimination obligations, which operate to secure fair conditions of trade, WTO law also contains many other rules that realize principle (D), i.e. promotion of fair competition. These rules are enshrined not only in the GATT 1994 (hereinafter the 'GATT'), but also in a number of agreements covering specific fields, such as agriculture, IPRs and services.[53] All these agreements will be discussed in other sections; this Section thus only focuses on the two common practices of unfair trade in goods, that is dumping[54] and subsidies.

Principle (E), that is to encourage development and economic reform, takes into account the fact that DC members need more time to implement the WTO agreements than do better-off members. WTO law provides for a number of rules, in the form of exceptions in favour of DC members, to operationalize principle (E). These rules will be briefly touched upon when discussing exceptions to WTO law.[55]

A. *Trade without Discrimination or Principles of Non-discrimination*

Non-discrimination is central to WTO law and is reflected in all of the key treaties of the WTO (*for example*, the GATT, GATS, and the TRIPS Agreement). In fact, as highlighted in the third Preambular paragraph of the WTO Agreement, 'the elimination of discriminatory treatment in international trade relations' is one of the means to attain the objectives

52 WTO, *Understanding the WTO*, http://www.wto.org.

53 Furthermore, the plurilateral agreement on government procurement arguably serves the same purposes, albeit among a limited number of WTO members.

54 M. J. Trebilcock and R. Howse, *The Regulation of International Trade,* (2005), at 232, stated that between 1995 and 2002, 2,160 anti-dumping initiations were reported to the WTO Committee on Anti-dumping Practices.

55 *See Infra* '2. General and Security Exceptions'.

of the WTO. The WTO law boasts two principles of non-discrimination, namely MFN obligation and NT obligation. Broadly, these two principles apply on the basis of the 'national origin or destination' of a good or service, or on the basis of the 'nationality' of the service supplier.[56]

The MFN treatment obligation, or the MFN principle, is the single most important rule in WTO law without which the multilateral trading system could not exist.[57] The fact that the MFN principle is provided in the first article of the GATT, and the second article (yet still the first among the general obligation provisions) of the GATS testifies to its significance.

In essence, the MFN treatment obligation prohibits discrimination by a WTO member *among different foreign* exporters and service suppliers, while the NT obligation constrains a WTO Member from discriminating *against foreign* products in favour of 'like' *domestic* products, services and service suppliers. However, since these non-discrimination principles have different connotations and vary in shade and tone in their application to trades both in goods and in services, it is necessary to consider them separately.

1. MFN Treatment under the GATT

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

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

56 While the non-discrimination obligations of MFN and NT also apply in the context of the TRIPS Agreement, it is, given the special character of IPRs, applied in a more limited manner than and differently from that in the GATT and GATS. This Section discusses only the MFN treatment obligations and NT obligations under the GATT and GATS.

57 *See* WTO, Appellate Body Report, *EC-Tariff Preferences*, para. 101, stating the MFN treatment obligation set out in Article 1(1) of the GATT is a 'cornerstone of the GATT' and 'one of the pillars of the WTO trading system'. *See* also WTO, Appellate Body Report, *US -Section 211 Appropriations Act*, para. 297.

The principal purpose of the MFN treatment obligation, as are non-discrimination obligations in general, is to ensure *equality of opportunity* to import from or to export to all WTO members.[58]

Despite the absence of the words '*de jure*' and '*de facto*' in its language, Article I(1) of the GATT is construed to cover both discrimination 'in law' and 'in fact'. In other words, the clause prohibits not only a measure that is, from a reading of the law, regulation or policy (in law), discriminatory, but is also a measure that is, on the face of it, 'origin-neutral' but whose application is still discriminatory in practice (in fact).[59]

To determine whether a particular measure is discriminatory or not, Article I(1) of the GATT sets out a three-tier test of consistency, that is: (i) whether the measure in question confers a trade 'advantage, favour, privilege or immunity'? (ii) whether the products concerned are 'like products'? and (iii) whether the advantage at issue is granted 'immediately and unconditionally to all like products' concerned?

As to the first question, it is generally agreed that Article I(1) covers a wide range of measures. In fact, many measures which have not been referred expressly to in Article I(1) may be classified as one measure or the other already covered by this Article.[60] On the other hand, while Article I(1) casts a wide net as to the measures covered, its scope of application is not unlimited. For example, the Panel in *EC-Commercial Vessels* noted that since measures by Article III(8)(b) (on subsidies to domestic products) fall outside the scope of the application of Article III(2) and (4), which occur in the expression 'matters referred to in paragraphs 2 and 4 of Article III in Article I(1), these measures also fall outside the scope of application of Article I(1).[61]

[58] *See* WTO, Appellate Body Report, *EC-Banana III*, para. 190:
[T]he essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a member categorizes or subdivides these imports for administrative or other reasons.

[59] *See Canada-Autos*, Panel Report, para. 10.40; WTO, Appellate Body Report, para. 78, where both Panel and the Appellate Body rejected Canada's argument that Article I(1) does not apply to measures which appear, on the face of it, 'origin-neutral'.

[60] *See*, e.g., Decision of the Contracting Parties of the GATT 1947 in August 1948 ('consular taxes' would be covered by the phrase 'charges of any kind' to cover); GATT Panel Report, *US-MFN Footwear*, para. 6.8 (rules and formalities applicable to countervailing duties are 'rules and formalities imposed in connection with importation'); GATT Panel Report, *US-Customs User Fee,* para.122 (merchandise processing fee was a 'charge imposed on or in connection with importation').

[61] WTO, Panel Report, *EC-Commercial Vessels,* para. 7.83.

The term of 'like product' featured prominently in a number of provisions of the GATT, including Article I(1). The question of 'whether two products are like' is essential to the determination of whether discrimination occurs under Article I(1). Nevertheless, nowhere in the GATT can one find a definition of 'like product'. The case law on 'like product' within the meaning of Article I(1), as opposed to Article 3 (considered bellow), of the GATT is limited.[62] Recourse to dictionary to define the adjective 'like' seems of no avail[63] as 'dictionary meanings leave many interpretive questions open.'[64] It is generally agreed that the concept of 'like product' has a different meaning in the different contexts in which it is used. In *Japan-Alcoholic Beverages II,* the Appellate Body illuminatingly commented on this very concept as follows:

> *The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.*[65]

It follows that two products may be 'like' under one provision but 'unlike' under another provision of the GATT. As a rule of thumb, when a WTO Panel examines whether products are 'like', it may look at: (i) the characteristics of the products; (ii) their end-users, and (iii) tariff regimes of other members.[66] It is suggested that a WTO Panel may also consider consumers' tastes and habits in its determination.[67] Finally, Article I(1) of the GATT requires that any advantage granted by a WTO member to imports from any country must be granted 'immediately and unconditionally' to imports from all other WTO members. That is to say, once a WTO member has granted an advantage to imports from

[62] Given the different scopes of these two articles, any analogy may be drawn only with caution.

[63] The Appellate Body in *EC-Asbestos*, para. 91, considered that the dictionary meaning of 'like' suggests that 'like products' are products that share a number of identical or similar characteristics. But the Appellate Body immediately acknowledged the indefinite nature of dictionary interpretation. *See ibid*., para. 92.

[64] WTO, Appellate Body Report, *Canada-Aircraft*, para. 153, cited in Appellate Body Report, *EC-Asbestos,* para. 92.

[65] WTO, Appellate Body Report, *Japan-Alcoholic Beverages II*, at 114.

[66] These are the criteria used by the GATT Panel in *Spain-Unroasted Coffee*.

[67] Peter Van den Bossche, *supra*, at 331.

a country, it cannot make the granting of that advantage to imports of other WTO members conditional upon the return of other advantage or payment for the advantage by those other WTO members.[68] The leading case in this regard is *Belgium-Family Allowances* where the Panel held that the Belgian law providing for a tax exemption for products purchased from countries which had a system of family allowances similar to that of Belgium '…[i]ntroduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependant on certain conditions'.[69]

On the other hand, whether the term 'unconditionality' allows discrimination between products *not* on the basis of their origin is an issue to be settled by the Appellate Body. While the Panel in *Canada-Autos* in 2000 opined that the term 'unconditionality' does rule out the imposition of conditions which do not discriminate between products on the basis of their origin,[70] the Panel in *EC-Tariff Preferences* in 2003 favoured a stricter meaning of the term 'unconditionally', stating that it 'sees no reason not to give that term its ordinary meaning under Article I(1), that is, 'not limited by or subject to any conditions'.[71] However, the Panel in *Colombia-Ports of Entry* [2009] upheld the approach in *Canada-Autos*,[72] which was reaffirmed by the Panel in *US-Poultry from China* [2010].[73]

2. MFN Treatment under the GATS

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

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

Again, as in Article I(1) of the GATT, Article II(1) of the GATS applies to both 'de jure' and 'de facto' discrimination as confirmed by the Appellate Body in *EC-Bananas III*.[74]

The MFN treatment test of Article II(1) of the GATS, as that of Article I(1) of the GATT, is a three-tier one. That is to say, it is necessary to answer the three questions: (i) whether the measure is covered by the GATS; (ii) whether the services or service suppliers are 'like'; and (iii) whether less favourable treatment occurs with regard to the services or service suppliers of a member.

As to the first question, the answer, dictated by Article I(1) of the GATS, needs to establish whether the measure is (i) a measure by a member and (ii) a measure affecting trade in services. A 'measure by a member' is a broad concept and covers, as defined by Article I(3) of the GATS, measures taken by (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

To determine whether a measure is one 'affecting trade in services', the Appellate Body in *Canada-Autos* stated that two issues must be examined,[75] that is: (i) whether there is 'trade in services' in the sense of Article I(2); and (ii) whether the measure in issue 'affects' such trade in services within the meaning of Article I(1).

Article I(2) of the GATS will be discussed in greater detail in Section Fourth of this Chapter. Suffice it here to say that the concept of 'trade in services' is very broad. That leaves the question of what *measure affects* trade in services. The Appellate Body in *EC-Bananas III* clarified the term 'affecting' as follows: '…[T]he use of the term "affecting" reflects the intent

[68] The Working Party Report on *Accession of Hungary*, L/3899, adopted on 30 July 1973, BISD 20S/34, para. 12:
[T]he prerequisite of having a cooperation contract in order to benefit from certain tariff treatment appeared to imply conditional most-favoured-nation treatment and would, therefore, not appear to be compatible with the General Agreement.

[69] WTO, GATT Panel Report, *Belgium-Family Allowances,* para. 3. This Report was referred to by the Panel in *Indonesia-Autos* discussing the same issue. *See* Panel Report, *Indonesia-Autos*, para. 14.144.

[70] WTO, Panel Report, *Canada-Autos*, para. 10.29.

[71] WTO, Panel Report, *EC-Tariff Preferences*, para. 7.59.

[72] WTO, Panel Report, *Colombia-Ports of Entry*, para. 7.361.

[73] WTO, Panel Report, *US-Poultry from China*, para. 7.437.

[74] WTO, Appellate Body Report, *EC-Bananas III*, para. 233.

[75] WTO, Appellate Body Report, *Canada-Autos*, para. 155.

of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application'.

This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'.[76]

For a measure to affect trade in services, it is not necessary that the measure is to regulate or govern the supply of services. As pointed out by the Panel in *EC-Bananas III*, a measure regulating a different matter may still *affects* trade in services and hence is governed by the GATS.[77]

As to the question of 'like services or service suppliers', it is noted that only a definition of 'service suppliers' is found in Article XXVIII(g), which provides that a 'service supplier' is 'any person who supplies a service', including natural and legal persons as well as service suppliers providing their services through forms of commercial presence. While no definition of 'services' is provided in the GATS, Article I(3)(c) states that 'services' includes 'any service in any sector except services supplied in the exercise of governmental authority.' The GATS, as the GATT, does not define concept of 'likeness' in the case of 'services' and 'service suppliers'. However, dissimilar to the GATT, there has as yet been no case in the GATS jurisprudence that may shed light on this nebulous concept. Bossche, however, suggests three following reasonable criteria to determine the 'likeness' of 'services' and 'service suppliers':[78]

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

He also rightly observes that two service suppliers that supply a like service are not necessarily 'like service suppliers' as factors such as their size, assets, use of technology, expertise, etc must be taken into account.[79]

[76] WTO, Appellate Body Report, *EC-Bananas III*, para. 220.

[77] WTO, Panel Report, *EC-Bananas III*, para. 7.285.

[78] Peter Van den Bossche, *supra*, at 340.

[79] *Ibid*.

The final question in the MFN treatment test of Article II(1) of the GATS is whether 'treatment no less favourable' than that accorded to 'like services' or 'like service suppliers' of one member is accorded to services or service suppliers of all other members. The GATS defines 'treatment no less favourable' not in the context of MFN, but in the context of NT (Article XVII - discussed below). However, the Appellate Body in *EC-Bananas III* warned that in interpreting Article II(1), particularly the concept of 'treatment no less favourable', one should not assume that the guidance of Article XVII equally applies to Article II.[80] On the other hand, despite the absence of comparable language in Article II(1), the same Appellate Body also stated that the concept of 'treatment no less favourable' in Article II(1) and Article XVII of the GATS should be interpreted to include both '*de facto*' and '*de jure*' discrimination.[81]

3. NT in the GATT

NT is provided in Article III of the GATT, which is of general scope. In other words, the NT obligation applies to imported products regardless of whether members have made tariff concessions them or not. In broad terms, the NT obligation prohibits a WTO member from discriminating against foreign products in favour of domestic products. Two other characters of general nature of the NT clause should be mentioned. *Firstly*, just as in the case of Article I, Article III also applies to both 'in law' and 'in fact' discrimination. *Secondly*, Article III applies only to internal measures, not to border measures.[82]

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

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

The above clause points out the first and important goal of

[80] WTO, Appellate Body Report, *EC-Bananas III*, para. 231.

[81] *Ibid*. para. 234.

[82] Cf with Article II (Tariff concessions) and Article XI (Quantitative restrictions), which apply to border measures.

the NT obligation,[83] which are also explicitly acknowledged in various Panel and Appellate Body reports, that is, to avoid protectionism.[84] Besides paragraph 1, paragraphs 2 and 4, which provide further general obligations, as opposed to particular measures in other paragraphs, are of interest and should also be discussed.

Paragraph 2 on NT with regard to 'internal taxation' covers two types of products, namely 'like products' and 'directly competitive or substitutable products'. It is convenient to deal first with the former, which is provided in the first sentence. Paragraph 2, first sentence of Article III of the GATT reads: '… [T]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products'.

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

> … [T]here are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT 1994: (a) whether imported and domestic products are *like products*? and (b) whether the imported products are *taxed in excess* of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence.[85]

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

The first case where Article III(2) was found violated is *Japan-Alcoholic Beverages* [1987], i.e., in the era of the GATT 1947. The issue in this case was an internal tax measure that classified alcoholic beverages according to alcohol content and other qualities. In examining the 'likeness' of products, the Panel in the case cited, 'inter alia', the Working Party Report on 'Border Tax Adjustments',[86] which concluded that problems arising from the interpretation of the terms 'like' or 'similar' products should be examined on a case-by-case basis using three criteria, namely, the product's end-users in a given market; consumers' tastes and habits, which change from country to country; and the product's properties, nature and qualities.

Interestingly, almost ten years later, in *Japan-Alcoholic Beverages II*, the Appellate Body reaffirmed the correctness of the approach for determining 'likeness' set out in the 1970 Report on 'Border Tax Adjustment'.[87] This approach, which has been followed in almost all post-1970 GATT panel reports involving the concept of 'like product' in GATT, remains the dominant one for determining 'likeness' in Article III(2), first sentence.[88] Two further points are, however, worth highlighting. *Firstly*, the Appellate Body in *Japan-Alcoholic Beverages II* in upholding the approach in the 1970 Report reminded that the range of 'like products' in Article III(2), first sentence of the GATT 1947 should be kept narrow. *Secondly*, the three criteria listed in the Report of the Working Party on 'Border Tax Adjustments' do not include the tariff classification of the products concerned. Yet, as acknowledged by the Appellate Body in *Japan-Alcoholic Beverages II*, the uniform classification in tariff nomenclatures based on the Harmonized System, but not tariff bindings, may be of help in determining the 'likeness'.[89]

With regard to the second tier in the NT test for internal taxation, i.e., 'taxes in excess of' the internal taxes applied to 'like' domestic products, the Appellate Body in *Japan-Alcoholic Beverages II* established a strict benchmark. In the Appellate Body's view, '… [e]ven the smallest amount of "excess" is too much and the prohibition of discriminatory taxes in Article III(2), first sentence of the GATT 1994 "is not conditional

[83] Cf Appellate Body Report, *Japan-Alcoholic Beverages II,* 16, stressing that Article III of the GATT has broader purpose.

[84] *See*, e.g., WTO, Appellate Body Report, *Korea-Alcoholic Beverages*, para. 120; Appellate Body Report, *Japan-Alcoholic Beverages II,* para. 109. *See* also GATT Panel Report, *US-Section 337*, para. 5.10 (also referred to by Appellate Body in *Japan-Alcoholic Beverages II*). Panels and scholars have also pointed to another purpose of the NT obligation, that is, to guarantee that internal measures of WTO members do not undermine their commitments regarding tariffs under Article II. *See* Panel Report, *Japan-Alcoholic Beverages II,* para. 6.13.

[85] WTO, Appellate Body Report, *Canada-Periodicals*, para. 468 (*Emphasis added*).

[86] WTO, Report of the Working Party, 'Border Tax Adjustments', adopted 2 December 1970, BISD 18S/102.

[87] WTO, Appellate Body Report, *Japan-Alcoholic Beverages II,* para. 113-114.

[88] There is another approach, the so-called 'regulatory intent' approach, better known as the 'aim-and-effect' approach, which was first introduced by the Panel in *US-Malt Beverages*. The Panel in *Japan-Alcoholic Beverages II,* however, rejected this approach. *See* Panel in *Japan-Alcoholic Beverages II,* paras. 6.16-6.17. This rejection was implicitly affirmed by the Appellate Body in *Japan-Alcoholic Beverages II*.

[89] WTO, Appellate Body Report, *Japan-Alcoholic Beverages II,* para. 114-115.

on a "trade effects test" nor is it qualified by a *de minimis* standard'.[90]

The second sentence of Article III(2) of the GATT addresses, as mentioned above, NT in the case of internal taxation on 'directly competitive or substitutable products'. This sentence reads: '… [M]oreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in Paragraph 1'.

It is recalled that the principle mentioned in Paragraph 1 of Article III of the GATT is to avoid protectionism.

The second sentence of Article III(2) of the GATT is interpreted to contemplate a 'broader category of products' than the first sentence.[91] Furthermore, the former sets out a different test of consistency. In *Japan-Alcoholic Beverages II*, the Appellate Body stated:

> *… [U]nlike that of Article III(2), first sentence, the language of Article III(2), second sentence, specifically invokes Article III(1). The significance of this distinction lies in the fact that whereas Article III(1) acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence. Giving full meaning to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III(2), second sentence. These three issues are whether:*
>
> 1. *The imported products and the domestic products are 'directly competitive or substitutable products' which are in competition with each other?*
> 2. *The directly competitive or substitutable imported and domestic products are 'not similarly taxed'? and*
> 3. *The dissimilar taxation of the directly competitive or substitutable imported and domestic products is 'applied… [s]o as to afford protection to domestic production'?*
>
> Again, t*hese are three separate issues. Each must be established separately by the complainant for a panel to find that a tax measure imposed by a member of the WTO is inconsistent with Article III(2), second sentence.*[92]

Thus, the NT test for internal taxation under Article III(2), second sentence of the GATT contains three steps. *Firstly*, it is necessary to determine whether the imported and domestic products are 'directly competitive or substitutable products'. As with 'like products' which are themselves a subset of 'directly competitive or substitutable products',[93] the determination of the appropriate range of the latter under Article III(2), second sentence, must be made on 'a case-by-case basis, taking into account all the relevant facts'.[94] *Secondly*, it is not inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as 'directly competitive or substitutable products'.[95] It has been interpreted by the Appellate Body that products are 'directly competitive or substitutable' when they are interchangeable or when they offer alternative ways of satisfying a particular need or taste.[96] *Thirdly*, in the *Japan-Alcoholic Beverage II*, the Appellate Body also agreed with the panel's view that '… [t]he decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, 'inter alia', as shown by elasticity of substitution'.[97]

After the determination of directly competitive or substitutable products, the next step is whether these products are 'similarly taxed'. In *Japan-Alcoholic Beverages II*, the Appellate Body opined that this phrase does not mean the same thing as the phrase 'in excess of', otherwise 'like products' and 'directly competitive or substitutable products' would mean one and the same thing.[98] The Appellate Body also agreed with the Panel that must the amount of differential taxation must be more than 'de minimis' to be deemed 'not similarly taxed' and whether any particular differential amount of taxation is 'de minimis' or not must be determined on a case-by-case basis.[99]

[90] *Supra* para. 115.

[91] *See* WTO, Appellate Body Report, *Japan-Alcoholic Beverages II*, para. 112; Appellate Body Report, *Canada-Periodicals*, para. 470.

[92] *See* WTO, Appellate Body Report, *Japan-Alcoholic Beverages II*, para. 116.

[93] *See* WTO, Appellate Body Report, *Korea-Alcoholic Beverages*, para. 118. *See* also Appellate Body Report, *Japan-Alcoholic Beverages II* and Appellate Body Report, *Canada-Periodicals*.

[94] *See* WTO, Appellate Body Report, *Korea-Alcoholic Beverages*, para. 137.

[95] *See* WTO, Appellate Body Report, *Japan-Alcoholic Beverages II*, para. 117.

[96] *See* WTO, Appellate Body Report, *Korea-Alcoholic Beverages*, para. 115.

[97] *See* WTO, Appellate Body Report, *Japan-Alcoholic Beverages II*, para. 117, citing Panel Report, para. 6.22.

[98] *See* WTO, Appellate Body Report, *Japan-Alcoholic Beverages II*, para. 118.

[99] *Ibid*.

The final step in the NT test under Article III(2) is taken only when it is established that 'directly competitive or substitutable products' are not 'similarly taxed'.[100] In the case of 'dissimilar taxation', it is necessary to determine whether the tax has been applied 'so as to afford protection.' This is a question, in view of the Appellate Body in *Japan-Alcoholic Beverages II*, that requires a comprehensive and objective analysis of the structure and application of the measure in question as related to domestic as compared to imported products.[101] The Appellate Body opined further that '… [i]t is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic courts'.[102]

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

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

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

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

According to the Appellate Body in *Korea-Various Measures,* in order to establish a violation of the above clause, it is necessary to show the three elements: (i) the complained-of measure is a 'law, regulation or requirement' affecting the internal sale, offer for sale, purchase, transportation, distribution, or use of domestic and imported products; (ii) the imported product is 'like' a domestic product sold in the domestic marketplace; and (iii) less favourable treatment has been afforded in the imported product than to the like domestic product.[103]

The *first* element is the scope of the obligation. In those earlier cases, the panels had interpreted the scope of this obligation broadly, opining that a government action need not take the form of a mandatory regulations in order to fall within the scope of Article III(4) provided that the action has an effect on the behaviour of the regulated private entity.[104] Similarly, the term 'affecting' has also been interpreted widely.[105]

The *second* element is again the concept of 'likeness'. The first case when the Appellate Body dealt with a dispute concerning Article III(4) of the GATT is the *Asbestos* case. By that time, the Appellate Body had already developed its approach to 'likeness' in Article III(2), first sentence.[106] However, in its report, the Appellate Body first noted that the concept of 'like products' in Article III(2), first sentence, had been interpreted narrowly. This narrow interpretation, the Appellate Body explained, was dictated by the existence of a second sentence in Article III(2) for which Article III(4) had no comparable sentence.[107] Given the textual difference between Articles III(2) and III(4), the Appellate Body concluded "'the accordion" of "likeness" stretches in different ways in' the latter.[108] The Appellate Body further noted that the meaning of 'like product' in Article III(4) must be informed by the principle of anti-protectionism in Article III(1). Since protectionism exists only in a competitive relationship, the Appellate Body came to the conclusion that the determination of whether imported and domestic products

[100] *Supra*, para.119.

[101] *Ibid*., para.120.

[102] *Ibid*.

[103] *See* WTO, Appellate Body Report, *Korea-Various Measures,* para. 133.

[104] *See* WTO, e.g., Panel Report, *Japan-Film*, para. 10.376.

[105] *See* WTO, Appellate Body Report, *US-FSC (Article 21.5-EC)*, paras. 208-210.

[106] *Supra*.

[107] *See* WTO, Appellate Body Report, *EC-Asbestos,* para. 94.

[108] *Ibid*., para. 96.

are 'like products' under Article III(4) is, in essence, a determination about *the nature and extent* of the competitive relationship between these products.[109] The conjunction 'and' signifies that a mere economic analysis of the cross-price elasticity of demand for the products at issue will not suffice to determine 'likeness'.[110] Instead, 'likeness' is a matter of judgment - qualitatively *as well as* quantitatively. While it is difficult to indicate in the abstract what the nature and extents of the competitive relationship needs to constitute for the products to be 'like', it may be said that the concept of 'like products' in Article III(4) is fairly broad and is certainly broader than the narrowly construed concept of 'like product' in Article III(2).[111] However, the Appellate Body also concluded that although the scope of the concept 'like products' in Article III(4) is broad, it is not broader than the combined product scope of the concepts of 'like products' and 'directly competitive or substitutable products' in the first and second sentences of Article III(2), respectively.[112] At the end of the day, a determination of 'likeness' in Article III(4) has to be made on a case-by-case basis.[113] The Appellate Body in the *EC-Asbestos* continued to refer to criteria outlined in the Report of the Working Party on 'Border Tax Adjustments'[114] but also added that they are 'simply tools to assist in the task of sorting and examining the relevant evidence'.[115] The Appellate Body also stressed that these criteria are 'neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products'.[116]

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

[109] *Ibid*., para 99.

[110] Cf the approach of the Panel in *Japan-Alcoholic Beverage* discussed *supra.*

[111] *See* WTO, Appellate Body Report, *EC-Asbestos,* para. 99.

[112] *Ibid.*

[113] *Ibid*., para. 101.

[114] *Supra.*

[115] *See* WTO, Appellate Body Report, *EC-Abestos,* para. 102.

[116] *Ibid*.

> [T]he term 'less favourable treatment' expresses the general principle, in Article III(1), that internal regulation 'should not be applied… [s]o as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products.[117]

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

4. NT in the GATS

NT is provided in Paragraph 1 of Article XVII of the GATS, which states:

> [I]n the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each member shall accord to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Thus, in contrast to the NT obligation in the GATT, which has general application to all trade, the NT obligation does not have for trade in services such general application; it applies only to the extent a WTO member has explicitly committed itself to grant 'NT' in respect of specific service sectors. Such NT commitments are set out in a member's Schedule of Specific Commitments on Services with, as is often the case, certain conditions, qualification and limitations. The WTO Secretariat has identified the following five typical NT limitations:[118]

- Nationality or resident requirements for executives of companies supplying services;
- requirements to invest a certain amount of assets in local currency;
- restrictions on the purchase of land by foreign service suppliers;
- special subsidy or tax privileges granted only to domestic suppliers, and

[117] *Ibid*., para. 100.

[118] *See* WTO Secretariat, *Market Access: Unfinished Business*, (2001), at 103, http://www.wto.org.

- differential capital requirements and special operational limits applying only to operations of foreign suppliers.

Once a WTO member has committed itself to grant NT, it must accord to services and service suppliers of any other member treatment no less favourable than it accords to its own like services and service suppliers. The Panel in *EC-Banana III* identified three elements that need to be demonstrated to establish a breach of the NT obligation under Article XVII of the GATS. These elements are: (i) measures by members affecting trade in services; (ii) 'like services' or 'like service suppliers'; and (iii) treatment no less favourable. Since the first two elements, 'measures affecting trade in services' and 'like services and service suppliers' have been discussed in the context of the MFN treatment obligation under Article II of the GATS, this section only considers the third and final element, i.e. 'treatment no less favourable'.

Paragraphs 2 and 3 of Article XVII of the GATS clarify the requirement of 'treatment no less favourable' in the following terms:

> …
>
> 2. *[A] member may meet the requirement of Paragraph 1 by according to services and service suppliers of any other member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.*
>
> 3. *formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the member compared to like services or service suppliers of any other member.*

Paragraph 3 clearly shows that on the one hand, even a member that gives formally identical treatment to foreign and domestic services or service suppliers may still be in breach of the NT obligation if the conditions of competition are modified in favour of the latter. On the other hand, a member that gives formally *different* treatment to foreign and domestic services or service suppliers does not act in breach of its NT obligation if that member does not modify the conditions of competition in favour of the domestic services or domestic service suppliers. In the *EC-Bananas III (Article 21.5-Ecuador)*, the Panel found that certain EC measures accorded to Ecuadorian service suppliers 'de facto' less favourable conditions of competition than to like EC service suppliers.[119]

[119] *See* WTO, Panel Report, *EC-Bananas III (Article 21.5-Ecuador)*, para. 6.126.

In this connection, it should be noted that Footnote 10 to Article XVII states that '… [S]pecific commitments assumed under this article shall not be construed to require any member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers'.

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

> … [F]ootnote 10 to Article XVII only exempts members from having to compensate for disadvantages due to the foreign character in the application of the national treatment provision; it does not provide cover for actions which might modify the conditions of competition against services or service suppliers which are already disadvantages due to their foreign character.[120]

B. *The Rules on Market Access*

The rules on market access ('MA') are at the core of WTO law. Indeed, as set out in the third Preambular Paragraph 3 of the WTO Agreement, 'the substantial reduction of tariffs and other barriers to trade' is one of the two means to attain the WTO's objects of higher standards of living, full employment, growth and sustainable economic development.[121] That Preambular paragraph also identifies two types of barriers to international trade, namely 'tariff' and 'NTBs'. The former is particularly relevant for trade in goods but of marginal importance for trade in services, while the latter relates to both trades in goods and in services. This Section briefly discusses the negotiations to reduce tariff barriers to trade in goods, and highlight some rules relating to NTBs elimination.

1. Negotiations to Reduce Tariff Barriers to Trade in Goods

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

[120] *See* WTO, Panel Report, *Canada-Autos*, para. 10.300.

[121] The other one is the elimination of discrimination discussed *supra*.

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

Indeed, as seen from the history of the GATT 1947, the first negotiation on tariff reductions was conducted and concluded along with negotiations of the text of the GATT 1947 itself.[122] In the GATT 1947 era, tariff reductions had always remained an important, if not the sole, substantive item on the agenda of the eight Rounds of trade negotiations.[123] Despite the successful results of the eight GATT 1947 Rounds of trade negotiations, customs duties remain an important barrier in international trade in the WTO era[124] and negotiations on their reductions have always been necessary.

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

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

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

As discussed above, reciprocity and mutual advantage constitute the first and basic principle of tariff negotiations. There is, however, an exception to this principle. This occurs in tariff negotiations between developed and developing- country members. Article XXXVI:8 of Part IV (Trade and Development) of the GATT reads: '[Developed-country members] do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of [developing-country members]'.

This is further elaborated by Paragraph 5 of the so-called of the 'Enabling Clause' adopted at the 1979 Tokyo Round,[125] which provides: '[Developed-country members] shall… [n]ot seek, neither shall [DC members] be required to make, concessions that are inconsistent with the latter's development, financial and trade needs'.

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

> [Developing-country members] expect that their capacity to make contributions or negotiated concessions… [w]ould improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

[122] *See* 'Section One. Introduction', *supra*.

[123] *Ibid*.

[124] Peter Van den Bossche, *supra*, at 409, lists three reasons for this: (i) most DC members still maintain high customs duties; (ii) developed-country members still have high, to very high, duties on specific groups of 'sensitive' industrial and agricultural products; and (iii) in very competitive markets and in trade between neighbouring countries, a very low duty may still constitute a barrier.

[125] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.

2. Non-Tariff Barriers ('NTBs')

(a) To trade in goods

The category of NTBs includes quantitative restrictions (such as quotas) and 'NTBs'. Differently from the case of customs duties, the GATT sets out a general prohibition on quantitative restrictions, be them on import or export, in Article XI(1) which is entitled 'General Elimination of Quantitative Restrictions'. Article XI(1) provides in relevant part:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any [member] on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other [member].

The Panel in *Japan-Semi-Conductors* noted the wording of Article XI(1) is 'comprehensive' and applies to *all measures* instituted or maintained by a [member] *prohibiting or restricting* the importation, exportation or sale for export of products *other than* measures that take the form of duties, taxes, or other charges.[126]

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

As to the rule of non-discrimination, Article XIII(1) of the GATT provides:

> *No prohibition or restriction shall be applied by any [member] on the importation of any product of the territory of any other [member] or on the exportation of any product destined for the territory of any other [member], unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.*

[126] WTO, GATT Panel Report, *Japan-Semi-Conductors,* para. 104 (*Emphasis added*).

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

Once quantitative restrictions, other than moratoria, are applied on the importation of a product, an important question arises as to how to distribute the trade that is allowed among the different members exporting the product in question. This triggers the rules on the distribution of trade. The chapeau of Article XIII(2) of the GATT provides in relevant part: '… [I]n applying import restrictions to any product, [members] shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various [members] might be expected to obtain in the absence of such restrictions…'.

Finally, when quantitative restrictions are applied in the form of quotas or tariff quotas, they are often administered through important-licensing procedures. A trader who wishes to import a product that is subject to a quota or tariff quota will therefore need to apply for an import licence, the granting of which in turn depends, 'inter alia', upon whether quota is filled or not.[127] Article 1 of the Agreement on Import Licensing Procedures in Annex 1A of the WTO Agreement sets out rules on the application and administration of import-licensing rules, the most important of which is that 'the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner'.[128]

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

To eliminate the lack of transparency of trade regulations, Article X(1) of the GATT entitled 'Publication and Administration of

[127] Of course such a granting also depends on the trader's meeting the import licence requirements.

[128] *See* Agreement on Import Licensing Procedures, Article 1(3).

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

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

With regard to customs formalities and procedures, Article VIII(1)(c) of the GATT provides in general terms that 'the [members]… [r]ecognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements'.[129]

The dearth of rules in WTO law regarding customs formalities and procedures precipitated the Ministerial Conference to direct the Council for Trade in Goods at Singapore Session in 1996, 'to undertake exploratory and analytical work … [o]n the simplification of trade procedures in order to assess the scope for WTO rules in this era.'[130] At the Doha Ministerial Conference in 2001, it was agreed to open negotiations on 'trade facilitation' after the fifth session of the Ministerial Conference in 2003. However, at the latter session, members failed to agree on the modalities of negotiation on any of the Singapore issues. It was agreed in 2004 that trade facilitation would be included on the agenda of the Doha Development Round.[131]

Finally, with regard to technical barriers, WTO law sets out specific rules in a separate agreement, that is, the Agreement on Technical Barriers to Trade (hereinafter the 'TBT Agreement') and the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter the 'SPS Agreement'). The former deals with general category of technical barriers to trade while the latter to special category, that is, sanitary and phytosanitary measures. These two agreements do not as such prohibit the application of technical barriers to trade. Rather it sets out the conditions for such an application. Article 2(2) of the TBT Agreement provides that: 'Members shall ensure technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.' Similarly, Article 2 of the SPS Agreement, after recognizing a right to take the SPS measure in Paragraph 1, provides in Paragraph 2 that: 'Any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life and health.'

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

(b) To trade in services

Trade in services, dissimilarly to trade in goods, does not face border measures. Instead, the production and consumption of services are subject to a large number of domestic regulations. As such, barriers to trade in services are primarily the result of these domestic regulations. These barriers may be classified as 'MA barriers' and 'other barriers to trade in services'.

The GATS does not explicitly define the concept of 'MA barriers'. However, in Article XV:2(a) to (f) of the GATS, one find an *exhaustive* list of those measures, which are

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

[129] Article VIII(3) of the GATT further provides penalties for breaches of customs regulations and procedural requirements to be proportional.

[130] Ministerial Conference, *Singapore Ministerial Conference*, 13 December 1996, WT/MIN(96)/DEC, para. 21.

[131] *See* General Council, *Doha Work Programme*, Decision of 1 August 2004, WT/L/579, para. 1(g).

numerical units in the form of quotas or the requirement of an economic needs test;

- *limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;*

- *measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and*

- *limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.*

The GATS does not provide for a general prohibition on the MA barriers listed above. Differently from the GATT, the GATS applies the so-called 'positive list' or 'bottom-up' approach to the liberalization of trade in services whereby a member is bound only with respect to the specific commitments it has undertaken in its Services Schedule.[132] When a member makes a MA commitment, it *binds* the level of MA specified in the Schedule[133] and agrees not to impose any MA barrier that would restrict access to the market beyond the level specified.[134]

In addition to the MA barriers, trade in services may also be impeded by a wide array of other barriers. Some of these barriers are similar to those other NTBs to trade in goods, such as a lack of transparency, or unfair or arbitrary application of measures affecting trade in services. The GATS addresses these barriers in a similar fashion to the GATT.[135] Besides, there are barriers peculiar only to the GATS, two of which are (i) domestic regulation; and (ii) lack of recognition of diplomas and professional certificates.

Domestic regulation, as mentioned above, is the primary restriction on trade in services. The GATS does not provide for rules on domestic regulation as such. However, for those regulations on licensing and technical standards, Article VI(5)(a) of the GATS is relevant:

> *In sectors in which a member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to Paragraph 4, the member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:*
>
> *(i) Does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and*
>
> *(ii) could not reasonably have been expected of that member at the time the specific commitments in those sectors were made.*

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

C. *Anti-dumping, Subsidies and Countervailing Duties*

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

1. Dumping and Anti-Dumping Measures

Article VI of the GATT and Article 2(1) of the ADA define dumping as the bringing of a product onto the market of another country at a price less than its 'normal value' (hereinafter the 'NV'). WTO law does not prohibit dumping as such, but this imposes obligations on and regulates the actions of WTO members. As dumping may cause injury to the domestic industry of the importing country, it is 'to be condemned'.[136] As a result, Article VI of the GATT and the ADA provide both substantive and procedural rules on how a member *may* counteract or 'remedy' dumping

[132] *See* , Article XVI of the GATS.

[133] *See* , Article XVI(1) of the GATS.

[134] *See* Article XVI(2) of the GATS.

[135] For 'lack of transparency', compare Article III of the GATS with Article X of the GATT; for 'unfair and arbitrary application of measures', compare Article VI(3) of the GATS with Article X(3)(a) of the GATT .

[136] *See* Article VI of the GATT.

through the imposition of AD measures. It is worth emphasizing that AD measures are not mandatory, but a policy of choice of WTO members, the imposition of which must follow certain procedures as stipulated by the GATT and ADA.[137]

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

(a) Determination of dumping

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

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

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

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

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

(iv) the price must be 'comparable'.[138]

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

After establishing the 'NV', the export price (hereinafter the 'EP')[139] is compared with the 'NV' to determine if dumping exists. This comparison should be 'fair', as stipulated under Article 2(4) of the ADA. In order to ensure a fair comparison between the EP and NV, Article 2(4) provides further that adjustments should be made to the NV, EP or both. Article 2(4) states in pertinent part that:

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

In *Argentina-Tiles*, the Panel found a violation of Article 2(4) because the Argentina, though while having made adjustments for certain physical differences, failed to do so for other differences and hence was held not to have made a 'fair comparison'.[140]

(b) Determination of injury

The second determination to be made after a finding of dumping concerns 'injury'. This is provided in Article 3 of the ADA entitled 'Determination of injury'. Indeed, the Appellate Body in *Thai Steel* identified Article 3 as focusing on the obligation on a member when it makes an injury determination.[141] The Appellate Body also opined that Article 3(1) is 'an overarching provision that sets forth a member's fundamental, substantive obligation' with respect to determining injury and 'informs the more detailed obligations in the succeeding paragraphs'.[142] Article 3(1) reads:

[137] *See* Article 1 of the ADA.

[138] *See* WTO, Appellate Body Report, *US-Hot-Rolled Steel*, para. 165.

[139] In the case where there is no EP because the transition is, for example, one of internal transfer or barter, Article 2(3) of the ADA provides for alternative method to 'construct' an EP. The 'constructed export price' is based on the price at which the product is first sold to an independent buyer. If it is not possible to 'construct' the EP on this basis, the investigating authorities may determine a reasonable basis to calculate the EP.

[140] *See* WTO, Panel Report, *Argentina-Tiles*, paras. 610-617.

[141] *See* WTO, Appellate Body Report, *Thailand Steel*, para. 106.

[142] *Ibid*.

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

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

- [T]the determination of the volume of imports, and their effect on prices (Article 3(2));
- the impact of dumped imports on the domestic industry (Article 3(4));
- causality between dumped imports and injury (Article 3(5));
- the assessment of the domestic production of the liked product (Article 3(6)); and
- the determination of the threat of material injury (Articles 3(7) and 3(8)).

In *Thailand Steel,* the Appellate Body indicated that Article 3(1) allows an investing authority to determine an injury based on all relevant reasoning and facts before it, not just on disclosed or discernible reasoning or facts.[143] In *US-Hot-Rolled Steel*, the Appellate Body expanded the discussion by providing definition to the terms 'positive obligation' and 'objective examination'. According to the Appellate Body, the former indicates that the evidence must 'be of an affirmative, objective and verifiable character, and that it must be credible'[144] while the latter 'requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested party, in the investigation'.[145]

As noted above, Article 3(1) requires the a determination of injury to the domestic market must involves an examination of (i) the volume of dumped imports and their effect on prices (Article 3(2)), and (ii) the impact of dumped imports on the domestic industry (Article 3(4)). With

[143] *Ibid*., para. 111.

[144] *See* WTO, Appellate Body Report, *US-Hot-Rolled Steel*, para. 192.

[145] *Ibid*., para. 193. For the case where the investigative authorities have been found not to be objective, *see* Appellate Body Report, *EC-Bed Linen (Article 21.5-India)*.

regard to the requirement of Article 3(2), the Appellate Body in *EC-Bed Linen (Article 21.5-India)* held that imports from those *exporters* who were not found to be dumping may not be included in the volume of dumped imports from a country.[146] With regard to the requirement of Article 3(4), the said Article states: 'The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors'.

15 relevant economic factors then are identified by Article 3(4), which include: factors and indices having a bearing on the state of the industry (such as an actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity); factors affecting domestic prices; the magnitude of the margin of dumping; and actual and potential negative effects on cash flow, inventories, employment, wages, growth, and the ability to raise capital or investments. Article 3(4) explicitly states that the list is not exhaustive and stresses that one or several of these factors will not necessarily give decisive guidance. The Panel in *Thailand-H-Beams* opined that the list of factors in Article 3(4) is a mandatory minimum.[147]

The term 'injury' in the ADA refers not only to material injury but also to the threat of material injury. Article 3(7) of the ADA lists requirements for finding a 'threat of material injury'. In *Mexico-Corn Syrup*, the Appellate Body stated that for the purposes of Article 3(7), investigating authorities may make assumptions, because future events 'can never be definitely proven by facts.'[148] Nevertheless, Article 3(7) does indicate that 'the situation in which the dumping would cause injury must be clearly foreseen and imminent.'[149] In this connection, it is noted that Article 3(8) of the ADA requires that the application of AD measures shall be considered and decided with 'special care' where a determination of treat of material injury is involved.

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

Once a determination of injury is made, there is a final step to take, that is, the demonstration of a causal link. Article 3(5) of the ADA provides

[146] *See* WTO, Appellate Body Report, *EC-Bed Linen (Article 21.5-India)*, para. 111. This conclusion was supported by an examination of Article 3(5). *See supra*, para. 112.

[147] *See* WTO, Panel Report, *Thailand-H-Beams*, paras. 7.224-7.225. The Appellate Body upheld this aspect of the Panel.

[148] *See* WTO, Appellate Body Report, *Mexico-Corn Syrup (Article 21.5-US)*, para. 85.

[149] *Ibid*.

that demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence. Article 3(5) also contains a 'non-attribution' requirement, according to which it is also necessary to examine any known factors other than the dumped imports, which are at the same time injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. In *US-Hot-Rolled Steel,* the Appellate Body stated that if the effects of other factors cannot be separated from those of the dumped imports then investigating authorities cannot attribute the injury to the dumped imports.[150]

2. Subsidies and Countervailing Duties

As mentioned above, in addition to rules on dumping, WTO law also includes rules on subsidization as another unfair trade practice. Subsidies are, however, a very sensitive matters in international trade relations since internally they help to pursue and promote important and fully legitimate objectives of economic and social policy; but externally, they may have adverse effects on the interests of trading partners whose industries may suffer, in its their domestic or export markets, from unfair competition with subsidised products.

The rules on subsidies are found in Articles VI and XVI of the GATT and also in, arguably more importantly, the Agreement on Subsidies and Countervailing Measures (hereinafter the 'SCM'). The latter contains, for the first time in the history of the WTO, a detailed and comprehensive definition of the concept of 'subsidy'.[151] Article 1(1) of the SCM defines a 'subsidy' as a *financial contribution by a government or public body*, which confers a *benefit*.

It should be noted in WTO law, subsidies were classified into three types, namely, actionable, non-actionable, and prohibited subsidies. The difference between among these types hinges upon the action that a member may take to respond. In particular, for actionable and prohibited subsidies, a member may follow one of the two methods to respond to subsidised trade, that is, to bring the issue to a dispute resolution forum or to impose a countervailing duty to offset the subsidization. For non-actionable subsidies, these two tracks to respond are not available to WTO members.[152] This type of subsidy, however, expired in 2000, pursuant to Article 31 of the SCM. As such *there are now only two types of subsidies, prohibited and actionable subsidies*.

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

> *Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:*
>
> *(a) Subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;*
>
> *(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.*

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

Article 3(1)(a) prohibits subsidies contingent, both 'de facto' and 'de jure', upon export performance. It refers to Annex I, which contains a non-exhaustive list of eleven types of export subsidy. The Appellate Body in *Canada-Aircraft* recognized that 'contingent' imports holds the same legal standard for both 'de jure' and 'de facto' contingency, i.e., 'conditional' or 'dependent for its existence on something else'.[153] The difference between '*de jure*' and '*de facto*' contingency lies in what evidence may be employed to demonstrate that a subsidy is export contingent. In the case of '*de jure*' contingency, such demonstration necessarily involves the use of words in the relevant legislation,[154] while in '*de facto*' export contingency, Footnote 4 to the SCM states that the standard is met if the facts demonstrate that the subsidy is 'in fact tied to actual or anticipated exportation or export earnings.'[155] It is evident that

[150] *See* WTO, Appellate Body Report, *US-Hot-Rolled Steel*, para. 223. The Appellate Body in *US-Hot-Rolled Steel,* in effect, reversed previous case law in which it was held that separate identification of the injurious effects of other causal factors was not required. *See* WTO, GATT Panel Report, *US-Norwegian Salmon AD*, para. 550.

[151] *See* WTO, Panel, *US-FSC*, para 7.80, considering this as one of the most important achievements of the Uruguay Round in the area of subsidy disciplines.

[152] In the case of non-actionable subsidy which is causing serious adverse effects to the domestic industry of a member, the Subsidies Committee may, however, recommend a modification to the programme.

[153] *See* WTO, Appellate Body Report, *Canada-Aircraft*, para. 166.

[154] *See* WTO, Appellate Body Report, *Canada-Autos*, para. 100.

[155] *See* WTO, Panel Report, *Australia-Automotive Leather II*, para. 9.55, for their interpretation of the word 'tied to'.

'*de facto*' export contingency is more difficult to demonstrate than '*de jure*' export contingency. The Appellate Body in *Canada-Aircraft* stated that the standard for determining '*de facto*' export contingency set out in Footnote 4 requires proof of three different substantive elements, namely, (i) 'the granting of a subsidy'; (ii) 'is … tied to…'; and (iii) 'actual or anticipated exportation or export earnings'.[156]

In addition to export subsidies, Article 3(1) also prohibits import substitution subsidies. As defined in Article 3(1)(b), import substitution subsidies are subsidies contingent upon the use of domestic over imported goods. While the words '*de jure*' and '*de facto*' are absent in Article 3(1)(b), the Appellate Body in *Canada-Autos* stated that Article 3(1)(b) still covers both '*de jure*' and '*de facto*' contingency upon the use of domestic cover imported goods.[157]

Subsidies that are neither prohibited nor non-actionable are placed in the *actionable* category. Article 5 of the SCM defines actionable subsidies as specific forms of government assistance to farms or industries. Actionable subsidy may be objectionable on three grounds,[158] which are that is

- They cause injury to the domestic industry of another member (Article 5(a));
- they entail nullification or impairment of benefits accruing to another country (Article 5(b)); or
- they cause serious prejudice to the interests of another country (Article 5(c)).

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

(a) displacing or impeding the imports of a like product of another member into the market of the subsidizing member;

(b) displacing or impeding the exports of a like product of another member from a third country market;

(c) resulting in a significant price undercutting by the subsidized product as compared with the price of a like product of another member in the same market; or significant price suppression, price depression or lost sales in the same market;

(d) leading to an increase in the world market share of the subsidizing member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years, and this increase follows a consistent trend over a period when subsidies have been granted.

Articles 5 and 7 of the SCM respectively provides for multilateral remedies for, respectively, prohibited and actionable subsidies. The procedure is that a member will request consultations with the other member over the latter's prohibited or actionable subsidy. If consultations fail, the issue will be referred to the Dispute Settlement Body for adjudication.[159]

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

2. General and Security Exceptions

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

[156] *See* WTO, Appellate Body Report, *Canada-Aircraft*, para. 169.

[157] *See* WTO, Appellate Body Report, *Canada-Autos*, para. 169. The Appellate Body reversed the Panel's finding that Article 3.1(b) only covered only 'de jure' contingency.

[158] Previously, Article 11 of the Tokyo Round Subsidies Code listed legitimate grounds for domestic subsidies. This Article was dropped at the Uruguay Round.

[159] In the case of prohibited subsidy, the Panel established by the Dispute Settlement Body may request the assistance of the Permanent Group of Experts established under Article 24 of the SCM.

is to reconcile conflicts between trade liberalization and other societal values and interests.

WTO agreements provide for wide-ranging *exceptions* which can broadly grouped into six categories, namely: the 'general exceptions', the 'security exceptions', the 'economic emergency exceptions', the 'regional integration exceptions', the 'balance of payments exceptions', and the 'economic development exceptions'. This Section focuses on the first exception, which is the single most important one of all the exceptions, and then cursorily discusses the second one, which functions similarly to the first. But before doing so, some brief remarks about the other exceptions are in order.

The 'economic emergency exceptions', which are set out primarily in Article XIX of the GATT and further elaborated in the Agreement on Safeguards, basically allow a member to adopt measures, which is otherwise inconsistent with the GATT, to a product which has been 'imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.'[160] In a similar vein, the 'regional integration exceptions', which are enshrined in Article XXIV of the GATT[161] and Article V of the GATS, enable members to adopt measures, otherwise WTO-inconsistent, in order to pursue regional economic integration. A member may have recourse to the 'balance-of-payments exceptions', which are provided in Articles XII and XVIII:B of the GATT[162] and Article XII of the GATS in order to protect its external financial position and its balance-of-payments.

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

(i) Provisions aimed at increasing the trade opportunities of DCs;

(ii) provisions under which WTO members should safeguard the interests of DC members;

(iii) flexibility of commitments, of action, and use of policy instruments;

(iv) transitional time periods;

(v) technical assistance;

(vi) provisions relating to LDCs.[163]

Among the six types of S&D treatment provisions, of particular importance is the General System Preferences (hereinafter the 'GSP') exception enshrined in the 'Enabling Clause'.[164] The 'Enabling Clause', in addition to providing for exception to the reciprocal principle in tariff negotiation as discussed above, also allows developed-country members to grant preferential tariff treatment to imports from DCs,[165] subject to certain substantive and procedural conditions.[166] The practical effect of this provision is that the fundamental MFN treatment obligation is neutralized in favour of DCs. Furthermore, it is arguable that the 'Enabling Clause' even allows a developed-country member to grant preferential tariff treatment to *some*, and not to other, DCs, provided that specific requirements are met.[167]

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

[160] Artile XIX(1)(a) of the GATT; Article 2(1) Agreement on Safeguards.

[161] Note that at the Uruguay Round, an Understanding on the Interpretation of Article XXIV was adopted.

[162] Note that at the Uruguay Round, an Understanding on the Balance-of-Payments Provisions of the GATT was adopted.

[163] *See* WTO, Committee on Trade and Development, 'Note by Secretariat: Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions', WT/COMTD/W/77, 25 October 2000, para. 3.

[164] *Supra*.

[165] Enabling Clause, para. 2(a).

[166] These are provided in paragraphs 3 and 4 of the Enabling Clause.

[167] This follows from the ruling of the Appellate Body in the *EC-Tariff Preferences* that the principle of non-discrimination in applying GSP 'does not prohibit developed-country members from granting different tariffs to products originating in different GSP beneficiaries, *provided* that such differential tariff treatment meets the remaining conditions in the Enabling Clause' and that 'preference-granting countries are required, by virtue of the term 'non-discriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond'. *See* Appellate Body Report, *EC-Tariff Preferences,* para. 173.

A. *General Exceptions*

General exceptions are key provisions of the GATT and GATS. These exceptions are stipulated in Article XX of the GATT (hereinafter the 'Article XX') and Article XIV of the GATS (hereinafter the 'Article XIV').

Article XX reads in the relevant part as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) Necessary to protect public morals;

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

…

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

…

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

…[168]

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

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

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

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

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

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

(iii) safety;

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

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

Despite the textual differences between Article XX and Article XIV, as the Appellate Body in the *US-Gambling* observed, these two articles boast similar structured, language and functions and thus can be cross-referenced in their analyses.[169] The same Appellate Body, in reaffirming previous case law, also pointed out a 'two-tier analysis' of a measure that a member seeks to justify under that provision as contemplated in these two articles: *firstly*, it is necessary to determine whether the measure at issue falls within the scope of one of the paragraphs of the general exception article; and *secondly*, if the measure at issue has been found to fall within one of the paragraphs of the article, then it is necessary to consider whether that measure satisfies the requirements of the chapeau of the article. Thus, it is convenient to discuss the two articles according to the two steps identified by the Appellate Body. But before doing so, some general observations on the purpose of the two articles and the connection between the measures and the objectives listed in the four subparagraphs are in order.

[168] The six other subparagraphs (c), (e), (f), (h), (i) and (j) respectively address gold and silver, the products of prison labour, national treasures, international commodity agreements, materials necessary to a domestic processing industry and products in short supply.

[169] *See* WTO, Appellate Body Report, *US-Gambling*, para. 291.

The purpose of the general exceptions is to allow members to adopt measures that pursue policy objectives that are considered 'legitimate' and 'important'. The phrase 'nothing in this Agreement' in the 'chapeau' signifies that the exceptions apply to *all* of the obligations in the GATT and GATS.[170] On the other hand, the exceptions, as pointed out by the GATT Panel in *US-Section 337*, are 'limited and conditional'.[171] That is to say, a member may justify their GATT-inconsistent or GATS-inconsistent measures only by invoking one of the policy objectives set out in the sub-paragraphs of Articles XX and XIV.

It is noted that the Articles X in its relevant part and XIV quoted above each contains three subparagraphs on general exceptions starting with the word 'necessary', and one paragraph with the word 'relating'. These words suggest degrees of connection between the measure and the objective sought. The Appellate Body in *Korea-Various Measures on Beef* was the first to consider the meaning of the word 'necessary' in the general exception clauses. According to the Appellate Body, to qualify as necessary, a measure does not need to be indispensible to the objective in question; nor does it need to be an inevitable response to the problem it addresses. On the other hand, the standard is not met if there are other measures reasonably available to the respondent which are not inconsistent with the WTO Agreement but that would achieve the same objective as the measure at issue.

With regard to the word 'relating', the Appellate Body in *US-Gasoline* held that it does not require 'the same kind or degree of connection or relationship between the measures under appraisal and the state interest or policy sought to be promoted or realized' as the word 'necessary'.[172] In that case, the Appellate Body accepted that a measure 'relates' to the objective when it is 'primarily aimed at' that objective.[173] However, the Appellate Body also held that there must be a 'substantial relationship' between the measure at issue and the objective sought, and that a measure that was 'merely incidentally or inadvertently' related to the objective would not satisfy the test.[174] That said, it is now appropriate to consider each policy objective identified in Articles XX and XIV in their order.

[170] *See* WTO, Appellate Body Report, *US-Gasoline*, para. 24.

[171] *See* WTO, GATT Panel Report, *US-Section 337*, para. 5.9.

[172] *See* WTO, Appellate Body Report, *US-Gasoline*, para. 18.

[173] *See* WTO, Appellate Body Report, *supra*, para. 18-19.

[174] *See* WTO, Appellate Body Report, *supra*,., para. 19.

1. Subparagraph (a): Public Morals

The concept 'public moral' is itself elusive, covering a wide range of measures that may overlap with those covered under other subparagraphs. Interestingly, despite its potential breath, the public moral exception was never invoked during the GATT 1947 era. In the WTO case law, there have been to date two cases where this exception has been invoked. The first case was *US-Gambling* and the second *China-Publications and Audiovisual Products*.

In the *US-Gambling,* the measures at issue restricted the remote supply of gambling services via the Internet and the US. The Panel, after acknowledging the difficulties involved in determining the exact scope of 'public morals', noted that the jurisprudence of the Appellate Body and other general exceptions suggested that members should enjoy some latitude in determining what public morality means in their own societies.[175] The Panel then turned to dictionary to define 'public' and 'morals' and concluded that the compound phrase 'public morals' means 'standards of right and wrong conduct maintained by or on behalf to a community or nation.'[176] The Appellate Body did not alter this definition, although this non-alteration was not explicitly challenged by the complainant.[177]

In the second case where public moral exception was invoked, the measure at issue in that case restricted the capacity of foreign enterprises to import and distribute foreign publications and audiovisual products; also, it imposed more onerous content review requirements on foreign products than were imposed on like domestic products. Although China argued that its measures were designed to protect public morals, the US did not challenge this characterization. As a result, it was assumed by the Panel and the Appellate Body that the prohibited content against which the measures were targeted *could* affect public morals in China.[178] In making such assumption, the Panel confirmed the state-to-state approach, stating 'the content and scope of "public morals" can vary *from member to member*, as they are influenced by *each* members' prevailing social, cultural, ethical and religious values.'[179]

[175] *See* WTO, Panel Report, *US-Gambling*, para. 6.461.

[176] *See* WTO, Panel Report, *supra*,, para. 6.465.

[177] *See* WTO, Appellate Body Report, *US-Gambling*, paras. 296-299.

[178] *See* WTO, *China-Publications and Audiovisual Products*, Panel Report, para. 7.763; Appellate Body Report, para. 148.

[179] *See* WTO, Panel Report, *China-Publications and Audiovisual Products*, para. 7.763.

There is one important difference between Article XX(a) and Article XIV(a): the latter cover measures designed to 'maintain public order' in addition to the common 'public morals' exception. In Footnote 5 to Article XIV, it is clarified that 'The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of the society.'

In *US-Gambling*, the Panel found that dictionary meaning of 'order', Footnote 5 to Article XIV(a) and the civil law concept of 'ordre public' together indicated that 'public order' means 'the preservation of the fundamental interests of a society, as reflected in public policy and law.'[180] This approach was upheld by the Appellate Body.[181]

2. Subparagraph (b): Human, Animal or Plant Life or Health

Subparagraph (b) of Article XX covers measures designed to protect 'human, animal or plant life or health'. This is a relatively easy test to meet since any measure that seeks to reduce air pollution,[182] eliminate cancer risks[183] or protect wildlife[184] may well fall within the ambit of this subparagraph.[185]

However, in *China-Raw Materials*, the Panel implied that a measure falling within Article XX(b) must be clearly *designed* to protect health and a mere connection between the effects of the measure and the objective is insufficient.[186]

Finally, as far as health protection is concerned, the measures invoked under Article XX(b) may also be examined under the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter the 'SPS Agreement'),[187] which applies to measures designed to protect human, animal or plant life or health from certain risks. This Agreement, as stated in its Preamble, aims to 'elaborate rules for the application of the provisions of the GATT which relate to the use of sanitary or phytosanitary measures', in particular Article XX(b).

[180] *See* WTO, Panel Report, *US-Gambling*, paras. 6.466-6.470.

[181] *See* WTO, Appellate Body Report, *US-Gambling*, paras. 296-299.

[182] *See* WTO, Panel Report, *US-Gasoline*, para. 6.21.

[183] *See* WTO, Panel Report, *EC-Asbestos*, paras. 8.173, 8.193-8.194.

[184] *See* WTO, Appellate Body Report, *US-Shrimp*, paras. 28, 127, 146.

[185] Although this does not mean that there are no measures outside this exception. The Panel in *EC-Tariff Preferences,* for example, found that a system for granting tariff preferences to encourage countries to combat the production and trafficking of drugs did not fall within Article XX(b).

[186] *See* WTO, Panel Report, *China-Raw Materials,* para. 7.515.

[187] In Annex 1A of the WTO Agreement.

3. Subparagraph (d) of Article XX and Subparagraph (c) of Article XIV: Prevention of Deceptive Practices

Subparagraph (d) is slightly more complex than subparagraphs (a) and (b), because it relates to measures designed to secure compliance with laws and regulations (which are not inconsistent with the GATT or GATS, as the case may be), whereas subparagraphs (a) and (b) provide for specific policy objectives. Subparagraph (d) of Article XX and subparagraph (c) of Article XIV each contains a non-exhaustive list indicative of the laws and regulations that may engage the exception. In this connection, it is noted that the two lists are different, reflecting the different subject matters of the GATT and GATS. To determine whether a measure satisfies the requirements of Article XX(d), the Appellate Body in *Korea-Various Measures on Beef* established a two-part test: '*Firstly*, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. *Secondly*, the measure must be 'necessary' to secure such compliance'.[188]

The first element was further divided by the Panel in *Canada-Wheat Exports and Grain Imports* into two parts: (i) the measure must secure compliance with other laws or regulations; and (ii) those other laws or regulations must not be inconsistent with the GATT.[189]

As to the second question, in *Mexico-Taxes on Soft Drinks*, the Appellate Body noted that 'the laws or regulations' refer to domestic laws or regulations and do not include obligations under international law.[190]

4. Subparagraph (g) of Article XX: Conservation of Exhaustible Natural Resources

The exception involving the conservation of exhaustible natural resources exists only in Article XX of the GATT and there is no comparable clause in the GATS. Article XX(g) sets out two requirements for the measures invoked: *firstly*, it must relate to 'the conservation of exhaustible natural resources'; and *secondly*, it is 'made effective in conjunction with restrictions on domestic production or consumption'.

In the WTO case law, the phrase 'exhaustible natural resources' has been interpreted so broadly that it is not limited to mineral and

[188] *See* WTO, Appellate Body Report, *Korea-Various Measures on Beef*, para. 157.

[189] *See* WTO, Panel Report, *Canada-Wheat Exports and Grain Imports*, para. 6.218.

[190] *See* WTO, Appellate Body Report, *Mexico-Taxes on Soft Drinks*, paras. 69-71.

other non-living resources;[191] it includes 'clear air'[192] and wild animals.[193]

The second requirement mandates a fair and balanced treatment of domestic and foreign production or consumption. The Appellate Body in *US-Gasoline* interpreted the phrase 'made effective in conjunction with restrictions on domestic production or consumption' to require an '*even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources'.[194] The Appellate Body opined a measure would *clearly* not meet the requirements of Article XX(g) if no restrictions relating to domestic products were imposed at all. But as the Appellate Body acknowledged, a requirement of the *identical* treatment of domestic and imported products would render Article XX(g) redundant as no inconsistency with Article III of the GATT (on NT) occurred to call for an exception.[195] The Panel Report in China—Rare Earths,[196] which was later confirmed by the Appellate Body,[197] observed:

> … [T]he 'even-handedness' criterion is satisfied where the regulating Member can show that, in addition to its GATT-inconsistent measures, it has also imposed real conservation restrictions on the domestic production or consumption of the resource subject to its GATT-inconsistent measures. These domestic measures must distribute the burden of conservation between foreign and domestic consumers in an even-handed or balanced manner. However, 'even-handedness' under subparagraph (g) does not require the Panel to assess the effects of the concerned restrictions. Instead, the relevant 'balance' or 'even-handedness' under subparagraph (g) is structural or regulatory. The balanced or even-handed nature of the domestic and foreign restrictions should be evident from the design, structure, and architecture of the challenged measure.[198]

[191] *See* WTO, Appellate Body Report, *US-Shrimp*, para. 127.

[192] *See* WTO, Panel Report, *US-Gasoline*, para. 6.37. On appeal, the Appellate Body did not touch upon this point for procedural reasons; nor did it reject the Panel's finding.

[193] *See* WTO, Appellate Body Report, *US-Shrimp*, paras. 127-131.

[194] *See* WTO, Appellate Body Report, *US-Gasoline*, para. 21.

[195] *Ibid*.

[196] See WTO, Panel Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*.

[197] *See* WTO, Appellate Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*.

[198] See WTO, Panel Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum,* para 7.337

As mentioned above (and also indicated in the Panel Report in *China-Rare Earths*), after a finding that a measure falls within one of the subparagraphs of Articles XX GATT and XIV GATS, the 'chapeau' must be considered to determine whether the measure satisfies the requirements of the general exceptions. The 'chapeau' of Articles XX and XIV contains two essential requirements, that is: (i) there must be no '*arbitrary or unjustifiable discrimination*' in the application of the measure; and (ii) the measure must not be a '*disguised restriction on international trade*.' In other words, the 'chapeau' looks at the way the measure challenged is *applied*. The Appellate Body in *US-Gasoline* explained in an important passage the latter's relationship with the two other prohibitions in the 'chapeau', namely, no 'arbitrary discrimination' and no 'unjustifiable discrimination':

> …['A]rbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. … [T]he fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[199]

As to the first requirement, i.e., no 'arbitrary or unjustifiable discrimination', the leading case is *US-Shrimp*. In the case, the US measure,[200] which was considered as falling within Article XX(g), was found as constituting both 'unjustifiable' and 'arbitrary' discrimination.[201] The measure was considered as 'unjustified discrimination' because it required that other countries adopt 'essentially the same comprehensive regulatory program' as that in force in the US without sufficient flexibility

[199] *See* WTO, Appellate Body Report, *US-Gasoline*, para. 25 (*Emphasis in original*).

[200] That was a ban on the importation into the US of shrimp from the countries that did not require commercial shrimp trawlers to use 'Turtle Excluder Devices'. *See* Appellate Body Report, *US-Shrimp*, paras. 3-5.

[201] Note that the Appellate Body, after reaching its conclusions, was careful to clarify that the findings did not preclude members from adopting measures like that of the US provided those measures did not violate the requirements of the chapeau. *See supra*., paras. 185-186.

to take into account the different conditions in different countries.[202] In addition, the Appellate Body held that the measure was applied in an arbitrarily discriminatory manner, because the certification process by which countries were approved to import shrimp into the US was not transparent and applicants were denied 'due process'.[203]

In *Brazil-Retreated Tyres,* the Appellate Body elaborated further on its reasoning in *US-Shrimp*. According to the Appellate Body, the application of a measure in a discriminatory manner will be 'arbitrary or unjustifiable' where the 'discrimination *bear[s] no rational connection* to the objective' in the subparagraph of Article XX, 'or would go against that objective'.[204]

As to the second requirement, i.e., 'disguised restrictions on international trade', it has been established in older GATT case law that a restriction might be 'disguised' if it is not properly publicized.[205] Other factors may, however, indicate a disguise. *For example*, in the context of the SPS Agreement, the Appellate Body in *Australia-Salmon* held that Australian measures restricting the importation of Canadian salmon constituted a 'disguised restriction on international trade' because of a series of 'warning signals' and 'additional factors', including that the measures were not based on a risk assessment as especially required by Article 5.1 of the SPS Agreement. While risk assessment is not stipulated in Article XX of the GATT 1994, the Appellate Body's approach in this case is significant in showing the possibility of using accumulation of indicators demonstrating an insufficient basis for a measure in determining if there is a disguised restriction on international trade. On the other hand, according to the Panel in *EC-Asbestos*, the mere fact that a measure has the effect of protecting domestic producers does not demonstrate that it is disguised.[206]

[202] *Ibid*., para. 164. The Appellate Body also *found* that the measure also led the exclusion of some shrimp that had been caught using TEDs and that the US was selective in its efforts to negotiate international agreements on shrimp imports with other countries. The 'cumulative effect' of these differences, according to the Appellate Body, also constituted 'unjustifiable discrimination'. *See ibid*., paras. 166-176.

[203] *Ibid*., paras. 179-181, 184.

[204] *See* WTO, Appellate Body Report, *Brazil-Retreated Tyres*, paras. 226-227 (*Emphasis added*).

[205] *See* WTO, GATT Panel Report, *US-Tuna from Canada*, para. 4.8, *United States-Automotive Springs*, GATT BISD 30S/107 (11 June 1982), para. 56, quoted in Panel Report, *EC-Asbestos*, para. 8.233, n 194.

[206] *See* WTO, Panel Report, *EC-Asbestos*, para. 8.239.

B. *Security Exceptions*

Besides the general exceptions, Article XXI of the GATT and Article XIVbis of the GATS provide exceptions that members may invoke to justify actions relating to their essential security interests. Article XXI of the GATT provides as follows:

> *Nothing in this Agreement shall be construed*
>
> *(a) To require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
>
> *(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
>
> *(i) Relating to fissionable materials or the materials from which they are derived;*
>
> *(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
>
> *(iii) taken in time of war or other emergency in international relations; or*
>
> (c) *to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

Article XIVbis of the GATS, the Paragraph 1 of which is modelled upon Article XXI of the GATT.

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

interests are engaged in order to invoke security exceptions.[207] It is therefore argued that Article XXI of the GATT, particularly paragraph (b), gives a member a broad discretion to take national security measures.[208] This being so, a certain degree of 'judicial review' should be maintained; otherwise the provision would be prone to abuse without redress.[209]

In the era of the GATT 1947, there were several cases where Article XXI could be invoked.[210] *US-Export Restrictions (Czechoslovakia)* [1949] was, however, the first and the only case where the security exceptions were successfully invoked.[211] The US invoked Article XXI to justify its export licence regime which Czechoslovakia considered discriminatorily administered in violation of Article I of the GATT 1947. The UK representative, at the meeting of the Contracting Parties, which voted that the US was in conformity with its obligations, stated: '… [T]he United States action would seem to be justified because every country must have the last resort on questions relating to its own security'.[212] However, in the controversial *US-Trade Measures Affecting Nicaragua*, the Panel, having found that it could not determine the validity of the US invocation of Article XXI of the GATT due to its terms of reference, raised a pertinent question:

> *If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision?*[213]

[207] For a useful discussion of this clause, *see* Ji Yeong Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security', (2016), 19 *Journal of International Economic Law* 417.

[208] Peter Van den Bossche, *supra*, at 666.

[209] *See* the GATT's Panel Statement in GATT *Activities 1986,* at 58-59.

[210] *See* WTO, the GATT Panel Report, *US-Export Restrictions (Czechoslovakia)*; GATT Panel Report, *US-Trade Measures Affecting Nicaragua* (unadopted); *Trade Measures Taken by the European Community against the Socialist Federal Republic of Yugoslavia*, (Communication from the European Communities). *United States-Imports of Sugar from Nicaragua* could have been another case, but the US refused to invoke any exceptions.

[211] In *Trade Measures Taken by the European Community against the Socialist Federal Republic of Yugoslavia,* the Panel was not established due to the uncertainty of the question of succession between status of Socialist Federal Republic and the Federal Republic of Yugoslavia. In the *US-Trade Measures Affecting Nicaragua*, the Panel was restricted by its terms of reference to consider the security exceptions.

[212] Contracting Parties, 3rd Session, *Summary Record of the Twenty-Second Meeting*, 8 June 1949, at 3.

[213] *See* WTO, GATT Panel Report, *US-Trade Measures Affecting Nicaragua*, para. 5.17.

Neither Article XXI of the GATT nor Article XIV of the GATS has been thoroughly examined in a case during the WTO era.[214] The above question thus remains open.

Section Three. TRADE IN GOODS AND THE WTO's AGREEMENTS

This Section will firstly give an overview introduction of the legal framework on trade in goods in the WTO; it will then outline key aspects of this area in six main subsections: (1) tariffs, which are a main barrier to international trade; (2) agriculture, a special and important sector; (3) a set of matters concerning standard and safety, notably sanitary and phytosanitary measures and technical barriers to trade; (4) textiles, like agriculture, a special sector; (5) trade remedies and measures dealing with unforeseen situation in international trade, notably, anti-dumping, subsidy, countervailing and safeguard measures; and (6) matters relating non-tariff barriers, notably import licensing, customs valuation, preshipment inspection and trade-related investment measures.[215] Each subsection will begin with an overview giving a short introduction of the subject in question; it mentions the coverage of and relevant definition under the agreement dealing with the subject, and introduces key aspects of the matter concerned. All reference to the Preamble and Articles in each subsection will be those of the WTO Agreement mentioned in that subsection.

Overview of the Legal Framework

Under the Agreement Establishing the WTO, which operates as an umbrella agreement, the area of trade in goods is governed by a set of three-tier agreements as follows:[216]

- The set starts with broad principles such as MFN and NT in the GATT;
- then come extra agreements and annexes dealing with the

[214] Three cases where Article XXI had been invoked as a defence were all settled during consultations. These are *US - The Cuban Liberty and Democratic Solidarity Act* in 1996 (DS38), *Nicaragua - Measures Affecting Imports from Honduras and Colombia* (Colombia) in 2000 (DS188) and *Nicaragua - Measures Affecting Imports from Honduras and Colombia* (Honduras) in 2000 (DS201)

[215] This approach of classification is used in the book: The WTO Secretariat, *Understanding the World Trade Organization*, (2003), http://www.wto.org.

[216] The WTO Secretariat, *supra*, at 15.

special requirements of specific sectors or issues; notably, Agreement on Agriculture; Agreement on Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade-Related Investment Measures; Agreement on Implementation of Article VI (Anti-dumping); Agreement on Implementation of Article VII (Customs Valuation); Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; and Agreement on Safeguards.

- finally, there are the detailed and lengthy schedules or lists of commitments made by individual countries allowing specific foreign products access to their markets. These take the form of binding commitments on tariffs for goods in general, and combinations of tariffs and quotas for some agricultural goods.[217]

The GATT 1994 consists of:

- The GATT 1947;
- the provisions of the legal instruments that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement, such as protocols and certifications relating to tariff concessions; protocols of accession; etc.
- the relevant Understandings on the Interpretation of a number of articles of the GATT 1994 dealing with such legal matters as Schedules of Concession, State-trading Enterprises, Balance-of-Payments, Customs Unions and Free Trade Areas, Waivers, Modification of GATT Schedules, and Non-application of the General Agreement.
- the Marrakesh Protocol to GATT 1994.

[217] *See* also http://wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm.

1. Tariff

A. *Overview*

A tariff is mainly provided for in the GATT. This Agreement shows a strong preference for tariffs over other instruments of protection. Tariffs may be levied on a per unit basis or on an '*ad valorem*' (according to value) basis. Tariff concessions that countries give or receive upon accession to the WTO or as a part of negotiations are recorded as 'bound' tariffs in their tariff schedules. Under Article II GATT, these schedules form an integral part of the GATT. The schedules are drawn up according to the 'positive list' approach, which means that no commitment exists for products not included in the schedule. For the included products, countries are not to impose a tariff on the WTO members higher than the commitment or 'binding' indicated in the schedule.[218]

B. *Definition*

Under the WTO, 'tariff' means duty levied at the border-gates on goods going from one customs territory to another (Article I of the GATT). It mainly means the import tariff. However, 'export tariffs' are also applied by some WTO members, but the main interest of the GATT/WTO has been historically on import tariffs. To make it clear, tariffs are not an 'internal tax', e.g. VAT (Article III(2) of the GATT), and tariffs are not a 'fee' or 'charge' for an import service (Article VIII of the GATT).

C. *Key Aspects of Tariffs*

1. A Tariff Is Binding

Tariff concessions that a WTO member gives are 'bound' and ceiling, not floor, tariffs. It means that such a member cannot apply a tariff rate higher than its binding commitment. With respect to binding effect of a tariff, developed countries increased the number of imports whose tariff rates are 'bound' (committed and difficult to increase) from 78 per cent of product lines to 99 per cent. For DCs, the increase was considerable: from 21 per cent to 73 per cent. Economies in transition from central planning increased their levels of binding from 73 per cent to 98 per cent

[218] *See* Arvind Panagariya, *Core WTO Agreements: Trade in Goods and Services and Intellectual Property*, at 9.

Together, this means a substantially higher degree of market security for traders and investors.[219]

2. A Tariff Is Subject to Reductions

In addition to being bound, a tariff is also subject to reductions. According to the WTO, developed countries' tariff reductions were for the most part being phased in over five years from 1 January 1995. The result will be a 40 per cent reduction in their tariffs on industrial products, from an average of 6.3 per cent to 3.8 per cent. The value of imported industrial products that receive duty-free treatment in developed countries will jump from 20 per cent to 44 per cent. There will also be fewer products charged at high rates of duty. The proportion of imports into developed countries from all sources facing tariffs rates of more than 15 per cent will decline from seven per cent to five per cent. The proportion of DCs' exports facing tariffs above 15 per cent in industrial countries will fall from nine per cent to five per cent.[220]

2. Agriculture[221]

A. *Overview*

The Agreement on Agriculture (hereinafter the 'AoA Agreement') came into force on 1 January 1995. The Preamble to the Agreement recognizes that the agreed long-term objective of the reform process initiated by the Uruguay Round reform programme is to establish a fair and market-oriented agricultural trading system. The reform programme comprises specific commitments to reduce support and protection in the areas of domestic support, export subsidies and market access, and through the establishment of strengthened and more operationally effective GATT rules and disciplines. The Agreement also takes into account non-trade concerns, including food security and the need to protect the environment, and provides S&D for DCs, including an improvement in the opportunities and terms of access for agricultural products of particular export interest to these members.[222]

[219] *See* The WTO Secretariat, *supra*, at 16.

[220] *See* The WTO Secretariat, *supra*, at 16.

[221] *See* The WTO Secretariat, *The WTO Agreements Series-Agriculture*, (2003).

[222] The Preamble of the Agreement on Agriculture.

B. *Coverage and Definitions*

Article 2 provides that the Agreement applies to the products listed in Annex 1 to the Agreement, hereinafter referred to as agricultural products. The Agreement defines in its Annex 1 agricultural products by reference to the harmonized system of product classification - the definition covers not only (i) basic agricultural products such as wheat, milk and live animals; but also (ii) the products derived from them such as bread, butter and meat; as well as (iii) all processed agricultural products such as chocolate and sausages. The coverage includes wines, spirits and tobacco products, fibres such as cotton, wool and silk, and raw animal skins destined for leather production. Fish and fish products are not included, nor are forestry products.[223]

C. *Key Aspects of the Agreement*

The Agreement establishes a number of generally applicable rules with regard to trade-related agricultural measures, primarily in the areas of MA, domestic support and export competition. These rules relate to country-specific commitments to improve MA and reduce trade-distorting subsidies contained in the individual country's schedules of the WTO members and constitute an integral part of the GATT. This subsection shall outline key features of provisions in the Agreement on area of MA, domestic support and export competition.

1. Market Access

(a) Tariff-only protection

On the MA side, the Uruguay Round resulted in a key systemic change: the switch from a situation where a myriad of NTBs impeded agricultural trade flows to a regime of bound tariff-only protection plus reduction commitments. The key aspects of this fundamental change have been to stimulate investment, production and trade in agriculture by

(i) Making agricultural MA conditions more transparent, predictable and competitive;

(ii) establishing or strengthening the link between national and international agricultural markets; and thus

(iii) relying more prominently on the market for guiding scarce resources into their most productive uses both within the agricultural sector and economy-wide.

[223] The WTO Secretariat, *supra*, at 4. *See* also Annex 1 to the AoA.

In many cases, tariffs were the only form of protection for agricultural products before the Uruguay Round - the Round led to the 'binding' in the WTO of a maximum level for these tariffs. For many other products, however, market access restrictions involved non-tariff barriers. This was frequently, although not only, the case for major temperate zone agricultural products. The Uruguay Round negotiations aimed to remove such barriers. For this purpose, a 'tariffication' package was agreed which, among other measures, provided for the replacement of agriculture-specific non-tariff measures with a tariff affording an equivalent level of protection. Following the entry into force of the Agreement, there is now a prohibition on agriculture-specific NTB, and the tariffs on virtually all agricultural products traded internationally are bound in the WTO.[224]

(b) Tariff reductions

The Agreement requires that developed country members have agreed to reduce, over a six-year period beginning in 1995, their tariffs by on average 36 per cent of all agricultural products, with a minimum reduction of 15 per cent for any product. For DCs, the reductions are 24 and 10 per cent, respectively, to be implemented over ten years. Those DC members which bound tariffs at ceiling levels did not, in many cases, undertake reduction commitments. LDC members were required to bind all agricultural tariffs, but not to undertake tariff reductions.[225]

(c) Prohibition of non-tariff border measures

Article 4.2 of the Agreement prohibits the use of agriculture-specific NTBs. Such measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing procedures, voluntary export restraint agreements and NTBs maintained through state-trading enterprises. All similar border measures other than 'normal customs duties' are also no longer permitted. However, Article 4.2 of the Agreement does not prevent the use of non-tariff import restrictions consistent with the provisions of the GATT or other WTO agreements applicable to traded goods generally.[226]

[224] The WTO Secretariat, *supra*, at 5-6.

[225] Ministry of Justice, *International Economic Integration - A Training Guidelines for Judicial Agencies*, (2008), at 97.

[226] Such measures include those maintained under balance-of-payments provisions (Articles XII and XVIII of the GATT), general safeguard provisions (Article XIX of the GATT and the related WTO agreements), general exceptions (Article XX of the GATT), the SPS Agreement, the TBT Agreement, or other general, non-agriculture-specific WTO provisions. *See* The WTO Secretariat, *supra*, at 7-8.

(d) Special safeguard provisions

As a third element of the tariffication package, members have the right to invoke for tariffed products the 'special safeguard' provisions of the Agreement (Article 5) (hereinafter the 'SSG'), provided that a reservation to this effect appears beside the products concerned in the relevant member's schedule. The right to make use of the SSG provisions has been reserved by 38 members, and for a limited number of products in each case. The SSG allow the imposition of an additional tariff where certain criteria are met. These involve either a specified surge in imports, or on a shipment-by-shipment basis, a fall in the import price below a specified reference price. In the case of the volume trigger, the higher duties apply only until the end of the year in question. In the case of the price trigger, any additional duty may be imposed only on the shipment concerned. The additional duties cannot be applied to imports taking place within tariff quotas.[227]

2. Domestic Support

The WTO classifies domestic support or subsidies into three categories:

- *Amber Box*: all domestic subsidies - such as market price support - considered to distort production and trade. Subsidies in this category are expressed in terms of a 'Total Aggregate Measurement of Support' ('Total AMS'), which includes all supports in one single figure. Amber Box subsidies are subject to WTO reduction commitments.
- *Blue Box*: subsidy payments directly linked to acreage or animal numbers, but under schemes that also limit production by imposing production quotas or requiring farmers to set aside part of their land. These are deemed by WTO rules to be 'partially decoupled' from production and are not subject to WTO reduction commitments. In the EU, they are commonly known as direct payments.
- *Green Box*: subsidies deemed not to distort trade, or at most cause minimal distortion, and are not subject to WTO reduction commitments. For the EU and the US, one of the most important allowable subsidies in this category is decoupled support paid directly to producers. Such support should not relate to current production levels or prices. It

[227] The WTO Secretariat, *supra*, at 8-9.

may also be given on condition that no production shall be required in order to receive such payments.[228]

3. Export Subsidies

Under the Agreement, the right to use export subsidies is limited to four situations:

(i) Export subsidies subject to product-specific reduction commitments within the limits specified in the schedule of the WTO member concerned;

(ii) any excess of budgetary outlays for export subsidies or subsidized export volume over the limits specified in the schedule as covered by the 'downstream flexibility' provision of Article 9.2(b) of the Agreement;

(iii) export subsidies consistent with the special and differential treatment provision for DC members (Article 9.4 of the Agreement); and

(iv) export subsidies other than those subject to reduction commitments provided that they are in conformity with the anti-circumvention disciplines of Article 10 of the Agreement on Agriculture. In all other cases, the use of export subsidies for agricultural products is prohibited (Articles 3.3, 8 and 10 of the Agreement).[229]

3. Standard and Safety

A. *Sanitary and Phytosanitary Measures*

1. Overview

Under the WTO, SPS measures are provided for in the GATT (in particular, the provisions of Article XX(b)) and the SPS Agreement). The SPS Agreement has 14 articles and three annexes giving definitions of various terms, and elaborating on certain obligations in the body of the SPS Agreement. This Agreement concerns the application of SPS measures, in other words, food safety and animal and plant health

[228] Actionaid, *The WTO Agreement on Agriculture,* at 5. For further information, http://www.actionaid.org

[229] The WTO Secretariat, *supra*, at 17.

regulations. The Agreement recognizes that governments have the right to take SPS measures, but that they should be applied only to the extent necessary to protect human, animal or plant life or health and should not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail.[230]

2. Coverage and Definitions

Pursuant to Annex A of the SPS Agreement, 'SPS measures' means any measure applied to

(i) Protect animal or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(ii) protect human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(iii) protect human life or health from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(iv) prevent or limit other damage from the entry, establishment or spread of pests.

3. Key Aspects of the Agreement

The SPS Agreement allows members to adopt and enforce measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between members where the same conditions prevail or a disguised restriction on international trade (the Preamble).

The SPS Agreement provides that the use and application of SPS measures should be pursuant to the following basic principles:[231]

(a) No-discrimination

The SPS Agreement ensures that there is no discrimination among

[230] *See* http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#gAgreement. For further information, *see* also The WTO Secretariat, *The WTO Agreements Series-The SPS Agreement: An Overview*, (2003).

[231] Ministry of Justice, *supra*, at 97.

members in the use of SPS measures. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail, including between their own territory and that of other members (Article 2.3).

(b) Harmonization

To harmonize SPS measures on as wide a basis as possible, members shall base their SPS measures on international standards, guidelines or recommendations, where they exist (Article 3.1). However, members may introduce or maintain SPS measures which result in a higher level of SPS protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of SPSprotection a member determines to be appropriate in accordance with the SPS Argreement (Article 3.3).

(c) Equivalence

Members shall accept SPS measures of other members as equivalent, even if these measures differ from their own or from those used by other members trading in the same product, if the exporting member objectively demonstrates to the importing member that its measures achieve the importing member's appropriate level of SPS protection (Article 4.1).

(d) Appropriate level of protection

According to the SPS Agreement, the 'appropriate level of protection' (hereinafter the 'ALOP') is the level of protection deemed appropriate by the WTO member to protect human, animal or plant life or health within its territory. Members shall ensure that any SPS measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence (Article 2.2).

Each WTO member has the right to determine its own ALOP. However, in determining their respective ALOP, WTO members should take into account the objective of minimizing negative trade effects. In addition, WTO members are required to apply the concept of ALOP consistently; i.e., they must 'avoid arbitrary or unjustifiable distinctions' that 'result in discrimination or a disguised restriction on international trade'.[232]

(e) Risk assessment

In the assessment of risks to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of SPS protection from such risk, members shall take into account available scientific evidence and relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment (Article 5.2). In addition, in such assessment, members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing member; and the relative cost-effectiveness of alternative approaches to limiting risks (Article 5.3).

However, the SPS Agreement also provides that in cases where relevant scientific evidence is insufficient, a member may provisionally adopt SPS measures on the basis of available pertinent information, including that from the relevant international organizations as well as from SPS measures applied by other members (Article 5.7).

(f) Transparency

The principle of transparency in the SPS Agreement requires WTO members to provide information on their SPS measures and to notify changes in their SPS measures. WTO members are also required to publish their SPS regulations. The notification requirements are met through a national notification authority. Each WTO member must nominate a national enquiry point to deal with SPS-related queries from other WTO members. A single agency may perform both notification and enquiry functions.[233] *For instance*, it provides that members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their SPS measures in accordance with the provisions of the SPS Agreement (Article 7).

[232] Australian Government, Department of Agriculture, Fisheries and Forestry, AusAID, *The WTO Sanitary and Phytosanitary (SPS) Agreement - Why Do You Need to Know?*, at 12.

[233] Australian Government, Department of Agriculture, Fisheries and Forestry, AusAID, *supra,* at 18.

In order to ensure compliance with above-mentioned principles, the SPS Agreement provides that when a member has reason to believe that a specific SPS measure introduced or maintained by another member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such SPS measure may be requested and shall be provided by the member maintaining the measure (Article 5.8).

B. *Technical Barriers to Trade*

1. Overview

Under the WTO, technical barriers to trade are provided for in the Agreement on Technical Barriers to Trade (hereinafter the 'TBT Agreement'). The adoption of the TBT Agreement under the framework of the WTO is (i) to recognize the necessity of technical barriers to trade; and, at the same time, (ii) to take control of such barriers in order to ensure that members shall use the barriers in appropriate and legitimate manner and such barriers shall not merely become a tool of protection.[234]

The TBT Agreement recognizes the important contribution that international standards and conformity assessment systems is able to make by improving efficiency of production and facilitating the conduct of international trade. However, the TBT Agreement wishes to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade. The TBT Agreement recognizes that any country has the right to take measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade (the Preamble).

[234] VCCI, *WTO Agreements and Principles: Technical Barriers to Trade*, Hanoi, News Publishing House, at 6.

2. Coverage and Definitions

The TBT Agreement distinguishes three kinds of technical barriers to trade, as follows:

- Technical regulation: document that lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory;
- standard: document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory;[235]
- conformity assessment procedures: any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.[236]

Technical regulations are addressed in the main body of the Agreement, and provisions are laid out to ensure that they do not act as unnecessary obstacles to trade. The provisions apply to technical regulations developed by central and local governments, as well as non-governmental bodies. WTO members are fully responsible for ensuring the observance of all of the provisions of the Agreement relating to technical regulations. However, standards are addressed separately under the 'Code of Good Practice', which forms one of the annexes to the Agreement (Annex 3). Most of the principles applied by the Agreement to technical regulations, apply to standards through the Code. The Code is open to acceptance by central, local and non-governmental standardizing bodies (at the national level), as well as to regional governmental or non-governmental ones.[237]

3. Key Aspects of the Agreement on Technical Barriers to Trade

The TBT Agreement sets out the principles with which a Member has to comply as follows:

[235] Both technical regulations and standard may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. The difference is that technical regulation is mandatory in term of compliance, while standard is not.

[236] Annex 1 to the TBT Agreement.

[237] Doaa Abdel Motaal, *Overview of the World Trade Organization Agreement on Technical Barriers to Trade*. Available at: http://*www.who.int/mta/Doc8.doc*.

(a) No-discrimination

Members shall ensure that in respect of technical regulations, products imported from the territory of any member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country (Article 2.1).

(b) No unnecessary obstacles to international trade

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, '*inter alia*': national security requirements; the prevention of deceptive practices, and the protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, 'inter alia': available scientific and technical information, related processing technology or intended end-uses of products (Article 2.2).

(c) Transparency

Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other members; or where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a member, such members shall publish a notice; notify other members; upon request, provide other members with copies of the proposed technical regulation; allow other members to present their comments in writing, etc. (Articles 2.9, 2.10, 5.6 and 5.7).

(d) Scientific justification

A member preparing, adopting or applying a technical regulation shall base on scientific justification, well-established practices. Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives may be addressed in a less trade-restrictive manner (Article 2.3).

(e) Harmonization

Where technical regulations are required and relevant international standards exist or their completion is imminent, members shall use them, or the relevant parts of them, as a basis for their technical regulations except in some exceptional cases. With a view to harmonizing technical regulations on as wide a basis as possible, members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations (Articles 2.4 and 2.6).

(f) Equivalence

Members shall give positive consideration to accepting as equivalent technical regulations of other members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations (Article 2.7).

(g) Recognition

Members are encouraged, at the request of other members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures (Article 6.3).

4. Textiles

Since 1995, the WTO's Agreement on Textiles and Clothing (hereinafter the 'ATC') has taken over from the Multifibre Arrangement (hereinafter the 'MFA'). By 2005, the sector was to be fully integrated into normal GATT rules. In particular, the quotas would come to an end, and importing countries would no longer be able to discriminate between exporters. The ATC would itself no longer exist: it is the only WTO Agreement that has self-destruction built in.[238] In brief, from 2005, textiles have been governed by the GATT and relevant agreements just as have any other product.

[238] The WTO Secretariat, *supra*, at 20.

5. Anti-Dumping, Subsidy and Countervailing Measures, and Safeguard

Binding tariffs, and applying them equally to all trading partners (under the MFN principle), are key to the smooth flow of trade in goods. The WTO agreements uphold the principles, while they also allow exceptions in three circumstances as follows: (A) actions taken against dumping (selling at an unfairly low price); (B) subsidies and special 'countervailing' duties to offset the subsidies; and (C) emergency measures to limit imports temporarily, designed to 'safeguard' domestic industries.[239] This subsection will address each topic separately.

A. *Anti-Dumping Measures*

1. Overview

AD measures are provided for in Article VI of the GATT and ADA.

2. Coverage and Definitions

Under, Article 2.1 of the ADA,

> A product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Therefore, dumping occurs when a product is sold for export to another country at less than its 'normal value'('NV'). Under the ADA, NV is:

- The price in the home market when the good is sold at a price above the cost of production;
- the price charged for the good when sold at a price above cost in third-country markets;
- 'constructed normal value' calculated as the total cost of producing the product plus a reasonable amount for selling, general and administrative expenses and profit.[240]

[239] The WTO Secretariat, *supra*, at 29.

[240] *See* Article 2.2 of the ADA.

3. Key Aspects of the ADA

The problem causing concern here is that the injury from imports sold at 'unfairly' low prices (dumping) must need a remedy - AD measure. The remedy is normally the imposition of duty or the negotiation of a price aimed to offset the margin of dumping. Duty remains in place as long as dumping margins persist.

(a) Preconditions for AD action

Under the ADA, the authorities of importing country, after conducting a tightly circumscribed investigation follows a complaint from an allegedly impacted industry, have determined the existence of all three following conditions:

- *Firstly*, imports are dumped (with a margin not below two per cent);
- *secondly*, there is material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry; and
- *thirdly*, there is a causal link between the dumped imports and injury to a domestic industry.

(b) Determination of injury

A determination of injury shall be based on positive evidence and involve an objective examination of both (i) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and (ii) the consequent impact of these imports on domestic producers of such products (Article 3.1). With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. Not one or several of these factors may necessarily give decisive guidance (Article 3.2).

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments (Article 3.4). It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of the ADA. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities (Article 3.5).

(c) Right to initial an AD action

An investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry (Article 5.1). An application shall include evidence of (i) dumping; (ii) injury; and (iii) a causal link between the dumped imports and the alleged injury (Article 5.2).

The application shall be considered to have been made 'by or on behalf of the domestic industry' if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry (Article 5.4).

In almost cases, an anti-dumping action is initialled by the domestic industry. However, if, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link to justify the initiation of an investigation (Article 5.6).

(d) Conducting an AD case and related matters

Normally, after the domestic industry submits a written application for AD action with initial evidence, the authorities concerned decide to initiate an investigation or decide to refuse to do so. The ADA provides in detail procedures for conducting an AD case; how to conduct such investigation and conditions to be fulfilled to ensure that all interested parties have full chance to give their evidence; application of provisional measures (Article 7); voluntary price undertakings from any exporter to revise its prices or to cease exports at dumped prices to the area in question so that the authorities are satisfied that the injurious effect of the dumping is eliminated (Article 8); the imposition and collection of AD duties (Article 9), and the duration and review of AD duties and price undertakings (Article 11), among other measures.

B. *Subsidies and Countervailing Measures*

1. Overview

Subsidies and countervailing measures are provided for in the SCM. This Agreement fulfills two functions: (i) it disciplines the use of subsidies; and (ii) it regulates the actions that member may take to counter the effects of subsidies. It says a member may use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Otherwise, the member may launch its own investigation and ultimately charge extra duty (known as 'countervailing duty') on subsidized imports that are found to be hurting domestic producers.[241]

In the WTO, subsidy is allowed; it is not prohibited outright, although has certain limitations and conditions. The WTO has two sets of agreement on subsidy depending on types of products in question, namely: (i) the SCM with respect to both industrial and agricultural products; and (ii) the AoA with respect to agricultural products.[242]

2. Coverage and Definitions

Pursuant to Article 1.1 of the SCM, a 'subsidy' shall be deemed to exist if there is *a financial contribution* by *a government or any public body* within the territory of a member, in one of the following manners which thereby confers *a benefit*, notably the following:

(i) A government practice involves a direct transfer of funds (e.g., grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g., loan guarantees);

[241] The WTO Secretariat, *supra*, at 30.

[242] *See* AoA.

(ii) government revenue that is otherwise due is foregone or not collected (e.g., fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments.

3. Key Aspects of the SCM

Since 2000, the SCM regulates two categories of subsidies: prohibited, and actionable. It applies to agricultural as well as industrial products, except when the subsidies conform to the AoA.[243]

(a) Prohibited subsidies

It means subsidies that require recipients to meet certain export targets, or to use domestic goods instead of imported goods. They are prohibited because they are specifically designed to distort international trade, and are therefore likely to hurt other members' trade.

(b) Actionable subsidies

In this category, the complaining member has to show that the subsidy has an adverse effect on its interests. Otherwise, the subsidy is permitted. The SCM defines three types of damage subsidies may cause. *Firstly*, one member's subsidies may hurt a domestic industry in an importing country; *secondly*, they may hurt rival exporters from another member when the two compete in third markets; and *thirdly*, domestic subsidies in one member may hurt exporters trying to compete in the subsidizing member's domestic market.

Under the SCM, countervailing duty may be charged only after the importing country has conducted a detailed investigation, similar to that required for anti-dumping action. There are detailed rules for deciding whether a product is being subsidized (not always an easy calculation), criteria for determining whether imports of subsidized products are hurting ('causing injury to') domestic industry, procedures for initiating and conducting investigations, and rules on the implementation and duration (normally five years) of countervailing measures.[244]

[243] *See* The WTO Secretariat, *supra*, at 31-32.

C. *Safeguards*

1. Overview

Safeguards are provided for in the Agreement on Safeguard (hereinafter the 'SA') dealing with emergency protection from imports. A WTO member may restrict imports of a product temporarily (take 'safeguard' actions) if its domestic industry is injured or threatened with injury caused by a surge in these imports. Here, the injury has to be serious. Safeguard measures were always available under GATT 1947 (Article XIX).[245] The SA is to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and to eliminate measures that escape such control (the Preamble).

2. Key Aspects of the SA[246]

The SA breaks major ground in establishing a prohibition against so-called 'grey area' measures, and in setting a 'sunset clause' on all safeguard actions. The SA stipulates that a member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.

The SA sets out requirements for safeguard investigation which include public notice for hearings and other appropriate means for interested parties to present evidence, including on whether a measure would be in the public interest. In the event of critical circumstances, a provisional safeguard measure may be imposed based upon a preliminary determination of serious injury.

The SA sets out the criteria for 'serious injury' and the factors that must be considered in determining the impact of imports. The safeguard measure should be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

The SA lays down time limits for all safeguard measures. Generally, the duration of a measure should not exceed four years, although

[244] The WTO Secretariat, *supra*, at 30.

[245] *Ibid*.

[246] *See* http://wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm.

this could be extended up to a maximum of eight years, subject to the confirmation of continued necessity by the competent national authorities and if there is evidence that the industry is adjusting. Any measure imposed for a period greater than one year should be progressively liberalized during its lifetime.

6. Non-Tariff Barriers ('NTBs')

A. *Import Licensing*

1. Overview

The WTO Agreement on Import Licensing Procedures (hereinafter the 'ILP') sets out rules for all members on the use of import licensing systems to regulate their trade. The provisions of the ILP include guidelines for what constitutes a fair and non-discriminatory application of such procedures with the goal of protecting members from unreasonable requirements or delays associated with a licensing regime.

The ILP emphasizes that import licensing, particularly non-automatic import licensing, should be implemented in a transparent and predictable manner; non-automatic licensing procedures should be no more administratively burdensome than absolutely necessary to administer the relevant measure; and it desires to simplify, and bring transparency to, the administrative procedures and practices used in international trade, and to ensure the fair and equitable application and administration of such procedures and practices (the Preamble).

2. Coverage and Definitions

Import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing member (Article 1.1). In addition to import licensing itself, the Agreement also covers procedures associated with a range of practices meeting that definition, including import approvals, import permissions or permits, and activity licenses required for importation.

3. Key Aspects of the ILP

The ILP covers both 'automatic' licensing systems, intended only to monitor imports and not to regulate them, and 'non-automatic' licensing systems, under which certain conditions must be met before a licence is issued. Governments often use non-automatic licensing to administer import restrictions such as quotas and tariff-rate quotas ('TRQs'), or to administer safety or other requirements (*e.g.,* for hazardous goods, armaments, or antiquities). Requirements for permission to import that act as import licenses, such as certification of standards and sanitary and technical regulations, are also subject to the rules of the ILP.[247]

B. *Customs Valuation*

1. Overview

The Agreement on Implementation of Article VII (or the Agreement on Customs Valuation, hereinafter the 'CVA') recognizes the need for a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values; the basis for the valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued; and customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply (the Preamble). Therefore, the CVA sets out six customs valuation methods, in which the transaction value method is the first and the most important priority.

2. Coverage and Definitions

Under the CVA, customs valuation means a customs procedure applied to determine the customs value of imported goods. If the rate of duty is 'ad valorem', the customs value is essential to determine the duty to be paid on an imported item of goods. Therefore, it is very important for both customs authorities and exporters.

3. Key Aspects of the CVA

Article VII(2)(a) of the GATT provides that the value for customs purposes of imported merchandise should be based on the actual value of the

[247] United States Trade Representative (USTR), http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/import-licensing

imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.

The CVA provides for six customs valuation methods: (i) transaction value (the first and most important method); (ii) transaction value of identical goods; (iii) transaction value of similar goods; (iv) deductive value; (v) computed value; and (vi) fall-back method, which is to be in sequential order of application.

Generally, the customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the country of importation if the following conditions are fulfilled (Article 1.1):

(a) That there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:

  (i) Are imposed or required by law or by the public authorities in the country of importation;

  (ii) limit the geographical area in which the goods may be resold; or

  (iii) do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8; and

(d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of Paragraph 2.

However, customs administrations have the right to 'satisfy themselves as to the truth or accuracy of any statement, document or declaration' (Article 17). Therefore, if they have doubts concerning the declared transaction value, customs administrations may ask the importer to provide further clarification that the declared value represents the total amount actually paid or payable for the imported goods. If reasonable doubt still exists, customs may decide that the value cannot be determined according to the transaction value method. Customs must communicate, before a final decision, its reasoning to the importer, who in turn must be given reasonable time to respond. Reasoning of the final decision must be communicated to the importer in writing.

If the customs value of the imported goods cannot be determined under the transaction value method, the customs value shall be the transaction value of identical goods sold for export to the same country of importation and exported at or about the same time as the goods being valued. The transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value (Article 2).

If the customs value of the imported goods cannot be determined under either method, i.e., of transaction value or transaction value of identical goods, the customs value shall be the transaction value of similar goods sold for export to the same country of importation and exported at or about the same time as the goods being valued. The transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value (Article 3).

If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to certain deductions provided for in Article 5.

If customs value is still undefined, the customs value of imported goods shall be based on a computed value. The computed value shall consist of the sum of

(a) The cost or value of materials and fabrication or other processing employed in producing the imported goods;

(b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation; and

(c) the cost or value of all other expenses necessary (Article 6).

If the customs value of the imported goods cannot be determined under any of the methods above, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT and on the basis of the data available in the country of importation. However, no customs value shall be determined on the basis of:

(a) The selling price in the country of importation of goods produced in such country;

(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

(c) the price of goods on the domestic market of the country of exportation;

(d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;

(e) the price of the goods for export to a country other than the country of importation;

(f) minimum customs values; or

(g) arbitrary or fictitious values.

C. *Preshipment Inspection*[248]

1. Overview

The Agreement on Preshipment Inspection (hereinafter the 'PSI') recognizes the need of DCs to do so for as long and in so far as it is necessary to verify the quality, quantity or price of imported goods; is mindful that such programmes must be carried out without giving rise to unnecessary delays or unequal treatment. Therefore, the PSI establishes an agreed international framework of rights and obligations of both user members and exporter members; to make it desirable to provide transparency of the operation of preshipment inspection entities and of laws and regulations relating to preshipment inspection (the Preamble).

[248] *See* WTO, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#gAgreement

2. Coverage and Definitions

The PSI shall apply to all preshipment inspection activities carried out on the territory of members, whether such activities are contracted or mandated by the government, or any government body, of a member (Article 1.1).

Preshipment inspection activities are all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be exported to the territory of the user member (Article 1.3).

3. Key Aspects of the PSI[249]

Used by governments of DCs, the purpose of the PSI is to safeguard national financial interests (prevention of capital flight and commercial fraud as well as customs duty evasion, *for instance*) and to compensate for inadequacies in administrative infrastructures.

The Agreement recognizes that GATT principles and obligations apply to the activities of preshipment inspection agencies mandated by governments. The obligations placed on PSI-user governments include non-discrimination, transparency, protection of confidential business information, avoidance of unreasonable delay, the use of specific guidelines for conducting price verification, and the avoidance of conflicts of interest by the PSI agencies.

The obligations of exporting contracting parties towards PSI users include non-discrimination in the application of domestic laws and regulations; prompt publication of such laws and regulations and the provision of technical assistance where requested. The PSI establishes an independent review procedure - administered jointly by an organization representing PSI agencies and an organization representing exporters - to resolve disputes between an exporter and a PSI agency.

D. *Rules of Origin*

1. Overview

The Agreement on Rules of Origin (hereinafter the 'RoO Agreement') aims at long-term harmonization of rules of origin, other than rules of origin relating to the granting of tariff preferences, and to ensure that

[249] *See* WTO, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#gAgreement.

such rules do not themselves create unnecessary obstacles to trade; also, to ensure that RoO are prepared and applied in an impartial, transparent, predictable, consistent and neutral manner (the Preamble).

2. Coverage and Definitions

Rules of Origin (hereinafter the 'RoO') shall be defined as those laws, regulations and administrative determinations of general application applied by any member to determine the country of origin of goods, provided such RoOare not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of Paragraph 1 of Article I of the GATT (Article 1.1).

3. Key Aspects of the RoO Agreement

The RoO Agreement sets up a work programme on harmonization, to be initiated as soon as possible after the completion of the Uruguay Round and to be completed within three years of initiation (Article 9.2). It would be based upon a set of principles, including making rules of origin objective, understandable and predictable (Part IV of the RoO Agreement).

The RoO Agreement sets out disciplines to govern the application of RoO, divided into two periods as follows:

- According to Article 2, disciplines during the transition period are following: Until the work programme for the harmonization of RoO set out in Part IV is completed, members shall ensure that:

(a) When they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined;

(b) their RoO are not used as instruments to pursue trade objectives directly or indirectly;

(c) RoO shall not themselves create restrictive, distorting, or disruptive effects on international trade;

(d) the RoO that they apply to imports and exports are not more stringent than the RoO they apply to determine whether or not a good is domestic and shall not discriminate between other members, irrespective of the affiliation of the manufacturers of the good concerned;

(e) their RoO are administered in a consistent, uniform, impartial and reasonable manner;

(f) their RoO are based on a positive standard. RoO that state what does not confer origin (negative standard) are permissible as part of a clarification of a positive standard or in individual cases where a positive determination of origin is not necessary;

(g) their laws, regulations, judicial decisions and administrative rulings of general application relating to RoO are published;

(h) when introducing changes to their RoO or new RoO, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;

(i) any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination; and

(j) all information that is by nature confidential or that is provided on a confidential basis for the purpose of the application of RoO is treated as strictly confidential by the authorities concerned.

- According to Article 3, disciplines after the transition period are following: Taking into account the aim of all members to achieve, as a result of the harmonization work programme set out in Part IV, the establishment of harmonized RoO, members shall ensure, upon the implementation of the results of the harmonization work programme, notably that:

(a) They apply RoO equally for all purposes as set out in Article 1;

(b) under their RoO, the member to be determined as the origin of a particular item of goods is either the country where the goods have been wholly obtained or, when more than one country is concerned in the production of the goods, the country where the last substantial transformation has been carried out; and

(c) other similar disciplines as during the transition period.

In addition, the RoO Agreement also sets out the procedural arrangements on notification, review, consultation and dispute settlement in Part III.

7. Agreement on Trade-Related Investment Measures

Agreement on Trade-Related Investment Measures (hereinafter the 'TRIMs Agreement') recognizes that certain investment measures restrict and distort trade. It provides that no member shall apply any TRIM inconsistent with Articles III (NT) and XI (prohibition of quantitative restrictions) of the GATT (Article 2.1 of the TRIMs Agreement). To this end, an illustrative list of TRIMs agreed to be inconsistent with these Articles is appended to the Agreement as follows:

- TRIMs that are inconsistent with the obligation of national treatment provided for in Paragraph 4 of Article III of the GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

(a) The purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

- TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in Paragraph 1 of Article XI of the GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

(a) The importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

The TRIMs Agreement requires mandatory notification of all non-conforming TRIMs and their elimination within two years for developed countries, within five years for DCs, and within seven years for LDCs (Article 5). It establishes a Committee on TRIMs that will, among other functions, monitor the implementation of these commitments. The Agreement also provides for consideration, at a later date, of whether it should be complemented with provisions on investment and competition policy more broadly (Article 9).[250]

Section Four. TRADE IN SERVICES AND THE GATS

1. Background

The General Agreement on Trade in Services ('GATS') is the instrument that disciplines and regulates trade in services among WTO members. Unlike other trade issues, trade in services did not figure prominently in the context of trade negotiations until the 1980s, when economists and policy-makers begun to confront the need to regulate what was becoming an increasingly important area of economic activity. Indeed, service industries account nowadays for as much as 70 per cent to 80 per cent of the GDP in developed economies and around 40 per cent of the GDP in developing economies.[251] The importance of services is not limited to its GDP ratio: service industries play an important role within the economy. Unlike any other sector, services are considered the real engine of economic growth, as they perform various important functions in the economy. First of all, services provide inputs for all the other sectors of an economy. *For instance*, without financial services, telecommunications, transport or energy it would be impossible to maintain a sound and efficient industrial system. In this sense, an

[250] WTO, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#g1Agreement

[251] The World Bank – IBRD-IDA, *Services, etc., Value Added (% of GDP)*, http://data.worldbank.org/indicator/NV.SRV.TETC.ZS.

inefficient service sector is equivalent to a high domestic tax, as it would increase the final cost of products. Services perform also important public functions. For instance, education, health care, and energy provide essential public functions. Economic evidence demonstrates that, wherever the comparative advantage of a country might lie, a proper and functioning services sector would be likely to boost economic growth.

The services sector has some characteristics that render it particularly difficult to regulate and to liberalize it. First of all, the strategic function of most service industries often renders services subject to government monopoly. Until a few decades ago, even in developed countries important services industries such as telecommunications, energy or transport were government-owned. Other services, such as health care or education, still to a large extent fall under government control. While the role of the state in service industries could ensure the availability of services at a cheap price, it might nonetheless probably have an adverse effect on the quality of the services, with direct repercussions on all other sectors of the economy. Another characteristic of services is their dependence on the factors of production such as labour, capital and technology. Consequently, the liberalization of service industries needs to rely on the liberalization of these factors of production, which in some cases, such as labour mobility, is from a political perspective difficult to achieve. From an economic perspective, services are subject to market imperfections that require government intervention. This renders services highly regulated sectors in all economies. From a political economy perspective, the regulatory intensity of service industries renders the achievement of liberalization particularly complex, as it requires the dismantling of cross-border regulatory barriers. A major difference between trade in services from trade in goods relies indeed on the form of protection of service industries. While barriers to trade in goods consist in tax or quotas, easy to measure and identify, trade in services is subject to invisible barriers. These take the form of laws, regulations, or monopolies, all difficult to identify and to dismantle. Furthermore, unlike other industries, the liberalization of services requires the presence of a good regulatory framework that would prevent adverse outcomes, as in the case of the premature liberalization of financial services. For this reason, the liberalization of services is usually not dependent upon reciprocal bargaining, as is the case of trade in goods. Rather, experience demonstrates that this is typically achieved as a result of domestic pressure to improve efficiency.

2. The GATS and Its Structure

The GATS is one of the most important results of the Uruguay Round. When negotiators began discussing how to regulate and discipline this difficult subject, it immediately became clear that services could not be considered similarly to any other trade issue. The intrinsic difficulty of structuring a regulatory platform for services and the regulatory specificities of some service sectors posed a challenge negotiators and policymakers for more than a decade. In 1994, the GATS finally came into force as a separate Annex to the Marakesh Agreement Establishing the WTO, and is part of the 'Single Undertaking'. This means that WTO members, when joining the WTO, must obligatorily adhere to the GATS.

The regulatory structure governing trade in services in the GATS may roughly be divided into three main bodies. The GATS, which comprises 28 articles, sets out the main disciplines on trade in services. Attached to the GATS, eight annexes clarify or set out specific provisions. The third part is comprised of the Schedule of Specific Commitments of the members.

The GATS is a complex regulatory instrument providing a comprehensive discipline governing transactions in services. The Agreement is structured in six parts. The Part I (Article I) defines the scope of the Agreement and provides a general definition of the modes of supply of services. The Part II (Articles II-XV), which contains the so-called 'general obligations and disciplines', comprises fourteen provisions applicable to all service sectors. In contrast, the Part III (Articles XVI-XVIII), the 'specific commitments' contain three article that apply only to the specific services and modes of supply scheduled by each member. While the provisions of the second part are applicable to any service sector, irrespective of whether a member has scheduled a commitment in this sector, the situation regarding obligations in the third part is quite different: they are applicable only if a member has voluntarily agreed to be bound by the obligations. Part IV (Articles XIX-XXI) and Part V (Articles XXII-XXVI) contain provisions dealing with modalities of negotiations and with 'Institutional Provisions', respectively. Finally, Part VI, 'Final Provisions', deals with the denial of benefits, definitions, and annexes.

The GATS is complemented by eight annexes, divided into three main groups according to their legal status. All annexes form an integral part of the GATS. The *first* group consists of Annex 1 containing the rules governing the conditions under which members may schedule

exemptions to Article II (MFN). The *second* group of annexes comprises sectoral annexes; these regulate on and clarify definitions of specific service sectors. In this group are the annexes on the Movement of Natural Persons, on Financial Services, on Air Transport, and on Telecommunications Services. The *third* group consists of the Annex 2 on Financial Services, Annex on Basic Telecommunication Services, and Annex on Maritime Transport. Unlike the other annexes, these three instruments provide only guidelines and modalities for negotiations and do not contain any substantive regulatory provisions.

Similar to the GATT and also in the GATS, members are obliged to schedule their commitments, which form an integral part of the Agreement. The schedule of commitments is divided on the one hand between horizontal commitments, which apply to all services sectors, and on the other hand, specific commitments, which apply only to the services and modes of supply specifically indicated by each member. The schedule of specific commitments is designed in such a way as to allow members to specify for each service sector and in each mode of supply whether it would be bound by the obligation of Market Access (Article XVI), National Treatment (Article XVII), or by any other additional commitment or reservation (Article XVIII). The particular approach adopted by the GATS allows members to retain a certain flexibility in their commitments, in order to preserve the policy space in liberalizing services industries.

Table 2.4.1. Example of the Viet Nam Commitments on Travel Services

Mode of Service Supply: (1) Cross Border Supply; (2) Consumption Abroad; (3) Commercial Presence; and (4) Movement of Natural Persons

Sectors and Sub-sectors	Limitation on Market Access	Limitation on National Treatment	Additional Commitment
Travel agencies and tour operator services (CPC 7471)	1) None. 2) None. 3) None, except that: foreign service suppliers are permitted to provide services in the form of joint ventures with Vietnamese partners with no limitation on foreign capital contribution. 4)Unbound, except as indicated in the horizontal section.	1) None. 2) None. 3) None, except: tourist guides in foreign-invested enterprises shall be Vietnamese citizens. Foreign service supplying enterprises can only do inbound services and domestic travel for inbound tourists as an integral part of inbound services. 4) Unbound, except as indicated in the horizontal section	

How to Read a Schedule

Where there are no limitations on MA or NT in a given sector and mode of supply, the entry reads 'None'. However, it should be noted that when the term 'None' is used in the second or sector-specific part of the schedule it means that there no limitations specific to this sector: it must be borne in mind that, as noted above, there may be relevant horizontal limitations in the first part of the schedule.

All commitments in a schedule are bound unless otherwise specified. In such a case, where a member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with MA or NT, the member has entered into the appropriate space the term 'Unbound'.

3. Services and Modes of Supply

One of the biggest challenges faced by negotiators when drafting the articles of the GATS was to define what 'services' actually entailed. Surprisingly enough, the GATS offers no definition of 'services'. Article I sets out the scope of the GATS, which 'applies to measures by members affecting trade in services'.[252] The article clarifies that those services subject to the discipline of the GATS are only those offered on a competitive basis. Indeed, Paragraph 3 clarifies that the GATS excludes from its coverage those service that are 'supplied in the exercise of governmental authority.'[253] This provision therefore carves out from the scope of the agreement all of those public services offered by governments in the exercise of public function, and 'supplied neither on a commercial basis, nor in competition with one or more service suppliers,[254] such as health care, education, telecommunications or energy.

The Agreement offers no definition of services; on the contrary, it describes services according to their modes of supply. The modes of supply are one of the backbones of the GATS, and a similar service could be scheduled and treated differently according to the manner in which it is supplied. The GATS distinguishes four modes of supply. They differ according to the legal status of the services supplier (either a legal or a natural person), and based on the movement of the consumer or of the service supplier.

A. *Cross Border Supply*

It refers the services supplied *from the territory of one member into the territory of any other member*. This mode of supply covers the supply of a service that requires no physical movement by the consumer or by the supplier. The service is supplied on a cross-border basis. One example could be the service provided by an architect or a lawyer located in country A, which upon the request of a consumer located in country B, provides a legal memorandum or a project plan to the client, without leaving the office. Another example could be the service provided by a call centre located in country A, which provides assistance via the telephone to consumers located in other countries. In both examples, neither the consumer nor the service supplier moves, while the service is supplied on a cross-border basis.

B. *Consumption Abroad*

It refers to the services supplied *in the territory of one member to the service consumer of any other member*. This mode of supply is typical of certain services industries, such as tourism or, in some countries, health care. In this mode of supply the service supplier remains in his/her own country and provides a service to a consumer, who moves from his/her own country to receive the service. Therefore, in consumption abroad it is the consumer who moves to receive a service. *For example*, a tourist moves from his/her own country to go a resort or a hotel located in another country.

C. *Commercial Presence*

It concerns the mode of supply in which a service is supplied *by a service supplier of one member, through* (the establishment of a) *commercial presence in the territory of any other member*. This mode of supply covers investment; it constitutes the majority of trade in services. In this mode of supply the service is supplied by a company that moves to another country to provide a service through establishing a commercial presence in the second country. *For example*, a bank or a telecoms company moves from country A to country B, where it sets up a subsidiary or a branch. In this case, the consumer does not move, while only the service supplier moves.

D. *Temporary Movement of Natural Persons*

It is the mode of supply whereby a service is supplied *by a service supplier of one member, through the presence of natural persons of a member in the territory of any other member*. In this mode of supply the service supplier is not a company, but a natural person. As in the previous case, the consumer remains in his/her territory, while the service supplier moves to the consumer in order to provide a service. One example could be a doctor or a nurse who moves to another country in order to provide a specialized medical service.

[252] Article I(1) of the GATS.

[253] Article I(3)(b) of the GATS.

[254] Article I(3)(c) of the GATS.

4. Main Discipline

The main discipline on trade in services is contained in 14 articles: Articles II to XV of the GATS. These provisions contain the main obligation of the GATS and, dissimilarly to the provisions on market access and national treatment, they are applied to all service sectors, irrespective of whether they have been agreed by all members of the WTO.

A. *The Most Favoured Nation ('MFN') (Article II)*

Similar to the GATT, the first provision of the GATS is MFN. This provision, which resembles that of Article I of the GATT, essentially provides an obligation of the member to accord identical treatment to like service supplier of any other member. The main body of the provision reads as follows:

> … [W]ith respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country.[255]

As noted by the Appellate Body in *EC-Bananas*,[256] the MFN treatment obliges members to accord the same '*de jure*' or '*de facto*' treatment to similar service suppliers, irrespective of whether they have entered into mutual concessions with the member. As in the GATT, the MFN is a prohibition against discriminating that is based on the nationality of the service supplier. According to this provision, a member would not be allowed, for instance, to grant a permission to set up an office only to firms originating from one country, or to refuse the access of foreign workers coming from a specific country.

Dissimilarly to under the GATT, in the GATS, members are allowed to schedule reservations on their ability to discriminate among members. This possibility is specifically regulated by the Annex on Article II Exemptions. The possibility to discriminate is unilateral, in the sense that members do not need to justify or seek approval by any committee. Nonetheless, the reservation cannot be extended to a whole sector; it must be specific to a particular measure. Furthermore, the Annex on Article II Exemptions specifies that the restriction must be temporary and it must be lodged at the moment of the accession.

[255] Article II(1) of the GATS.

[256] WTO Appellate Body Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas)*, WT/DS27/AB/R, 9 September 1997, para. 220.

B. *Transparency (Article III)*

Article III of the GATS imposes an obligation on the members to publish 'all general measures of general application, which pertain to or affect the application of the GATS'. Except in the case of emergency situations, members are required to publish all laws, regulations, guidelines or even international agreements that affect the operation of the GATS. At the moment of the accession, members are required to publish all laws and regulations that pertain to trade in services, and to answer questions from other members. In order to ease the dialogue on service regulations, members are requested to set up within two years from the accession a *GATS Enquiry Point* from where would be published and disseminated all information. Furthermore, members commit to informing annually the GATS Council of any changes in law and regulations pertaining to services. Given the strategic importance of some service sectors for national security, members may avoid publishing information (i) which impedes law enforcement; (ii) is contrary to public interest; or (iii) prejudices the legitimate interest of particular public or private enterprises.

The obligation of transparency is of the utmost importance in the process of the liberalization of services. Unlike trade in goods, the major barrier to services consists in regulation, found at any level of the legislation. A change in legislation could therefore severely undermine trade concessions in MA or NT. For this reason, members need always to be informed about the regulatory process in other members' jurisdictions in order to prevent a domestic measure that would undermine their concessions.

C. *Domestic Regulations (Article VI)*

Service industries are in general heavily regulated. This is particularly true for certain service sectors such as energy, telecoms or financial services, where regulation is used to correct 'market failures'. As was said earlier, regulations are a fundamental tool in economic policymaking; at times, though, they pose serious barriers to foreign operators. These

barriers are usually dealt with through the obligation of MA (Article XVI) or NT (Article XVII). Nonetheless, in some cases, services regulations could be so burdensome that they could present a barrier to trade even without being discriminatory. Article VI of the GATS ensures that domestic regulation does not constitute unnecessary barriers to trade. In doing so, this provision sets out a few important principles:

Paragraph 1 imposes on the members an obligation to administer measures affecting trade in services in a reasonable, objective and impartial manner. Unlike the obligation of NT or MA, which concerns the substance of the specific regulation, Article VI deals with the application and implementation of the regulations.

For instance, in Paragraph 2, it is mandated on the members to establish tribunal or procedures for the objective and impartial review of administrative decisions that affect services, in order to avoid arbitrary decision-making that could undermine trade in services.

Paragraph 3 recognizes that authorization procedures could be used in order to delay market access concessions. For this reason, it provides that all authorization should be given in a reasonable amount of time and obliges members to furnish any information regarding the status of the application.

Paragraph 4 is specifically dedicated to three types of regulation (licensing requirement, qualification requirements and procedures, and technical standards) that, for their widespread use and importance in regulating services, could be particularly relevant as potential barriers to services. This provision reads as follows:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, 'inter alia':
>
> (a) Based on objective and transparent criteria, such as competence and the ability to supply the service;
>
> (b) not more burdensome than necessary to ensure the quality of the service;
>
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Paragraph 5, on the other hand, applies only to the sectors where commitments have been undertaken. It obliges members not to apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner contrary to the criteria set out in Paragraph 4, and in a manner that could not reasonably have been expected of that member at the time the specific commitments in those sectors were made. In order to assess whether these criteria have been met, Paragraph 5 allows members to base their determination by taking into account relevant standards applied by the international organization to which both members are party.

D. *Recognition (Article VII)*

In those service sectors that rely on the movement of natural persons in the supply of the services, such as professional services, medical services or engineering services, it is of fundamental importance that the service supplier is recognized as a legitimate professional. This recognition is usually the result of a degree or of an examination usually granted in the country of origin. Most of the time, countries do not adopt the same standards for access to a profession. For this reason, the lack of recognition of a foreign degree, experience, or a certain qualification could become a serious obstacle to trade in services. Article VII deals with this issue and it provides guidelines to the Members as to how to structure and implement recognition agreements.

In order to overcome the asymmetry of recognition, countries are encouraged to harmonize legislations or to enter into bilateral agreement.[257] In order to prevent that such agreement results in discrimination for those members omitted from the agreement or whose regulations are not harmonized, Article VII obliges members not to accord recognition 'in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services'.[258]

In the case where members follow the criteria spelled out in this provision, the recognition is considered to be in compliance with the requirement of Article II (MFN), to which Article VII is an exception.

[257] Article VII(1) of the GATS.

[258] Article VII(3) of the GATS.

5. Specific Commitments

A. *Market Access ('MA') (Article XVI)*

The provision of MA, together with the principle of NT of Article XVII, is the cornerstone of the GATS. By virtue of Article XVI members' service suppliers are accorded the right to entry into the domestic market, based on the commitments negotiated by the member in its Schedule. Indeed, the rules and discipline provided by Article XVI are applied only to the extent that a member has inscribed specific commitments in the Market Access column.

In a sector for which it has made a MA commitment, a member is obliged to accord services and service suppliers of any other member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[259]

The obligation to grant MA, not only is not compulsory on the members, however it may be tailored to the specific modes of supply for any given service. This means that a member wishing to open its market to banking services may opt for market liberalization limited only to Mode 1 (cross-border services), or only Mode 3 (commercial presence), leaving the other modes of supply closed to foreign competition. To the extent that a sector has been liberalized, members are prevented from adopting any measures that would undermine their MA concessions. Dissimilarly to trade in goods, MA restrictions are not easy to identify and may take various forms. The Paragraph 2 of Article XVII provide for a list of measures that are in principle prohibited:

(a) Limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

In interpreting these requirements there are some points worth mentioning. *Firstly*, the requirements imposed upon the members are to be intended only as minimum requirements. Thus, a member would not be prevented from providing more favourable treatment, if s/he chooses to do so. For instance, even if its schedule of commitments allows a maximum of three market entries, a member is always free to allow the entry of five or more service providers. *Secondly*, the provision of the second paragraph is exhaustive, in the sense that a member is allowed to adopt a restriction on market access that does not fall within the ambit of the six limitations. For instance, a member would be allowed to adopt a high tax regime for a certain sector that would 'de facto' prevent or discourage market entry. In this case, the tax measure would probably be in compliance with Article XVI. Nonetheless, as was explained previously, the provision of Article VI (domestic regulation) acts as an overarching obligation that ensures that, even in the absence of specific commitments, a measure does not constitute an unduly burdensome barrier to trade.

B. *National Treatment ('NT') (Article XVII)*

NT is the other cornerstone of the GATS and, as is Article XVI, is applied only to the services and modes of supply scheduled by the member. Similar to Article III of the GATT, Article XVI of the GATS provides an obligation on its members to guarantee to service supplier of other members conditions of competition equal to those of their domestic service suppliers. Where GATT Article III, which covers only products

[259] Article XVI(1) of the GATS.

'*per se*', this GATS provision covers not only service supplier, but extends also to consumers. Its substantive coverage is more limited than the GATT, because it covers only 'measures affecting the supply of a service', leaving outside the scope of the provision other internal measures that do not affect the supply of the service 'per se'. The provision of Article XVII reads as follows:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each member shall accord to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

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

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

6. Safeguards and Exceptions

A. *Balance of Payments ('BoP') (Article XII)*

Article XII of the GATS provides for the conditions under which a member may derogate from its obligations in the case of BoP difficulties. This provision, together with the prudential carving out of Article 2 of the Annex on Financial Services, regulates the right of a member to suspend its concessions in order to preserve its financial and monetary stability.

In the event of serious BoP and external financial difficulties or threat thereof', a member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of 'a member in the process of economic development or economic transition may necessitate the use of restrictions' to ensure, '*inter alia*', the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

This provision allows members to deviate from their commitments to trade in services in the event of both a current serious balance of payment or external financial difficulties, and also in the event of a threat of a crisis. The particular situation envisaged in this provision occurs when the international monetary reserves of a member are at such a low level that it would be impossible for the member to pay for the imports. In this case, Article XII allows the suspension of trade concessions, and especially the suspension of the obligation to liberalize the payment or transfers for service transactions. Particular consideration is then given to developing countries, considered more prone to monetary instability associated with the opening of the capital account. In order to invoke Article XII, members must demonstrate:

(i) The measure does not discriminate among members;

(ii) it is consistent with the IMF Articles (which restricts the policy space only to capital account restrictions, allowed by the IMF) and to current account restrictions approved by the IMF;[260]

(iii) it does not cause unnecessary damage to other member;

(iv) it shall not be unnecessary in respect to the conditions set out above; and shall be only temporary.

If all of these conditions are met, the BoP Committee allows the member to maintain the suspension of the concession, which shall be terminated as soon as the situation improves.

B. *General and Security Exceptions (Articles XIV and XIVbis)*

Besides the case of an economic emergency, members are entitled to suspend their obligations also for general exceptions or security reasons. Article XIV provides a list of general exceptions reasons that could in principle justify a deviation from the commitments and

[260] One example is the current and capital account restrictions approved by the IMF on Iceland during the financial crisis of 2008. In order to be approved, Iceland had to comply with the recommendations of the Fund.

obligations. These are: the maintenance of public moral or public order; the protection of human, animal or plant life or health; privacy; safety reasons, or fiscal policy. Furthermore, Article XIVbis provides a list of exceptions to the obligation of transparency and to the other main discipline that takes into account the need to maintain national security. *For instance*, the Paragraph 1 of Article XIVbis permits the deviation from the obligation of transparency in order to prevent the disclosure of essential information on national security. Furthermore, the Paragraph 2 allows a member to take any action necessary to protect its national security interests.

In order for the measures to be in compliance with the requirement of Articles XIV and XIVbis, the member needs to pass a two-fold test. *Firstly*, they need to demonstrate that a particular measure is justified by one of the abovementioned exceptions. *Secondly*, they must demonstrate that the measures ' […] are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services [...]'.[261]

7. Unfinished Agenda: the Missing Pieces of Services Regulations

A. *Safeguards in Services (Article X)*

Article XIX of the GATT provides for the members the possibility to adopt temporary import restrictions in the event of unforeseeable events leading to a surge of imports of goods that causes a situation of particular distress for those domestic industries producing the same product. Were such an event to occur, the invoking member has the right to suspend temporarily its concession in the affected sector, upon the obligation to make a compensatory adjustment in return. The rationale of safeguard is to guarantee a 'safety valve' for industries seriously affected by any unforeseeable consequences of trade liberalization. Article X of the GATS, while understanding the importance of safeguard measures in services, does not provide any discipline. On the contrary, it simply states '[t]here shall be multilateral negotiations on the question of emergency safeguard measures based on the principle on non-discrimination'.[262] In the absence of a specific definition of safeguard in the GATS, similarly to trade in goods, safeguards in services should be intended as

> a mechanism that can be invoked by governments, under specified conditions, to impose or increase protection in order to relieve, on a temporary basis, difficulties or pressures that have arisen as a result of liberalization commitments and obligations undertaken in trade agreements.[263]

As of 2012, no real progress has been made in creating a legal discipline on safeguarding services.

B. *Subsidies in Services (Article XV)*

Under the WTO framework, a government measure that confers an external financial support to a private industry is deemed to be a subsidy. Any government intervention that confers on private firms benefits not normally available in the free market constitutes an intrusion that has the effect to alter the normal conditions of competition between firms. In international trade, the impact of subsidies such that they distort trade explains why these peculiar forms of government interventions, widely used throughout the world by every state and potentially a useful tool in promoting positive externalities or in correcting market failures, are nonetheless not well tolerated.[264] Within the GATS, Article XV is the only specific provision to address the issue of subsidies. This provision fails to provide a clear definition as to what precisely constitutes a subsidy. Indeed, the regulatory sophistication of the GATS and the hybrid nature of services makes it difficult to confine subsidies to services or only to one particular category of financial intervention. Furthermore, the peculiar differentiation of services among the four different modes of supply and the subsequent implications in determining the trade impact of the subsidies on the other members renders it even more challenging to reach a tailor-made definition for the services sector that would comprise all the economic and political elements of the subsidy.[265] Despite failing to define subsidies, it nevertheless recognizes

[261] Article XIV(1) of the GATS.

[262] Article X(1) of the GATS.

[263] Pierre Sauvé, 'Completing the GATS Framework: Addressing the Uruguay Round Leftovers', Aussenwirtschaft, Vol. 57, No 3, (2002). Available at SSRN: http://ssrn.com/abstract=350840 or doi:10.2139/ssrn.350840.

[264] John Jackson talks about the 'perplexities of subsidies in international trade': J. H. Jackson, *supra*, Chapter 11.

[265] Mark Benitah proposed a definition of subsidies to a service supplier as 'a specific contribution made by a government, provided to a firm located, or not located, within the territory of

that 'in certain circumstances, subsidies may have distortive effects on trade in services'.[266] Unfortunately, similarly to safeguards, Article XV fails to provide any discipline on the subject, simply exhorting members to 'enter into negotiations with the view to developing the necessary multilateral discipline to avoid such distortive effect'.[267] Even in this case, as of 2012, Members have not committed to any discipline on subsidies for services.

8. Specific Sector - GATS and Financial Services

The Annex on Financial Services is an agreement specific to the GATS that clarifies existing GATS rules as they apply to the specificities of the financial services sector. Dissimilarly to other sectors, financial regulations are an essential tool for the maintenance of financial stability. At times, the adoption of such regulations could be in contrast with GATS obligations. Thus, negotiators agreed to inscribe in the Annex a provision that would prevent that strict adherence to the rules of the GATS would undermine the stability of the financial system. This provision, contained in Paragraph 2 of the Annex, is commonly known as the 'prudential carve-out'. In essence, it guarantees the freedom of the members to adopt any measure aimed at maintaining the soundness of the financial system. Given the fundamental importance of financial stability, the 'prudential carve-out' is one of the most important articles of the GATS and it provides as follows:

> Notwithstanding any other provisions of the Agreement, a member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the member's commitments or obligations under the Agreement.[268]

the contributing government and which provides a benefit in the free market in one of the countries involved in the production line process of the service'.
For a good overview of the issue, *see* M. Benitah, 'Subsidies, Services and Sustainable Development', *The International Centre for Sustainable Development (ICTSD)*, Geneva, (2004).

266 Article XV(1) of the GATS.

267 Article XV(1) of the GATS.

268 Annex on Financial Services, Paragraph 2(a).

Based on Paragraph 2, any domestic measure that may be inconsistent with Articles XVI or VI of the GATS, as in the case of financial safety measures, may nonetheless be justified on prudential grounds once it is proven that it has been adopted to accomplish objectives of prudential or financial stability. In brief, this clause operates as an 'escape clause' that derogate to the general obligation of the GATS, based on the prevalence of macroeconomic stability against effects of trade liberalization. In the recent *Argentina - Financial Services* case, it was clarified that there must be a 'rational relationship of cause and effect between the measure that the Member seeks to justify under Paragraph 2(a) and the prudential reason provided for taking it'.[269]

Section Five. INTELLECTUAL PROPERTY RIGHTS AND THE TRIPS AGREEMENT

Intellectual property (hereinafter the 'IP') easily crosses national and regional borders and becomes an element of international trade due to its character of intangibility and trade-related aspects.[270] Intellectual property rights (hereinafter the 'IPRs') also have an undeniable interaction with international trade regardless of its territoriality. IPRs may involve in international commercial transactions in two main forms: (i) attaching to imported/ exported IPRs - protected goods (including imported/exported goods in the authorized distribution channels, and parallel imported/exported goods in the channels of parallel importation/parallel exportation);[271] (ii) being direct objects of IP-related

269 WTO Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services (Argentina - Financial Services)*, WT/DS453, 14 April 2016, paras.6.242-6.245; this finding had not been the subject of appeal.

270 Discussing the interface between IPRs and international trade, Chow and Lee maintained:
Intellectual property has always involved elements of foreign trade, dating back to the Renaissance when Venice enacted the first patent law in part to attract the foreign investors to the city. Indeed, the impetus for many of the first major international intellectual property treaties, such as the Paris Convention and the Berne Convention, was to ensure intellectual property protection abroad and to open up to foreign markets.
See Daniel C. K. Chow and Edward Lee, *International Intellectual Property: Problems, Cases, and Materials*, Thomson West, (2006), at 4.

271 For further details of parallel importation and parallel exportation, *see* Mattias Ganslandt and Keith E. Maskus, *IPRs, Parallel Imports and Strategic Behavior*, IFN Working Paper No 704, (2007), Research Institute of Industrial Economics, Sweden; Fink Carsten and Maskus Keith E. (eds.), *Intellectual Property and Development: Lessons from Recent Economic Research*, A copublication of the World Bank and Oxford University Press, (2005); Christopher Heath, *Parallel Imports and International Trade,* <www.wipo.int/edocs/mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf>; Christopher Heath (ed.), *Parallel Imports in Asia*, Kluwer Law International (2004); Frederik M. Abbott, *Parallel Importation: Economic and Social Welfare Dimensions*,

international commercial transactions such as assignment of IPRs, licensing of IP objects, franchising, and technology transfer. The relation between these areas is even more evident in certain fields. For instance, industrial designs have an undeniable link with the trade of textiles and geographical indications have a close link with agricultural trade.

In the context of international integration and globalization, IPRs play a greater role than ever in international business transactions of all kinds.[272] As already shown by the practice, the implementation of IPRs may facilitate or create barriers to international trade.

1. An Overview of the TRIPS Agreement

A. *History of the TRIPS Agreement*

The TRIPS Agreement was negotiated as part of the Uruguay Round of Multilateral Trade Negotiations. For the first time, discussions on international trade-related aspects of IPRs were included in the negotiations.[273] The results of such negotiations were embodied in the TRIPS Agreement which is Annex 1C to the Agreement Establishing the WTO, which itself forms part of the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations. The TRIPS Agreement is binding on all WTO members and was adopted at Marrakesh on 15 April 1994; it came into force on 1 January 1995. As such, the Agreement is one of the most important pillars of the WTO and IPRs protection has become an integral part of the WTO multilateral trading system.

B. *The TRIPS Agreement: IPRs and International Trade*

1. The TRIPS Agreement: the Most Comprehensive Multilateral Agreement on IPRs to Date

The comprehensiveness of the TRIPS Agreement, as compared to other international treaties on IPRs, stems from the following features: (i) the result of the incorporation and consolidation of many earlier international conventions on IPRs; (ii) the establishment of minimum standards of protection with specified deadlines for virtually all categories of IPRs, namely, copyright and related rights, trademarks, geographical indications, industrial design, patents (including plant varieties), layout designs of integrated circuits, and undisclosed information; (iii) the grant of flexibilities in many areas, and (iv) the establishment of general rules of IPRs enforcement.

Firstly, the TRIPS Agreement incorporates the most important international pillars in the field of IP law, namely the Paris, Berne, Rome Conventions and the Treaty on Intellectual Property in Respect of Integrated Circuits (as provided in Article 2 of the TRIPS Agreement). The provisions of these international conventions become compulsory even for countries that have not ratified them, except in the case of the Rome Convention, which is binding only on states to have joined it.

The incorporation of the above-mentioned IPRs conventions into the TRIPS Agreement has been explained in the framework of the WTO Dispute Settlement Mechanism in *US-Section 211 Appropriations Act (US-Havana Club)*[274] and *EC-Bananas (Article 22.6-Ecuador)*.[275] In the former, the WTO Appellate Body stated that members do have an obligation to provide protection to trade names in accordance with Article 8 of the Paris Convention (1967) as incorporated by Article 2 of the TRIPS Agreement.[276]

Secondly, the TRIPS Agreement sets forth the same minimum standards of IPRs protection for all WTO members, regardless of their level of development. With respect to each type of IPR, the Agreement sets out minimum standards of protection that each country must provide. The main aspects of these standards are the subject matter to be protected; the permissible exclusions from the subject matter to be protected; the rights to be conferred (including the minimum duration of protection); and the permissible exceptions to the standards of protection. Those standards are established under the TRIPS Agreement in two ways. The TRIPS Agreement obliges WTO members to comply with the substantive provisions of the Paris and Berne Conventions as

the International Institute of Sustainable Development, (2007), <http://www.iisd.org/pdf/2007/parallel_importation.pdf>; Tomasso Valetti and Stefan Szymanski, 'Parallel Trade, International Exhaustion and IPRs: A Welfare Analysis', *Journal of Industrial Economics*, (2006), 54, at 499-526.

272 Daniel C. K. Chow and Edward Lee, *supra*, at 4.

273 WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use,* WIPO Publication No 489, (2004), at 345, <http://www.wipo.int/about-ip/en/iprm/>; Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs,* Kluwer Law International, (2006), at 36.

274 WTO, Panel Report, *United States-Section 211 Omnibus Appropriations Acts of 1988 (US-Havana Club),* WT/DS176/R, circulated on 6 August 2001.

275 WTO, the Arbitrators, *EC-Bananas (Article 22.6-Ecuador)*, WT/DS27/ARB/ECU, circulated on 24 March 2000.

276 WTO, Panel Report, *United States-Section 211 Omnibus Appropriation Acts of 1988 (US-Havana Club),* WT/DS176/R, circulated on 6 August 2001, paras. 336, 337 and 341.

incorporated by reference through the Agreement. In addition, the TRIPS Agreement places certain additional obligations on WTO members beyond those contained in the two Conventions. All WTO members are obliged to comply with and apply the standards set forth in the TRIPS Agreement. The members cannot, in the case of specific issues covered by the TRIPS Agreement, confer a lower level of protection than provided for by it. At the same time, members cannot be obliged to provide more extensive protection. '[T]he fact is that the Agreement established what the negotiating parties deemed 'adequate' standards and principles in this area.'[277] There is no special treatment for DCs and LDCs, except the provisions on transitional periods under Articles 65-67.[278]

The mandatory standards set forth in the TRIPS Agreement eliminated the asymmetries to which the operation of the national treatment principle in Article 2.1 of the Paris Convention gave rise.[279] Specifically, according to Article 2.1, where the Convention does not itself establish minimum mandatory standards, members of the Union are free not to grant protection to nationals of other countries of the Union provided they do not grant protection to their own nationals. Such freedom has given rise to differences in levels of protection among the members of the Paris Union, which were, at some point, designated as asymmetries.[280]

Thirdly, the TRIPS Agreement does confer some flexibility on WTO members. Apart from the matter of the minimum mandatory standards, in many areas and instances the Agreement leaves open the possibility of WTO members conforming their national standards of IPRs protection to those national public policies they respectively pursue.

[277] Carlos M. Correa, *Trade Related Aspects of IPRs - A Commentary on the TRIPS Agreement,* Oxford University Press, (2007), at 8.

[278] The World Bank criticized TRIPS' same treatment of all countries on the basis that 'one size does not fit all'. *See* World Bank, *Global Economic Prospects and the Developing Countries*, Washington DC, (2001), at 129.

[279] Article 2.1 of the Paris Convention reads:
Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

[280] WIPO, *Patent Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels CDIP/5/4*, Committee on Development and IP, Fifth Session, Geneva, 26-30 April 2010, para. 6(ii), <http://www.wipo.int/ meetings/en/ doc_details. jsp?doc_id=131629>.

According to the explanation given by the World Intellectual Property Organization ('WIPO'), the term 'flexibilities' means, the alternate ways through which TRIPS obligations can be transposed into national law so that national interests are accommodated and yet TRIPS provisions and principles are complied with.[281]

The word 'flexibility' is expressly used in Paragraph 6 of the Preamble of the TRIPS Agreement and it or terms equivalent to its meaning are found in a series of TRIPS articles. Within this classification, the TRIPS flexibilities may be classified under four heads,[282] including: (i) flexibilities as regards transitional periods that are provided for in Paragraph 6 of the Preamble; (ii) flexibilities as regards the method of implementation of TRIPS obligations that are provided for in Article 1.1; (iii) flexibilities as regards standards of protection that are provided for in Articles 6, 8.1, 17, 18, 20, 23.4, 23.5, 23.9, 24.8, 26.2, 26.3, 30, 31, 33, 37, and 38; and (iv), flexibilities as regards enforcement that are provided for in Article 41.5.[283]

Fourthly, the TRIPS Agreement is the first such convention to establish an effective enforcement mechanism of IPRs. One of the most drastic differences between the TRIPS Agreement and other pre-TRIPS agreements is that it provides much more detailed rules in order to ensure the enforceability of commitments made under the Agreement. IPRs disputes covered by the TRIPS Agreement are to be resolved by a variety of measures, namely, civil and administrative procedures and remedies, provisional measures, border measures and criminal procedures.[284] Disputes between members that arise out of the TRIPS Agreement are resolved pursuant to the dispute settlement procedures of WTO. This means that the WTO rules contained in the GATT and the Dispute Settlement Understanding (DSU) may apply.

[281] WIPO, *Patent Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels CDIP/5/4*, Committee on Development and IP, Fifth Session, Geneva, 26-30 April 2010, para. 34, <http://www.wipo.int/meetings/en/doc_ details.jsp?doc_id=131629>.

[282] Nuno Pires de Carvalho, *WIPO Seminar for Certain Asian Countries on Flexible Implementation of TRIPS Provisions,* Singapore, 28-30 July 2008.

[283] WIPO noted that, as another way of looking at flexibilities, members may resort to them in three different (and sequential) moments: in the process of acquisition of the right; once the right has been acquired, in framing it and establishing its dimensions, and once the right has been so acquired, framed and given dimensions, in using and enforcing it. *See* WIPO, *Patent Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels CDIP/5/4*, Committee on Development and IP, Fifth Session, Geneva, 26-30 April 2010, para. 35, <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id= 131629>.

[284] *See* Articles 41-61 of the TRIPS Agreement.

With all of these innovations, the TRIPS Agreement may be considered as the most comprehensive multilateral agreement on IP to date.[285] '[I]t constitutes the most important significance [in the] strengthening ever of global norms in the intellectual property area.'[286]

2. The TRIPS Agreement: the Most Fundamental Objective Is to Promote International Trade

In line with the purposes and objectives of the WTO, the stated objective of the TRIPS Agreement is to facilitate and promote free international trade by protecting IPRs, while at the same time preventing the use of IPRs protection by individual members as trade barriers.[287]

> One of the most common misunderstandings about the TRIPS Agreement is that its main objective is to enhance the protection of intellectual property. But it is not. The main - if not the only - objective of the TRIPS Agreement as well as that of the whole WTO Agreement is to promote free trade.[288]

As emphasized in the Preamble of the TRIPS Agreement, the first fundamental goal is 'to reduce distortions and impediments to international trade … [a]nd to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.'[289]

This goal should be read in conjunction with Articles 7 and 8 of the TRIPS. Accordingly, the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations (Article 7). The WTO members are empowered to adopt measures for public health and other public interest reasons and to prevent the abuse of IPRs or practices which unreasonably restrain trade or adversely affect the international transfer of technology (Article 8).

In addition to the Preamble, many provisions of the TRIPS Agreement embody the goal of facilitating free trade. They are, for instance, the provisions on enforcement of IPRs. It is assumed that some measures and procedures to enforce IPRs may themselves become barriers to trade when used in an inappropriate manner. The WTO members are, thus, requested by the TRIPS Agreement to apply enforcement measures 'in such a manner as to avoid the creation of barriers to legitimate trade' as provided in Article 41. Articles 48, 50.3, 50.7, and 56, are examples of provisions that aim at preventing and remedying the misuse of enforcement measures by right holders (or alleged right holders), which might impede legitimate international trade.[290]

C. *Principles of the TRIPS Agreement*

The TRIPS Agreement, as are the other WTO agreements such as the GATT and GATS, is based on three principles, NT, MFN, and transparency.[291] All matters concerning the availability, scope, acquisition, use, and enforcement of trade-related IPRs addressed in the TRIPS Agreement are subject to the first two principles.[292] The last principle is intended to maintain the publicity, stability, and predictability of trade-related IP laws and regulations.

1. National Treatment Principle (NT)

The NT principle was first developed in the Paris Convention (Article 2). However, the operation of the principle laid down in the Paris

[285] On the role of the TRIPS Agreement, *see* Carlos M. Correa, *IPRs, the WTO and Developing Countries: The TRIPS Agreement and Policy Options,* Zed Books Ltd. (2000); Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford University Press, (2009); Gary W. Smith, 'IPRs, Developing Countries, and TRIPS: An Overview of Issues of Consideration during the Millennium Round of Multilateral Trade Negotiations', *Journal of World Intellectual Property*, Vol. 2, Issue 6, (1999), at 969; WTO, *Overview: the TRIPS Agreement,* <http://www.wto.org/english/tratop_e/ TRIPS_e/ intel2_e.htm>.

[286] Keith E. Maskus, *IPRs in the Global Economy,* Institute for International Economics, Washington DC, (2000), at 16.

[287] The TRIPS Agreement, *Preamble*.

[288] Nuno Pires de Carvalho, *supra*, at 47.

[289] The first paragraph of the Preamble, TRIPS Agreement.

[290] Nuno Pires de Carvalho, *supra,* at 44.

[291] Articles 3, 4, and 63 of the TRIPS Agreement; Articles III, I, and X of the GATT; Articles 17, 2, and 3 of the GATS.

[292] *See* Note 3, the TRIPS Agreement; Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis,* Sweet and Maxwell, (1998), at 45-59; UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), at 61-91.

Convention gave rise to differences in the levels of industrial property protection among the members of the Paris Union and this could create barriers to exports of intellectual property right - embodied goods and services. Negotiators in the Uruguay Round, thus, agreed to a different formulation of the NT principle, which may be found at Article 3 of the TRIPS Agreement.

The NT principle under the TRIPS Agreement has been extensively scrutinized and explained in the framework of the WTO Dispute Settlement Mechanism. It is interpreted in the following cases, for instance: *European Communities-Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs,* complaint by the US; *European Communities-Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs,* complaint by Australia; *Indonesia-Autos*; and *US-Section 211 Appropriations Act (US-Havana Club)*.[293] Accordingly, the protection that a WTO member grants to nationals of other members is no longer the same protection it grants to its own nationals (as provided in the Paris Convention), but rather 'no less favourable'. In other words, regardless of the level of protection that a WTO member grant to its own nationals, the minimum standards established by the TRIPS Agreement are of mandatory application to nationals of other members. Where the protection granted by that member is lower than the minimum levels required by the TRIPS Agreement, the member may only limit the protection granted to nationals of other members to the TRIPS minimum standards. When the protection of that member is higher than or equal to the TRIPS minimum levels, the same protection levels must be granted to nationals of other members.[294]

2. The Most Favoured Nation Principle (MFN)

The MFN principle is provided for in Article 4 of the TRIPS Agreement. It is absent in the pre-TRIPS conventions on IPRs but is found in other WTO Agreements such as GATT (Article I) and GATS (Article 2). While the NT principle prohibits discrimination by a WTO member between its own nationals and the nationals of other members, this principle prohibits discrimination by a member state between the nationals of two different members. Article 4 of the TRIPS Agreement requires WTO members, in IPR, to accord 'immediately and unconditionally' any 'advantage, favour, privilege or immunity' to 'the nationals of any other country' (including non-WTO members) as they do to their own nationals. In regard to interpretation of this principle, *see European Communities-Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs,* complaint by the US; *US-Section 211 Appropriations Act (US-Havana Club)*.[295]

3. The Transparency Principle

The transparency principle was first included in Article X of the GATT 1947. In the TRIPS Agreement, it is in Article 63. Article 63 requires WTO members to make their IPRs-related rules publicly available. The IPRs-related rules are defined at Article 63.1 as laws, regulations, final judicial decisions, administrative rulings of general application, agreements between one member's government or a government agency and another member's government or government agency. This obligation can be executed in one of three ways, namely official publication (Article 63.1), notification to the TRIPS Council (Article 63.2), and bilateral requests for information and access (Article 63.3). The objective of this stipulation is to 'keep foreign governments and private rights holders informed about possible changes in a member's legislation on intellectual property rights in order to ensure and contribute to a stable and predictable legal environment'.[296]

It is worth noting that the TRIPS Agreement allows exceptions to the three principles. Exceptions from the NT are to be found in Article 3.1; from the MFN in Articles 4(a), (b), (c), and (d); from the transparency requirement in Article 63.4 of the TRIPS Agreement.[297]

[293] WTO, *European Communities-Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs,* complaint by the US, WT/DS174/R, 15 March 2005 and WT/DS174/23, 25 April 2005; WTO, *European Communities-Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs,* complaint by Australia, WT/DS290/R, 15 March 2005 and WT/DS290/21, 25 April 2005; WTO, Panel Report, *Indonesia-Autos*, WT/DS54/R, WT/DS55R/, WT/DS59/R, WT/DS64/R, circulated on 2 July 1998; WTO, Panel Report, *United States-Section 211 Omnibus Appropriations Acts of 1988 (US- Havana Club),* WT/DS176/R, circulated on 6 August 2001.

[294] WTO, *Principles of Trading System,* <http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact2_ e.htm#national>.

[295] WTO, *European Communities-Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs,* complaint by the US, WT/DS174/R, 15 March 2005; WTO, Panel Report, *United States-Section 211 Omnibus Appropriations Acts of 1988 (US-Havana Club),* WT/DS176/R, circulated on 6 August 2001.

[296] UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), at 641. For further understanding of the transparency principle, *see* UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), at 637-650; WTO, *Transparency,* Working Group on the Relationship between Trade and Investment, noted by the WTO Secretariat, WT/WGTI/W/109, 27 March 2002.

[297] For further details, *see* UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), at 75 (for the

2. Main Contents of the TRIPS Agreement

In addition to the general provisions and basic principles (as provided in Part I of the TRIPS Agreement),[298] the TRIPS Agreement consists of the following main contents: (A) it is a set of standards concerning the availability, scope and use of IPRs with respect to seven IP objects, namely, copyright and related rights, trademarks, geographical indications, industrial designs, patents (including plant varieties), layout designs (topographies) of integrated circuits, and undisclosed information; (B) the TRIPS Agreement includes the provisions on IPRs-related anti-competitive practices; (C) the TRIPS Agreement has the detailed provisions on enforcement of IPRs; and (D) the TRIPS Agreement makes disputes involving IP matters subject to the Dispute Settlement Mechanism of the WTO.[299]

A. *Standards Concerning the Availability, Scope and Use of IPRs*

1. Copyright and Related Rights

(a) Copyright

The TRIPS Agreement confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such (Article 9.2). Computer programmes, whether in source or object code, must be protected under copyright as literary works (Article 10.1). Databases and other compilations of data or other material shall be protected as such under copyright even where the databases include data that as such are not protected under copyright (Article 10.2).

Authors and their successors shall have in respect of at least computer programmes and, in certain circumstances, of cinematographic works the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works (Article 11).

According to Article 12, the term of protection of a work (except a photographic work or a work of applied art), is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making. The TRIPS Agreement requires the WTO members to confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder (Article 13). In *US-Section 110(5) Copyright Act*,[300] the WTO Panel interpreted Article 13 in term of the scope,[301] the relationship with the other Articles,[302] and the application conditions.[303]

(b) Related rights

The TRIPS Agreement consists of the provisions on the protection of performers, producers of phonograms and broadcasting organizations. Accordingly, performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram. The fixation right covers only aural, not audiovisual, fixations. Performers must also be in position to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance (Article 14.1). The Agreement requires the WTO members to grant producers of phonograms an exclusive reproduction right (Article 14.2). In addition to this, they have to grant, in accordance with Article 14.4, an exclusive rental right at least to producers of phonograms. Broadcasting organizations shall have the right to prohibit the unauthorized fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of their television broadcasts (Article 14.3).

The term of protection is at least 50 years for performers and producers of phonograms from the end of the calendar year in which the fixation was made or the performance took place, and twenty years for broadcasting organizations from the end of the calendar year in which the broadcast took place (Article 14.5). The WTO members

principle of NT); at 78-82 (for the principle of MFN); at 646 (for the principle of transparency).

[298] The contents of Part I of the TRIPS Agreement have already been mentioned in subsection '2. An Overview of the TRIPS Agreement'.

[299] It should be noted that there are other contents in the TRIPS Agreement. They are: (i) acquisition and maintenance of IPRs and related *inter-partes* procedures (Part IV); (ii) transitional agreements (Part VI); and (iii) institutional agreements: final provisions (Part VII). In the context of this Textbook, nevertheless, these contents are not regarded as the main contents.

[300] WTO, Panel Report, *US-Section 110(5) of the US Copyright Act*, WT/DS160/R, circulated on 15 June 2000.

[301] WTO, Panel Report, *supra*, para. 6.80.

[302] WTO, Panel Report, *supra,* paras. 6.94, 6.87-6.89, and 6.90.

[303] WTO, Panel Report, *supra*, paras. 6.112, 6.165, 6.166-6.167, 6.222, 6.223-6.225.

are empowered to provide for conditions, limitations, exceptions and reservation to the rights conferred on performers, producers of phonograms and broadcasting organizations to the extent permitted by the Rome Convention (Article 14.6).

2. Trademarks

Regarding the issue that signs may constitute a trademark, the TRIPS Agreement provides broadly that: any sign, or any combination of signs, including visible (*e.g.*, letters, numerals, and figurative elements) and invisible signs (e.g., sound, smell, and taste), capable of distinguishing the goods and services of one undertaking from those of other undertakings, shall be eligible for registration as a trademark (Article 15.1). '[A] distinctiveness acquired through use' may be required where signs are not inherently capable of distinguishing the relevant goods or services'.

The owner of a registered trademark must be granted the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. 'In case of the use of an identical sign for identical goods or services, a likelihood of confusion must be presumed' (Article 16.1).

The protection of well-known marks is included in Articles 16.2 and 16.3, which supplement the protection required by Article 6bis of the Paris Convention. *Firstly*, the TRIPS Agreement confirms that 'Article 6bis of the Paris Convention (1967) shall apply, "mutatis mutandis", to services'. In terms of the criteria for the evaluation of well-known marks, knowledge in the relevant sector of the public is acquired not only as a result of the use of the mark but also by other means, including as a result of its promotion. *Secondly*, the protection of registered well-known marks must extend to goods or services which are not similar to those in respect of which the trademark has been registered, provided that its use would indicate a connection between those goods or services and the owner of the registered trademark, and the interests of the owner are likely to be damaged by such use.

As provided in Article 17, the WTO members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

The term of trademark protection for initial registration and each renewal of registration shall be no less than seven years. The registration of a trademark shall be renewable indefinitely (Article 18).

In terms of requirement of use, the Agreement provides that: the cancellation of a mark on the grounds of non-use cannot take place before three years of uninterrupted non-use has elapsed unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark, such as import restrictions or other government restrictions, shall be recognized as valid reasons of non-use. The use of a trademark by another person, when subject to the control of its owner, must be recognized as use of the trademark for the purpose of maintaining the registration (Article 19).

3. Geographical Indications

A definition of geographical indication is included in Article 22.1 of the TRIPS Agreement. According to that,

> [G]eographical indications are, for the purposes of the Agreement, indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (Article 22.1).

The WTO members are required to have legal means to prevent use of indications that mislead the public as to the geographical origin of the good, and use that constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (Article 22.2).

The interface between trademarks and geographical indications is mentioned in Article 22.3. In particular, the registration of a trademark which uses a geographical indication in a way that misleads the public as to the true place of origin must be refused or invalidated 'ex officio' if the legislation so permits or at the request of an interested party.

It is worth noting that the TRIPS Agreement grants a special protection for geographical indications for wines and spirits at Article 23. Accordingly, the WTO members must have the legal means to prevent the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication. This applies even where the public is not being misled, there is no

unfair competition and the true origin of the good is indicated or the geographical indication is accompanied be expressions such as 'kind', 'type', 'style', 'imitation' or the like. Similar protection must be given to geographical indications identifying spirits when used on spirits. Protection against the registration of a trademark must be provided accordingly. The exceptions to the protection of geographical indications are provided in Article 24.

4. Industrial Designs

The TRIPS Agreement obliges members to provide for the protection of independently created industrial designs that are new or original and such protection may not extend to designs dictated essentially by technical or functional considerations (Article 25.1).

Stemming from the undeniable link between industrial designs and textile industry and characters of the short life cycle and sheer number of new designs in the textile sector, a special provision on industrial design protection for textiles is included in the TRIPS Agreement.

> The protection for textile designs, in particular in regard to any cost, examination or publication, must not unreasonably impair the opportunity to seek and obtain such protection. Members are free to meet this obligation through industrial design law or through copyright law (Article 25.2).

Article 26.1 requires the WTO members to grant to the owner of a protected industrial design the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes. The WTO members are allowed to provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties (Article 26.2). The duration of industrial design protection available shall amount to at least ten years (Article 26.3).

5. Patents

The TRIPS Agreement requires member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness and industrial applicability (Article 27.1). There are three permissible exceptions to the basic rule on patentability. *Firstly*, it is for inventions contrary to 'ordre public' or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment (Article 27.2). *Secondly*, members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals (Article 27.3(a)). *Thirdly*, members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective 'sui generis' system of protection (Article 27.3(b)).

The rights conferred on patent owners are of making, using, offering for sale, selling, and importing for these purposes. Process patent protection must give rights not only over use of the process but also over products obtained directly by the process. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts (Article 28). The WTO members may provide limited exceptions to such exclusive rights, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties (Article 30). In *Canada-Pharmaceutical Patents*,[304] the WTO Panel interpreted the rights conferred to patent owners provided in Article 28 and the exceptions to the rights conferred on patent owners in Article 30.

The term of patent protection available shall not end before the expiration of a period of twenty years counted from the filing date (Article 33). In *Canada-Term of Patent Protection,*[305] the WTO Appellate Body found that: the patent protection term of seventeen years (counted from the date of grant) accorded to patent applications filed before 1

[304] WTO, Panel Report, *Canada-Patent Protection of Pharmaceutical Products,* WT/DS114/R, circulated on 17 March 2000.

[305] WTO, Report of the Appealate Body, *Canada-The Term of Patent Protection,* WT/DS170/AB/R, circulated on 18 September 2000.

October 1989 and often ended before twenty years from the date of filing as provided in Section 45 of Canada's Patent Act was inconsistent with Article 33 of the TRIPS Agreement.

Compulsory licensing and government use without the authorization of the right holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right holder (Article 31). Certain conditions are relaxed where compulsory licences are employed to remedy practices that have been established as anticompetitive by a legal process.

6. Layout-Designs (Topographies) of Integrated Circuits

Under the TRIPS regime, protection of layout-designs of integrated circuits based on certain provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits (Article 35) and additional provisions of the TRIPS Agreement itself (Articles 36-38). The former deal with, '*inter alia*', the definitions of 'integrated circuit' and 'layout-design (topography)', requirements for protection, exclusive rights, and limitations, as well as exploitation, registration and disclosure.[306] The latter includes three remarkable points. They are: (i) the applicability of the protection to articles containing infringing integrated circuits (Article 36); (ii) the treatment of innocent infringers who perform the acts of importing, selling, or otherwise distributing for commercial purposes in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit but she/he did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design (Article 37.1); (iii) application of Article 31 of the TRIPS Agreement, '*mutatis mutandis*', to non-voluntary licensing of a layout-design or to its use by or for the government without the authorization of the right holder, instead of the provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits on compulsory licensing (Article 37.2).

7. Undisclosed Information

Differently from the six above-mentioned IP objects, the TRIPS Agreement states clearly that the protection of undisclosed information is to ensure 'effective protection against unfair competition' (Article 39.1). Besides that, the Agreement defines 'undisclosed information' at Article 39.2. According to this provision, undisclosed information must be secret, have commercial value since it is secret, and be subject to reasonable steps to keep it secret. The Agreement also contains provisions on undisclosed test data and other data whose submission is required by governments as a condition of approving the marketing of pharmaceutical or agricultural chemical products that use new chemical entities (Article 39.3). In such a situation, the WTO members 'shall protect such data against unfair commercial use [and] protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use'.

[306] *See* Articles 2, 3, 6, and 7 of the Treaty on Intellectual Property in Respect of Integrated Circuits.

B. *Control of IPRs-Related Anti-competitive Practices*

The TRIPS Agreement contains a number of articles dealing with IPRs-related anti-competitive practices, especially Articles 8.2, 31(k), and 40.[307] The provisions of the Agreement on contractual restraints relating to IPRs are Articles 8.2 and 40 only.[308] These articles recognize that certain abuses of IPRs and IPRs-related anti-competitive practices may restrain competition and they leave the issue up to WTO members to deal in some cases and require the members to follow the minimum obligations in others.

1. Flexible Rules

Articles 8.2 and 40.2 allow WTO member states to adopt 'appropriate measures' to prevent or control IPR-related anti-competitive practices. With Article 8.2, the WTO members acknowledge that there are IPRs-related anti-competitive practices that need to be prevented and members are empowered to deal with such practices. These practices are: the abuse of IPRs by right holders; practices that unreasonably restrain trade, and practices that adversely affect international technology transfer.

The control of anti-competitive practices in licensing agreements is provided for by Article 40. This contains four paragraphs, of which paragraphs 1 and 2 deal with issues of substantive law whereas paragraphs 3 and 4 treat enforcement matters. Article 40, as a '*lex specialis*' provision in relation to Article 8.2, narrows the scope of Article

[307] To some extent, Articles 6, 31(c), and 37.2 of the TRIPS Agreement may be also regarded as competition provisions.

[308] Article 31(k) relates to unilateral conduct of intellectual property right abuses, not to contractual relationships.

8.2 and covers only some of the conduct of intellectual property right-holders listed in Article 8.2.[309] Article 40 belongs to Section 8 and the title of the section is '[c]ontrol of anti-competitive practices in contractual licenses'. However, Article 40.1, by referring in general terms to 'licensing practices or conditions', clarifies that it covers all conduct surrounding the grant and the execution of licenses. Both unilateral conduct and restrictive contract terms relating to intellectual property rights thus fall within the scope of the provision. Article 40.1 simply recognizes that 'some licensing practices or conditions pertaining to IPRs which restrain competition may have adverse affects on trade and may impede the transfer and dissemination of technology.' Article 40.1 is, thus, 'non-committal' with regard to Article 8.2.[310]

While Article 40.1 gives no list of anti-competitive licensing practices or conditions, Article 40.2 does list some examples of these, namely, 'exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing'. However, the words 'for example' show that this is not an exhaustive list. This implies that WTO members have discretion in defining the concept of 'licensing practices and conditions'. In addition to this, Article 40.2 expressly allows WTO members to establish and define the rules of competition law to control or prevent anti-competitive licensing practices and conditions. Article 40.2 also acknowledges members' authority to 'take appropriate measures to prevent or control' anti-competitive licensing practices and at the same time requires them to comply with certain minimum obligations.

In short, Articles 8.2, 40.1, and 40.2 leave WTO members free to deal with IPRs-related anti-competitive practices. Specifically, members have the right to address such practices or not to do so; to define the concepts of IPRs-related anti-competitive practices and of licensing practices or conditions pertaining to IPR; to establish and define the rules of competition law to control or prevent such practices, and to take appropriate measures to prevent or control such practices.

[309] UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), at 554. Besides the view that Article 40 is a 'lex specialis' provision in relation to Article 8.2, some argue that Article 8.2 contains a policy statement only and is implemented by Article 40. *See* Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis,* Sweet and Maxwell, (1998), at 68, para. 2.49.

[310] Gervais, Daniel, *The TRIPS Agreement: Drafting History and Analysis,* Sweet and Maxwell, (1998), para. 191; Heinemann, 'Antitrust Law of Intellectual Property in the TRIPS Agreement of the World Trade Organization', in Beier, Schricker (ed.), *From GATT to TRIPS*, Weinheim, (1996), at 245.

2. Minimum Standards

In addition to providing flexible provisions on IPRs-related anti-competitive practices, the TRIPS Agreement does stipulate minimum standards for measures preventing IPRs-related anti-competitive practices. More specifically, the WTO members decide whether or not to control IPRs-related anti-competitive practices by domestic competition laws and regulations. If members wish to do so, however, domestic competition laws and regulations must be 'consistent with the provisions of the [TRIPS] Agreement' and 'appropriate' to prevent the practices in question (provided for in Articles 8.2 and 40.2). In other words, the measures must meet two requirements, namely, consistency and appropriateness. Additionally, WTO members have consultation and cooperation obligations in the control of IPRs-related anti-competitive practices (provided at Articles 40.3 and 40.4). *Firstly*, Articles 8.2 and 40.2 require the measures controlling or preventing IPRs-related anti-competitive practices to be 'consistent with other provisions of [the TRIPS Agreement].' *Secondly*, Article 8.2 and Article 40.2 of the TRIPS Agreement require that measures controlling or preventing IPR-related anti-competitive practices be 'appropriate' and 'needed'. The requirement of appropriateness was reviewed in WTO documents[311] and has been elaborated on by the WTO in some GATT/GATS related disputes. For instance, *Korea-Measures Affecting Import of Fresh, Chilled and Frozen Beef*; *European Communities-Measures Affecting Asbestos-containing Products*; *European Communities-Trade Description of Sardines*; *Japan-Measures Affecting the Importation of Apples*; *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*; *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*.[312] *Finally*, Articles 40.3 and 40.4 of

[311] For example, *see* WTO Working Party on Domestic Regulation, *'Necessity Test' in the WTO,* note by the Secretariat, S/WPDR/W/27, 2 December 2003, para. 4.

[312] For example, *see* WTO, *Korea-Measures Affecting Import of Fresh, Chilled and Frozen Beef,* WT/DS161/AB//R and WT/DS169/AB/R, circulated on 11 December 2000; WTO, *European Communities-Measures Affecting Asbestos-Containing Products,* WT/DS135/AB/R, circulated on 12 March 2001, paras. 168-175; WTO, *European Communities-Trade Description of Sardines,* WT/DS231/AB/R, circulated on 26 September 2002, paras. 285-291; WTO, *Japan-Measures Affecting the Importation of Apples,* WT/DS245/R, circulated on 15 July 2003, paras. 8.180-8.198; and WT/DS245/AB/R, circulated on 26 November 2003, para. 163-165; WTO, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R, circulated on 7 April 2005, paras. 309-311; WTO, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS291/R, WT/DS292/R, and WT/DS293/R, circulated on 29 September 2006, para. 7.1423.

the TRIPS Agreement establish a basic obligation of consultation and cooperation with respect to control of IPRs-related anti-competitive practices in licensing agreements. This is the first multilateral agreement that sets forth an obligation of assistance in antitrust law enforcement.[313]

C. *Enforcement of IPRs*

1. General Obligations

The TRIPS Agreement requires WTO members to ensure that enforcement procedures are available to permit effective action against any act of infringement of IPRs covered by the Agreement, including expeditious remedies to prevent infringements and remedies that constitute a deterrent to further infringements. The procedures must be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against the abuse of such procedures (Article 41.1). Moreover, enforcement procedures must be fair and equitable, not unnecessarily complicated or costly, nor entail unreasonable time limits or unwarranted delays (Article 41.2). In *Canada-The Term of Patent Protection*,[314] the WTO Panel states that:

> … [R]equiring applicants to resort to delays such as abandonment, reinstatement, non-payment of fees and non-response to a patent examiner's report would be inconsistent with the general principle that procedures [of intellectual property right enforcement] not be unnecessarily complicated as expressed in Article 41.2.[315]

Decisions on the merits of a case shall preferably be in writing and reasoned, shall be made available at least to the parties to the proceeding without undue delay, and shall be based only on evidence in respect of which parties were offered the opportunity to be heard (Article 41.3). Parties to a proceeding shall have an opportunity for review of final administrative decisions and of at least the legal aspects of initial judicial decisions on the merits of a case, except for acquittals in criminal cases (Article 41.4).

[313] UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), at 561-562.

[314] WTO, Appellate Body Report, *Canada-The Term of Patent Protection,* WT/DS170/AB/R, circulated on 18 September 2000.

[315] WTO, Appellate Body Report, *Canada-The Term of Patent Protection,* WT/DS170/AB/R, circulated on 18 September 2000, paras. 6.117-6.118.

2. Civil and Administrative Procedures and Remedies

The TRIPS Agreement has established detailed provisions on civil and administrative procedures for enforcement of IPRs. These provisions deal with the following issues: (i) requirements of fair and equitable procedures (Article 42);[316] (ii) evidence (Article 43)[317]; (iii) injunctions (Article 44); (iv) damages (Article 45); (v) other remedies, such as the authority to order disposal of infringing goods or materials and implements used in the creation of infringing goods (Article 46); (vi) right of information (Article 47); (vii) indemnification of the defendant (Article 48), and (viii) application of the above guidelines to administrative procedures (Article 49).

3. Provisional Measures

Provisional measures are applied in order to prevent an infringement of any IPR from occurring, and in particular to prevent the entry of goods into the channels of commerce in their jurisdiction, including imported goods immediately after customs clearance; and to preserve relevant evidence in regard to the alleged infringement (Article 50.1). These measures are adopted 'where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed' (Article 50.2). The provisions on provisional measures contain certain safeguards against the abuse of such measures. The judicial authority may require the applicant: (i) to provide any reasonably available adequate evidence that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent (Article 50.3); (ii) to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse (Article 50.3); and (iii) to supply information necessary for the identification of the goods (Article 50.5). Further, the defendant has a right to review with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed (Article 50.4).

[316] Article 42 contains certain principles aiming at ensuring due process for 'right holders'. In *US-Section 211 Appropriations Act (US-Havana Club)*, the Appellate Body considered that the term 'right holders' included not only persons who had been established as owners of rights, but also persons who claimed to have legal standing to assert rights. *See* WTO Panel Report, *United States-Section 211 Omnibus Appropriations Acts of 1988 (US- Havana Club),* WT/DS176/R, circulated on 6 August 2001, para. 217.

[317] This provision was interpreted in the framework of the WTO Dispute Settlement Mechanism, *see* WTO Panel Report, *India-Patents (EC),* WT/DS79/R, circulated on 24 August 1998.

4. Special Requirements Related to Border Measures

Border measures must be available at least against the importation of counterfeit trademark and pirated copyright goods (Article 51). Border measures allow customs to suspend imported counterfeit trademark and pirated copyright goods from releasing into free circulation. In accordance with Article 60, members may exclude from the application of these procedures 'de minimis' imports, i.e., small quantities of goods of a non-commercial nature contained in travelers' personal luggage or sent in small consignments. The TRIPS Agreement leaves freedom for the WTO members to apply corresponding procedures to the suspension by customs authorities of infringing goods destined for exportation from their territories (Article 51).

Similarly to provisional measures, for the purpose of preventing abuse of border measures, many types of safeguards are provided for in the TRIPS Agreement. The competent authority may require the applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. The importer and the applicant must be promptly notified of the detention of goods (Article 54). If the right holder fails to initiate proceedings leading to a decision on the merits of a case within ten working days, the goods shall normally be released (Article 55). Where goods involve the alleged infringement of industrial designs, patents, layout-designs or undisclosed information, the importer must be entitled to obtain their release on the posting of a security sufficient to protect the right holder from any infringement, even if proceedings leading to a decision on the merits have been initiated (Article 53.2).

In regard to remedies, the competent authorities must have the power to order the destruction or disposal outside the channels of commerce of infringing goods in such a manner as to avoid any harm to 'other rights of action open to the right holder' (Article 59).

5. Criminal Procedures

The TRIPS Agreement requires that members provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. They also have to provide for remedies such as imprisonment, monetary fines and seizure, forfeiture and destruction of the infringing goods and of any materials and implements predominantly used for the commission of the offence (Article 61).

D. *Dispute Settlement*

Settlement of IPRs-related disputes under the WTO's Dispute Settlement Mechanism is one of the most important contents of the TRIPS Agreement.

Article 3.2 DSU set out:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system …[a]nd serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[318]

Its operation involves the Dispute Settlement Body (DSB) panels, the Appellate Body, the WTO Secretariat, arbitrators, independent experts and several specialized institutions.

The TRIPS Agreement itself invokes the provisions of Articles XXII and XXIII of GATT 1994, as elaborated by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which applies to consultations and the settlement of disputes under the TRIPS Agreement (Article 64.1). As a result, IPRs-related disputes covered by the TRIPS Agreement subject to the Dispute Settlement Mechanism of the WTO.

Section Six. WTO's DISPUTE SETTLEMENT MECHANISM

1. Overview

A. *The Dispute Settlement System - from GATT to the WTO*

The current WTO dispute settlement, as it has been operating since 1 January 1995, is not a novel system. On the contrary, it was built on the basis of the dispute settlement system under GATT 1947.[319] Approximately 50 years before the creation of the WTO, the GATT dispute settlement system had evolved with only two brief provisions,

[318] Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.

[319] *See* Article 3.1 of the DSU. The current WTO system adheres to the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947.

Articles XXII and XXIII of GATT 1947, and several of the principles and practices were codified into decisions and understandings of the contracting parties to GATT 1947.[320] Unsurprisingly, the GATT 1947 dispute settlement system could not provide for detailed procedures to handle disputes effectively. Moreover, the GATT 1947 dispute settlement also had some serious shortcomings that led to increasing problems in the 1980s.[321] Thus, many contracting parties to GATT 1947, both developing and developed countries, felt that the old, rudimentary and power-based GATT system for settling disputes through diplomatic negotiations needed to be improved and strengthened in order to become an elaborate, rules-based one for settling disputes through adjudication. After long discussions, the WTO dispute settlement system negotiated during the Uruguay Round was established. It was created mainly to provide a mechanism to settle promptly disputes between WTO members concerning their respective rights and obligations under WTO law and to protect the security and predictability of the multilateral trading system.[322] The operation of the WTO dispute settlement is based on such fundamental principles as the 'negative consensus' principle, confidentiality of the proceedings, settlement of disputes in good faith, and special rules and assistance for DC members.

Although the WTO dispute settlement system is based on GATT 1947 dispute settlement provisions and practice, it has certain major changes:

- The introduction of 'negative consensus';
- the speeding up of the process with an explicit time frame for proceedings at the WTO;

[320] The contracting parties to GATT 1947 progressively codified and sometimes also modified the emerging procedural dispute settlement practices. The most important pre-Uruguay Round decisions and understandings were:
The Decision of 5 April 1966 on Procedures under Article XXIII;
The Understanding on Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979;
The Decision on Dispute Settlement, contained in the Ministerial Declaration of 29 November 1982;
The Decision on Dispute Settlement of 30 November 1984.
See WTO website, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/ c2s1p1_e.htm, accessed on 3 August 2017.

[321] *See* Peter Van den Bossche, *supra*, at 170. *See* also WTO website, *Weaknesses of the GATT Dispute Settlement System*, available at: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_ cbt_e/c2s1p1_e.htm, accessed on 3 August 2017.

[322] *See* Peter Van den Bossche, *supra*, at 171-172.

- the addition of the appellate process that brings a further opportunity for dispute parties to protect their legal rights and benefits under WTO law; and
- the addition of the compulsory nature and the enforcement mechanism to provide greater guarantees for WTO members on protecting their rights.

Besides its remarkable achievements, the WTO dispute settlement also has some serious issues and new practices such as the ability and effectiveness of retaliation, the scope of appellate review, the application of provisional measures, promoting electronic filing in disputes, which need to be resolved in negotiations under the WTO. WTO members agreed to negotiate to improve and clarify the DSU, as addressed below. Since 1998, negotiations to review and reform the DSU have taken place; however, there has been no agreement yet now.[323]

B. *The Dispute Settlement Understanding*

The Understanding on Rules and Procedures for the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding or DSU,[324] is generally considered to be one of the most significant achievements of the Uruguay Round negotiations. The DSU provides a single dispute settlement mechanism applicable to all WTO agreements listed in Appendix 1 included in the WTO Agreement; the twelve WTO multilateral agreements on trade in goods; the GATS; the TRIPS; the Agreement on Procurement and the Agreement on Trade in civil aircraft, and the DSU itself.

The DSU contains twenty-seven articles and four appendices. The DSU sets out the basic institutional and jurisdictional scope of WTO dispute settlement. Its four appendices specify the agreements covered by the DSU; itemize special and additional dispute settlement rules and procedures contained in covered agreements; outline working procedures and a suggested timetable for panels, and set out the rules and procedures that apply to any expert review groups that may be established by panels.[325]

[323] *See* more on WTO website, *News, Negotiations to Improve Dispute Settlement Procedures, and Consultations on Panel Process*, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm, accessed on 3 August 2017. *See* also Thomas A. Zimmermann, 'The DSU Review (1998-2004): Negotiations, Problems and Perspective', in Dencho Georgiev and Kim Van der Borght (eds), *Reform and Development of the WTO Dispute Settlement System*, Cameron May Ltd (2006).

[324] It is stipulated in Annex 2 of the WTO Agreement that describes the procedures for resolving trade disputes.

[325] *See* David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, (2004), at 16.

C. *WTO Bodies Involved in the Dispute Settlement Process*

The key WTO Bodies involved in the dispute settlement process are the Dispute Settlement Body (hereinafter the 'DSB'), the panels, the Appellate Body, the Director-General and the WTO Secretariat, arbitrators, independent experts and several specialized institutions. This Section examines mainly the DSB, the panels and the Appellate Body.

The General Council discharges its responsibilities under the DSU through the DSB.[326] As is the General Council, the DSB is a political body that consists of representatives of every WTO member. According to Article 2.1 of the DSU, the DSB has the authority to establish dispute settlement panels, to adopt panel and AB reports, to maintain surveillance of the implementation of the rulings and recommendations it adopts, and to authorize the suspension of concessions and other obligations under the covered WTO agreements, if its rulings and recommendations are not acted upon by members within an accepted time frame. The DSB has its own chairperson, usually the head of one of the permanent missions to Geneva of one of its members, [327] and is supported by the WTO Secretariat.[328]

The panels are independent, quasi-judicial institutions established by the DSB to adjudicate disputes that have not been resolved at the consultation stage. Article 6.1 of the DSU stipulates that the panel is established at the latest at the DSB meeting following the meeting at which the request for the establishment first appears as an item on the agenda of the DSB, unless at that meeting the DSB decides by consensus not to establish a panel. Each of the panels is normally composed of three, and exceptionally five, well-qualified and independent experts selected on an 'ad hoc' basis.[329] Pursuant to Article 8.10 of the DSU, in the case of a dispute between a DC member and a developed country member, at least one panellist shall be from a DC member if the DC member so requests. The function of the panel is making an objective assessment on both of the factual and legal aspects of the case and submitting a report to the DSB in which it expresses its conclusions including its recommendation in case of finding breaches of the obligations of a member of the WTO.[330]

[326] Article IV.3 of the WTO Agreement.

[327] *See* David Palmeter and Petros C. Mavroidis, *supra*, at 15.

[328] Article 27.1 of the DSU.

[329] Articles 8.1 and 8.2 of the DSU.

[330] Articles 11 and 19 of the DSU.

The Appellate Body is the second and final stage in the adjudicatory part of the dispute settlement system. As are the panels, the Appellate Body is an independent, quasi-judicial institution, but unlike the panels, it is a permanent institution composed seven individuals each of whom serves a four-year term and can be reappointed once.[331] According to Article 17.3 of the DSU, the Appellate Body members must be persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally, and they must not be affiliated with any government. If a party files an appeal against a panel report, the Appellate Body shall review the challenged legal issues and submit a report to the DSB in which it may uphold, reverse, or modify panel findings, but only on issues of law and legal interpretation.[332] Furthermore, the panels and the Appellate Body cannot add to or diminish the rights and obligations of any WTO members provided in the covered agreements in their findings and recommendations.[333]

Besides the three main WTO Bodies mentioned above, there are certain others that also play important roles in the dispute settlement process, such as the Director-General and the WTO Secretariat,[334] arbitrators,[335] independent experts and several specialized institutions.[336]

D. *Participants in the Dispute Settlement System*

The WTO dispute settlement is a government-to-government procedure; thus, only WTO members may have access to the WTO dispute settlement system either as parties or as third parties. Consequently, if any industry association or private individual from a WTO member wishes to activate the WTO dispute settlement system against another WTO member government, it must first persuade its own government to prosecute

[331] Article 17.2 of the DSU.

[332] Articles 17.6 and 17.13 of the DSU.

[333] Article 19.2 of the DSU.

[334] Relating to the responsibilities of the Director-General, *see* Article 5.6, Article 8.7, footnote 12 to Article 21.3(c), Article 22.6 and Article 24.2 of the DSU. Relating to the responsibilities of the WTO Secretariat, *see* Article 8.6, Article 27.1, Article 27.2 and Article 27.3 of the DSU.

[335] Relating to arbitrators, *see* Articles 22 and 25 of the DSU.

[336] Relating to experts, *see* Article 13 and Appendix 4 of the DSU; Article 11.2 of the SPS Agreement; Article 14.2, 14.3 and Annex 2 of the TBT Agreement; Article 19.3, 19.4 and Annex 2 of the CVA; Article 4.5 and 24.3 of the SCM Agreement.

a complaint on its behalf against such other WTO member.[337] It also means that the WTO Secretariat, WTO observer, other international organizations, and regional or local governments which are not WTO's members shall not entitled to initiate dispute settlement proceedings in the WTO.[338] The same holds for non-governmental organizations ('NGOs'). They have no direct access to WTO dispute settlement procedures; however, they may play a role in WTO dispute settlement proceedings, *for example*, by filing 'amicus curiae' submissions with the panels or the Appellate Body.[339]

E. *Modes of the WTO Dispute Settlement*

It is important to note that the involvement of panels and the Appellate Body is not the only way to settle disputes between WTO members. There are various other ways without recourse to panels and the Appellate Body to solve disputes within the framework of the WTO. These other ways include consultations; good offices, conciliation and mediation; and arbitration. In many instances, the parties prefer using these to having recourse to adjudication by panels and the Appellate Body. Although the WTO dispute settlement system prefers solving disputes by finding a solution mutually acceptable to the parties to a dispute, it does not mean that parties may act in any way they wish. It is provided in the DSU that application by parties of the other methods mentioned above must be confidential, and without prejudice to the rights of any WTO Member.

Consultation is the mode in which parties themselves negotiate by seeking an agreed solution to resolve their dispute. Consultation may be 'an alternative mean of dispute settlement', i.e., negotiation, or may be 'a mandatory stage' in the WTO dispute settlement proceedings which must always precede resort to adjudication. In that case, if the consultations fail to settle a dispute, the complaining party may request the establishment of a Panel.

[337] *See* Bruce Wilson, 'The WTO Dispute Settlement System and Its Operation: A Brief Overview of the First Ten Years', in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement*, (2005), at 16.

[338] *See* WTO website, *Participants in the Dispute Settlement System*, available at: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm, accessed on 3 August 2017.

[339] In these situations, according to WTO jurisprudence, the panels and the Appellate Body have the discretion to accept or reject these submissions, yet are not obliged to consider them. *See* David Palmeter and Petros C. Mavroidis, *supra,* at 39.

Good offices, conciliation and mediation are voluntary procedures and require the parties' agreement.[340] According to Article 5.3 of the DSU, these above methods may be requested by a party at any time and at any point in a dispute. They may also be terminated at any time and, once terminated, entitle the complaining party to request the establishment of a panel. If the parties agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.[341]

Arbitration may be used as an alternative means of dispute settlement to find the solution for certain disputes between WTO members concerning issues that are clearly defined by both parties. According to Article 25 of the DSU, if parties decide to resort to arbitration, they must agree on the particular procedure to be followed and also agree to abide by the arbitration award.[342] It is, however, necessary to distinguish between the arbitration pursuant to Article 25 of the DSU, on the one hand, and that provided in Articles 21.3 and 22.6 of the DSU, which is not 'an alternative means of dispute settlement'.[343]

2. The WTO Dispute Settlement Proceedings

The WTO dispute settlement proceedings may be described as a four-stage procedure consisting of:

- Consultations (A);
- the panel process (B);
- the appellate process (C); and
- implementation and enforcement (D).

A. *Consultations*

Consultation is the first mandatory stage of the WTO dispute settlement proceedings. The rules and procedures for consultations under the WTO are stipulated in Article 4 of the DSU.

[340] Article 5.1 of the DSU.

[341] Article 5.5 of the DSU.

[342] It is important to stress that the arbitration award must be consistent with the WTO agreements. *See* Article 3.5 of the DSU.

[343] Pursuant to Articles 21.3 and 22.6 of the DSU, these arbitrations concern some specific issues that may arise in the context of a dispute, such as the determination of the reasonable period of time for implementation and the appropriate level of retaliation.

Dispute settlement begins with a formal request for consultations. The request for consultations must be submitted in writing and a copy should be served on the DSB and to the relevant WTO Councils and Committees. The request also must give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint. In some instances, a WTO member that is neither the complainant nor the respondent may request to join consultations.[344] The request must be addressed to the consulting members and the DSB within ten days after the date of the circulation of the original request for consultations.

Pursuant to Article 4.3 of the DSU, unless otherwise agreed, the respondent must meet two deadlines: within ten days to reply the request; and within thirty days after the date of receipt of the request for consultations or within a time frame mutually agreed by parties to enter into consultations in the case of response. If the respondent fails to meet any of these deadlines, the complainant may immediately request the DSB to establish a Panel. The complainant may request the establishment of a Panel, if no satisfactory solution emerged from the consultations, within 60 days after the date of receipt of the request for consultations; or if the parties jointly consider that consultations have failed to settle the dispute even where the sixty-day period has not concluded.[345] In cases of urgency, the above deadlines are shortened.[346]

B. *The Panel Process*

As mentioned above, if the consultations have failed to settle the dispute, the complainant may request the DSB to establish a Panel. If so, pursuant to Article 6.1 of the DSU, the Panel is established at the latest at the DSB meeting following that at which the request first appears as an item on the agenda of the DSB, unless the DSB decides by consensus not to do so. The request for the establishment of a Panel must be made in writing; it must indicate whether consultations were held, identify the specific measures at issue and provide a brief, but sufficiently clear, summary of the legal basis of the complaint.[347]

The Panel is composed '*ad hoc*' for each individual dispute. With regard to the composition of the Panel, if there is no agreement between the parties within 20 days after the date of its establishment by the DSB, either party may request the Director-General of the WTO to rule. The Director-General, within ten days after sending this request to the chairperson of the DSB, appoints the Panel members in consultation with the chairperson of the DSB and the chairperson of the relevant Council or Committee, after consulting with the parties.[348]

The Panel may start its work by drawing up a working schedule, normally following the suggested timetable in Appendix 3 of the DSU, and notifying the parties. This timetable may be adjusted depending on the circumstances of the case. Key steps of the Panel process also are set out in the timetable (*see* Figure 2.6.1):

Figure 2.6.1. The working procedures and proposed timetable for Panel work in Appendix 3 of the DSU

Receipt of the first written submissions of the parties: (a) Complaining party: (b) Party complained against:	 3-6 weeks 2-3 weeks
First substantive meeting with the parties; third party session:	1-2 weeks
Receipt of written rebuttals of the parties:	2-3 weeks
Second substantive meeting with the parties:	1-2 weeks
Issuance of descriptive part of the report to the parties:	2-4 weeks
Receipt of comments by the parties on the descriptive part of the report:	2 weeks
Issuance of the interim report, including the findings and conclusions, to the parties:	2-4 weeks
Deadline for party to request review of part(s) of report:	1 week

[344] If the WTO Member has a substantial trade interest in the matter being discussed and if consultations were requested pursuant to Article XXII(1) of the GATT, Article XXII(1) of the GATS or the corresponding provisions of the other covered agreements. Furthermore, the participation of the interested member must be accepted by the responding member. If the respondent does not agree that the claim of substantial trade interest is well founded, the interested member cannot impose its presence at the consultations. In that case, pursuant to Article 4.11 of the DSU, the interested member may request consultations directly with the respondent, which would open a new, separate dispute settlement proceeding.

[345] Article 4.7 of the DSU.

[346] According to Article 4.8 of the DSU, in cases of urgency, including those which concern perishable goods, the deadline to enter into consultations is within ten days after the date of receipt of the request and the deadline to request the establishment of a Panel is within 20 days after the date of receipt of the request.

[347] Article 6.2 of the DSU.

[348] Article 8.7 of the DSU.

Period of review by panel, including possible additional meeting with parties:	2 weeks
Issuance of final report to parties to dispute:	2 weeks
Circulation of the final report to the Members:	3 weeks

The final report of the Panel is submitted to the parties to the dispute, is circulated to all WTO Members and becomes a public WT/DS document. If the Panel report is appealed, the dispute is referred to the Appellate Body. If not, the Panel report will be adopted by the DSB by 'negative consensus'. This adoption may take place, at the earliest, on the twentieth day after the circulation of the Panel report and in the case of the absence of an appeal and of a negative consensus against adoption, it must occur within 60 days after the circulation.[349]

C. *The Appellate Process*

As mentioned above, if the Panel report is appealed, the dispute is referred to the Appellate Body. Note that the Panel report must be appealed before it is adopted by the DSB.

It is important to stress that only the parties to the dispute, *i.e.*, both the 'winning' and the 'losing' parties, not third parties, may appeal the panel report. However, third parties that have been third parties at the panel stage may also participate in the appeal as a so-called 'third participant'. They may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.[350]

The appeal process begins with notification in writing to the DSB and simultaneous filing of a Notice of Appeal with the Secretariat. In that case, a body including three of the seven Appellate Body members, a 'division', is to serve on the appeal.[351] The Division to the appeal will prepare a working schedule. Pursuant to Article 17.5 of the DSU, the appellate process must generally be completed within 60 days,[352] and

[349] *See* Articles 16.1 and 16.4 of the DSU.

[350] Article 17.4 of the DSU.

[351] Rule 6 of the Working Procedures for Appellate Review circulated on 16 August 2010 and applied to appeals initiated on or after 15 September 2010 (hereinafter the 'Working Procedures for Appellate Review').

[352] If an appellate procedure takes more than 60 days, the Appellate Body must inform the DSB of the reasons for the delay and give an estimate of the time until the circulation of the report.

in no case take longer than 90 days from the date when the notice of appeal was filed. The Appellate Body report will be adopted by the DSB by 'negative consensus' within 30 days following its circulation to Members and the parties must unconditionally accept it if it is adopted. Note that in contrast to the panel procedure, there is no interim review at the Appellate Body stage.

Key steps of the appellate process also are set out in the timetable (*see* Figure 2.6.2):

Figure 2.6.2. The working procedures and timetable for general appeals in Annex 1 of the Working Procedures for Appellate Review

Notice of Appeal	0
Appellant's Submission	0
Notice of Other Appeal	5
Other Appellant's Submission	5
Appellee's Submission	18
Third Participant's Submission	21
Third Participant's Notification	21
Oral Hearing	30 - 45
Circulation of Appellate Report	60 - 90
DSB Meeting for Adoption	90 - 120

D. *Implementation and Enforcement*

The DSB is the WTO body responsible for supervising the implementation of Panel and Appellate Body reports. Once a report is adopted, its recommendations and rulings become those of the DSB itself. In that case, according to Article 21.3 of the DSU, the recommendations and rulings adopted by the DSB must be implemented promptly and if it is impracticable, the losing member has a reasonable period of time for implementing.[353] If the losing member fails to implement the recommendations and rulings within the reasonable period of time and agreement on compensation cannot be reached within 20 days after

[353] With regard to the determination of the reasonable period of time, this time-period can be: (i) proposed by the member concerned and approved by consensus by the DSB; (ii) mutually agreed by the parties to the dispute within 45 days after adoption of the report(s); or (iii) determined by an arbitrator. *See* Article 21.3 of the DSU.

the expiry of the reasonable period of time, the winning member may ask the DSB for permission to impose the temporary suspension of WTO obligations, i.e., informally also called 'retaliation' or 'sanctions'.[354] Such suspension of obligations must be imposed on the basic of discrimination and only against the member that failed to implement. Furthermore, its level must be 'equivalent' to the level of nullification or impairment.[355] If the losing member disagrees with the winning member's proposed form of retaliation, it may request arbitration.[356] The DSB continues keep the implementation under its surveillance until the recommendations and rulings are implemented.

1.3. Developing Country Members and the WTO Dispute Settlement System

DC members, the majority of WTO members, have used the WTO dispute settlement system more frequently and prevailed over larger trading nations. *US-Underwear*, a complaint by Costa Rica, and even more so *US-Gambling*, a complaint by Antigua, are well-known examples of successful 'David and Goliath' uses of the system.[357] The successes of Thailand and Viet Nam against the US in such cases as *US-Shrimp (Thailand)* and *US-Shrimp (Viet Nam)* are remarkable.

However, in most instances, DC members have to face many disadvantages when they wish to use the WTO dispute settlement system, for example, the lack of a sufficient number of experts in the field of WTO law or the dispute settlement procedure, and the lack of financial capacity; challenges on using retaliation. To some extent, the WTO recognizes the difficulties of DC members when they participate in the WTO dispute settlement system; therefore, S&D treatment and legal assistance is provided for them.[358] It is important to stress that the

[354] According to Article 22.3 of the DSU, there are three types of obligations to be suspended: (i) imposing first the sanctions with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment (informally called 'parallel' retaliation); (ii) imposing the sanctions in a different sector under the same agreement if the complainant considers it impracticable or ineffective to remain within the same sector (informally called 'cross-sector' retaliation); and (iii) imposing the sanctions under a different agreement if the complainant considers it impracticable or ineffective to remain within the same agreement, and the circumstances are serious enough (informally called 'cross-agreement' retaliation).

[355] Article 22.4 of the DSU.

[356] Articles 22.6 and 22.7 of the DSU.

[357] *See* Peter Van den Bossche, *supra*, at 232.

[358] S&D for DC members and LDC members found in many WTO dispute settlement proceedings are provided in Article 4.10, Article 8.10, Article 12.10, Article 12.11, Article 21.2, Article 21.8 of the DSU. Legal assistance is given by the WTO Secretariat and the Geneva-based Advisory Centre on WTO.

above treatment and assistance does not reduce obligations or enhance substantive rights to them. It simply makes itself available to developing country members through additional or privileged procedures, or longer or accelerated deadlines. DC members may choose a faster procedure, request longer time-limits, or request legal assistance.[359]

Viet Nam was recognized as a DC member in the WTO's accession of 2007. As of 2017, Viet Nam has participated in the WTO dispute settlement system twenty-seven times as a third party and three times as a complainant.[360] After more than 10 years of accession, the involvement of Viet Nam in the WTO dispute settlement system is better. It has gained useful experience as well as brought more opportunities to Viet Nam to influence the WTO jurisprudence in ways that protect its trade interests. As in other DC members, there are still many challenges for Viet Nam in the WTO; therefore, Viet Nam should improve its capacity of and experience in defending itself in future disputes by using effectively the WTO dispute settlement system.

Section Seven. SOME NEW ISSUES OF THE WTO

Since the creation of the WTO, a number of new trade-related issues have emerged. Among these new issues, the relationship between trade regulation and liberalization and their impact on the environment and on social and human rights have probably been the most prominent. Indeed, it seems safe to say that the links between trade and the environment and trade and human rights have occupied (and still occupy) much of the 'space' in any discussion regarding new trade-related issues within the Organization. This Section will focus specifically on these two subjects addressing them in turn.

1. Trade and Environment

Trade expansion has raised the issue of the interrelation between trade and environment. Trade flows and the rules that govern these are undeniably generating environmental change. Most of the world's environmental indicators have been gradually deteriorating;

[359] *See* WTO website, *Developing Country Members and the Dispute Settlement System,* available at: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s6p1_e.htm, visited on 3 August 2017.

[360] *See* WTO website, *Dispute Cases Involving Vietnam*, available at: http://www.wto.org/english/thewto_e/ countries_e/vietnam_e.htm, visited on 3 August 2017.

international trade is perceived as an increasingly important driver to this worsening. At the same time, however, trade might support the achievement of environmental goals.

Attention has been increasingly drawn to trade-related environmental issues, as well as to the role of the WTO in the field of trade and environment. In the Preamble to the Marrakesh Agreement Establishing the WTO, reference was made to the importance of working towards sustainable development. WTO members recognized that

> […] their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living […] [w]hile allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Trade law increasingly defines how countries' domestic laws should be structured in areas such as environmental protection. Wider understanding of the linkages between the two is key in grasping how this objective may be achieved. The present section aims to foster such understanding of the relationship between environment and trade from a legal perspective. More precisely, it expands on the interaction between environmental law and trade law by expounding on the relevant GATT provisions and WTO agreements that are of direct relevance to the environment. The Convention on Biodiversity (CBD) and TRIPS Agreement are then addressed before moving on to environment-related disputes.

A. *Relevant GATT/WTO Provisions*

1. GATT: Articles I and III on Non-discrimination

Trade rules are based mainly on the principle of non-discrimination. Article I of the GATT contains the MFN and Article III the NT, both articles thereby providing the principle of non-discrimination.

Article (I) stipulates that:

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

As far as Article III is concerned, its fourth paragraph provides that:

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

The first component of the principle of non-discrimination is thus achieved when all WTO members are on an equal footing, according to the MFN principle. Article I ensures that members shall not give any special trading advantages to another or discriminate against it. The second component of non-discrimination laid down in Article III is also achieved when goods having entered a country are accorded the same treatment as national products.

Concerning trade-related environmental issues, the principle of non-discrimination ensures that national environmental protection policies are not adopted in order to arbitrarily discriminate between foreign and domestically-produced products. It also aims at preventing discrimination between similar products imported from different trading partners. It seeks to avoid the use and abuse of environmental policies as disguised restrictions on international trade.

2. GATT: Article XI on General Elimination of Quantitative Restrictions

Article XI of the GATT focuses on the elimination of quantitative restrictions introduced or maintained by countries on products' importation or exportation. It prohibits such restrictions with the objective of encouraging countries to convert them into tariffs, which are more transparent. Its Paragraph 1 indeed states that

> … [N]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

This provision appears relevant in connection with environmentally-related policies. On this point, it is worth noting that in *China - Rare Earths*, China did not deny that it had imposed export quotas on a number of rare earths and that these measures were inconsistent with Article XI:1 of the GATT 1994.[361] Similarly, in the previous case *China - Raw Materials*, a Panel had concluded that a series of measures had resulted in a restriction or prohibition of their exportation in a manner inconsistent with China's obligations under Article XI:1 of the GATT 1994.[362]

3. GATT: Article XX on General Exceptions

Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules. As partly noted, two exceptions contained in paragraphs (b) and (g) are relevant to environmental protection. The Article indeed states that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> …
>
> (b) [n]ecessary to protect human, animal or plant life or health;
>
> …
>
> (g) [r]elating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

[361] WTO Panel Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (China Rare Earths)*, WT/DS431/R, WT/DS432/R, WT/DS433/R, 26 March 2014, para.7.200.

[362] WTO Panel Report, *China - Measures Related to the Exportation of Various Raw Materials (China - Raw Materials)*, WT/DS394/R, WT/DS395/R, WT/DS398/R, 5 July 2011, para.7.224.

Those two exceptions allow WTO Members to justify GATT-inconsistent policy measures if these are either 'necessary' to protect human, animal or plant life or health, or if the measures relate to the conservation of exhaustible natural resources. Article XX's chapeau specifies that such measures must not result in arbitrary or unjustifiable discrimination. It also ensures that the exceptions do not constitute a disguised restriction on international trade.

In *China - Rare Earths*, China had argued that the export quota measures at issue related to the conservation of exhaustible natural resources and were justified, *inter alia*, under Article XX(g) of the GATT 1994.[363] The Panel concluded that, while China truly maintained a comprehensive conservation program for natural resources, it had failed to justify its rare earths export quotas under Article XX(g) of the GATT 1994.[364] The Appellate Body uphold the Panel conclusion relating to Article XX(g) of the GATT 1994.[365] In *China - Raw Materials*, China had tried as well to justify its measures, *inter alia*, under Article XX(g) of the GATT 1994. The Panel found that the export quota applied to refractory-grade bauxite and the export duties on fluorspar were not justified under Article XX(g) of the GATT 1994.[366] The Panel conclusions were not however completely uphold by the Appellate Body.[367]

4. The General Agreement on Trade in Services (GATS)

GATS contains a general exceptions clause in its Article XIV, identical to Article XX of the GATT. In addressing environmental concerns, Article XIV(b) of the GATS allows WTO members to maintain GATS-inconsistent policy measures if this is 'necessary to protect human, animal or plant life or health', similarly to Article XX(b) of the GATT. Accordingly, such measures must not result in arbitrary or unjustifiable discrimination and must not constitute disguised restriction on international trade.

5. The Agreement on Technical Barriers to Trade (TBT)

TBT ensures that product specifications (technical regulations and

[363] Id.

[364] WTO Panel Report, *China - Rare Earths*, paras.7.600-7.615; Article XX of the GATT 1994 will be discussed in the next paragraph of this book.

[365] WTO Appellate Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (China - Rare Earths)*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, 7 August 2014, paras.5.244-5.252.

[366] Ibid., paras.7.467-7.468.

[367] WTO Appellate Body Report, *China - Measures Related to the Exportation of Various Raw Materials (China - Raw Materials)*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 30 January 2012, paras.353-361, 362.

standards), as well as procedures to assess compliance with those specifications, do not create unnecessary obstacles to trade. Otherwise, the protection of human, animal or plant life or health and the protection of the environment are recognized as legitimate objectives for countries to pursue. Its Article 2.2 indeed stipulates that

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, '*inter alia*': national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, '*inter alia*': available scientific and technical information, related processing technology or intended end-uses of products.

In *US - COOL*, the measure at issue was a 'country of origin labelling' (COOL) requirements regarding meat products. The Panel concluded that the COOL measure was a technical regulation as it fulfilled all three criteria of the three-pronged test under Annex 1.1 of the TBT Agreement.[368] Indeed, the Panel found that: i) compliance with the COOL measure was mandatory;[369] ii) the COOL measure applied to an identifiable product or group of products;[370] iii) the COOL measure laid down one or more product characteristics by imposing a country of origin labeling requirement.[371] The question of whether the COOL measure was a technical regulation was not raised in the appeal.[372]

6. The Agreement on Sanitary and Phytosanitary Measures (SPS)

SPS and TBT measures complement each other. The former covers a narrower range of measures than the latter. It includes measures taken by countries to ensure the safety of foods, beverages and feedstuffs from additives, toxins or contaminants. Protection measures from the spread of pests or diseases are also embodied. SPS measures should be applied only to the extent necessary to protect human, animal or plant life or health. They should not arbitrarily or unjustifiably discriminate between countries where similar conditions prevail.

It is worth noting that the same measure might concurrently fall under the scope of both the SPS and the TBT Agreements. Under Article 1.5 of the TBT Agreement, the TBT Agreement does not apply where a measure qualifies as a sanitary and phytosanitary measure under Annex A of the SPS Agreement.

7. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Convention on Biodiversity (CBD)

TRIPS sets minimum standards on the laws used by national governments to promote effective and adequate protection of IPRs. The latter embodies various functions, such as the encouragement of innovation and the disclosure of information on inventions, including environmentally sound technology. In the context of trade and environment, the TRIPS Agreement has particular significance. Some of its provisions are designed to deal with the environmental concerns associated with the protection of IPRs. Indeed, it makes explicit reference to the environment in Section 5 (on Patents) with its Article 27, Paragraph 2 of which stipulates that members may exclude the patenting of inventions that may cause serious prejudice to the environment:

> Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect 'ordre public' or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

Under the Agreement, Members may also exclude from patentability plants and animals other than microorganisms, as well as biological processes for the production of plants or animals. Article 27.3(b) indeed states:

> Members may also exclude from patentability:
>
> ... [(b)] Plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

[368] WTO Panel Report, *United States - Certain Country of Origin Labelling (COOL) Requirements (US - COOL)*, WT/DS384/R, WT/DS386/R, 18 November 2011, para.7.216.

[369] *Ibid.*, paras.7.156-7.162.

[370] *Ibid.*, paras.7.200-7.208.

[371] *Ibid.*, paras.7.211-7.214.

[372] WTO Appellate Body Report, *United States - Certain Country of Origin Labelling (COOL) Requirements (US - COOL)*, WT/DS384/AB/R, WT/DS386/AB/R, 29 June 2012, paras.256, 267.

The paragraph also goes on adding that members must provide for the protection of different plant varieties 'either by patents or by an effective *sui generis* system or by any combination thereof'.

The TRIPS Agreement is positively proscriptive. It is unique among the WTO rules, which usually describe what countries should not do. Moreover, the Agreement is also distinctive because it deals with private rights (the rights of innovators and creators), whereas other WTO Agreements deal with the rights and obligations of governments.

On the other hand, the Convention on Biodiversity (CBD) requires Parties to co-operate to ensure that patents and other IPRs 'are supportive of and do not run counter to' their objectives. Conflicts may indeed occur between the CBD and certain features of the IPR system. Potential problems might appear from the fact that the CBD grants states the right to sovereign control over their own genetic resources. Thereby, they may regulate and control access to genetic resources within their borders. Those genetic resources may be embodied in the form of plant varieties with valuable genetic codes, or even traditional knowledge. The resources are sought after by a variety of commercial interests, such as pharmaceuticals and herbal medicines, biotechnology, agriculture, etc. The CBD requires that any access to genetic resources should be on mutually agreeable terms, and subject to prior informed consent of the host state. Besides, it ensures that the country providing genetic resources obtains an equitable share of benefits originated by revenues from commercialization of a new drug or product. This is aimed at avoiding any patents based on 'pirated' genetic material, obtained in violation of the rules of engagement.

B. *Environment-related Disputes*

1. The US/Canada Tuna Case (United State-Prohibition of Imports of Tuna and Tuna Products from Canada)[373]

The *US/Canada Tuna* case revolved around Canada seizure of American fishing vessels and arrest of fishermen fishing for albacore tuna without having obtained prior authorization from the Canadian government. They were present in waters considered by Canada to be under its jurisdiction. However, the US did not recognize this jurisdiction and started prohibiting imports to retaliate against Canada under the Fishery Conservation and Management Act. The Panel found that the import prohibition was contrary to Article XI(1) of the GATT, and was justified neither under Article XI(2) nor under Article XX(g).

[373] GATT 1947 Panel Report, *United State-Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198 - 29S/91, 22 February 1982.

2. The US/Canada Issue on Salmon and Herring (Canada-Measures Affecting Exports of Unprocessed Herring and Salmon)[374]

The *US/Canada Issue on Salmon and Herring* dispute emerged from Canada maintenance of regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon, in accordance with its 1970 Canadian Fisheries Act. The US complained that Canada's measures were inconsistent with Article XI of the GATT 1947. Canada argued that the application of Article XX(g) was justified because its export restrictions were part of a system of fishery resource management aimed at preserving fish stocks. The Panel found that the measures maintained by Canada were contrary to Article XI(1) of the GATT and were not justified either under Article XI(2)(b) or under Article XX(g).

3. The Tuna/Dolphin Case (United States - Restrictions on the Imports of Tuna)[375]

In the *Tuna/Dolphin* dispute Mexico's complaints related to the application of the US Marine Mammal Protection Act (hereinafter the 'MMPA'), which required a general prohibition of the taking of marine mammals when fishing yellowfin tuna in the Eastern Tropical Pacific Ocean. This area is indeed known for the presence of dolphins swimming above schools of tuna. The MMPA also banned the importation of marine mammals (except when explicitly authorized). Besides, when fishes caught with commercial fishing technologies result in the incidental killing of or serious injury to ocean mammals, their importation is prohibited. In the particular case of tuna, their importation became prohibited, unless the competent US authorities established that (i) the government of the harvesting country had a 'programme regulating the taking of marine mammals, comparable to that of the US'; and (ii) the 'average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such taking by US vessels'.

[374] GATT 1947 Panel Report, *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 - 35S/98, 22 March 1988.

[375] GATT 1947 Panel Report, *United States - Restrictions on the Imports of Tuna*, DS/21/R - 39S/155, 3 September 1991, this case was brought by Mexico and others against the US under GATT 1947, but although the Panel Report was circulated in 1991, it was not adopted. It does not thus have the status of a legal interpretation of GATT 1947. The US and Mexico eventually settled the dispute.

In addition, imports of tuna from countries purchasing tuna from a country subject to the primary embargo were also prohibited. Mexico complained that the import prohibition on tuna and its products was inconsistent with Articles XI, XIII and III. The US argued that the embargo was consistent with Article III and in any case covered by Article XX(b) and (g). The US also added that the 'intermediary' embargo was consistent with Article III as well as justified by Article XX, paragraphs (b), (d) and (g).

Within the meaning of Article III, the Panel supported that the import prohibition under the 'direct' and the 'intermediary' embargoes did not constitute internal regulations. It also found that it was inconsistent with Article XI:1 and was not justified by Article XX paragraphs (b) and (g). As far as the intermediary embargo is concerned, it was not justified under Article XX(d).

4. The US-Gasoline (United States-Standards for Reformulated and Conventional Gasoline)[376]

In the *US-Gasoline* case, Venezuela (the complainant) had complained that the US Environmental Protection Agency (EPA) regulations (the Gasoline Rule) concerning the composition and emissions effects of gasoline and aiming at reducing air pollution in the country, were inconsistent with a number of WTO obligations. Accoridng to the EPA regulations, only gasoline of a specified cleanliness (called 'reformulated gasoline') was be sold to consumers in the most polluted areas of the US. In the rest of the country, only gasoline no dirtier than that sold before these regulations (called 'conventional gasoline') could be sold. The regulations applied to all refiners, blenders and importers of gasoline in the US. It required any domestic refiner to establish an individual refinery baseline. This baseline signaled the quality 'level' of gasoline produced by that refiner in 1990.

Venezuela and Brazil pointed out the Gasoline Rule's inconsistency with Article III of the GATT, further claiming that neither was it covered by its Article XX. The Gasoline Rule was said to be consistent with Article III, according to the US, which further argued that in any case, it was covered by Article XX's exceptions stipulated in paragraphs (b), (g) and (d).

However, the Panel found that the Gasoline Rule was inconsistent with Article III, and could not be justified under paragraphs (b), (d) or (g). The Panel's findings on Article XX(g) were appealed. The Appellate Body found that the establishment of a baseline fell within the terms of Article XX(g), but failed to meet the requirements of Article XX's chapeau.

5. The EC-Asbestos (European Communities-Measures Affecting Asbestos and Asbestos-Containing Products)[377]

The *EC - Asbestos* case revolved around France's ban of white asbestos. In the dispute, Canada argued that asbestos should not have been banned totally but, rather, have its use restricted. Canada also complained about France's discrimination in favor of asbestos substitutes. The Panel ruled that the ban was justified to protect the health of French workers under Article XX and its paragraph (b) allowing an exception to WTO rules for measures considered necessary to protect human health. However, the Panel agreed with Canada that France had discriminated against Canadian asbestos. It concluded that white asbestos and less-dangerous domestic substitute fibres are 'like' products according to Article III(4). Therefore, the same treatment should in principle be accorded on the French market. The WTO Appellate Body upheld the ruling on Article XX(b), yet reversed the initial panel's decision on Article III(4).

6. Recent WTO 'Environmental' Disputes

Some WTO environment-related disputes have been very long and protracted over time, such as the *US - Tuna II (Mexico)* case, in which the most recent decision (Article 22.6 Arbitration Report) was circulated in 2017.[378] Nonetheless, a certain number of disputes concerning the environment or environment-related policies have also recently emerged.

Among these recent cases, *Brazil - Retreaded Tyres* is certainly worth mentioning. The European Communities filed a complaint against Brazil claiming that Brazil's prohibition of importation of retreaded tyres and related fines, together with Brazil's measures restricting the marketing of imported retreaded tyres, were inconsistent with Brazil's

[376] WTO Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline (US - Gasoline)*, WT/DS2/AB/R, 29 April 1996; WTO Panel Report, *United States-Standards for Reformulated and Conventional Gasoline (US - Gasoline)*, WT/DS2/R, 29 January 1996.

[377] WTO Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (EC - Asbestos)*, WT/DS135/AB/R, 12 March 2001; WTO Panel Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (EC - Asbestos)*, WT/DS135//R, 18 September 2000.

[378] WTO Article 22.6 Arbitration Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II (Mexico))*, WT/DS381/ARB, 25 April 2017.

WTO obligations.[379] Brazil argued that its measures were justified, *inter alia*, under Article XX(b) of the GATT 1994 regarding measures 'necessary to protect human, animal or plant life or health.'[380] The Panel concluded that though the measures were justified under Article XX(b) of the GATT 1994,[381] they were inconsistent with the 'chapeau' of Article XX of the GATT 1994.[382] The Appellate Body upheld (though for reasons different from those of) the Panel's conclusion on the import ban inconsistency with Article XX of the GATT 1994.[383]

In 2016, the Appellate Body issued its Report in the case *India - Solar Cells*.[384] The dispute related to certain domestic content requirements (DCR) that India imposed on solar powers developers selling electricity to governmental agencies. The Panel found that India's DCR measures were inconsistent with the national treatment obligation under Article III:4 of the GATT 1994 and India's obligations under the TRIMS Agreement.[385] This conclusion was upheld by the Appellate Body.[386]

2. Trade and Social Rights

A. *International Trade and Labour Standards*

The interaction of international trade and labour standards is a prominent and growing issue between the developed and developing countries. The original text of the GATT made no reference to labour and social considerations. On the other hand, today's Preamble of the WTO Agreement proclaims that 'trade should be conducted with a view to raising standards of living, ensuring full employment… [i]n accordance with the objective of sustainable development.' However, only few indirect references to labour-related considerations may be found in current trade provisions, nor labour-related trade actions stipulated. They are, rather, provided by the International Labour Organization (hereinafter the 'ILO'). Despite that, WTO Members confirmed in the Singapore Ministerial Declaration their 'commitment to the observance of internationally recognized core labour standards… [a]nd [we affirm our] support for [the ILO] work in promoting them.'[387] Since the Ministerial Declaration was political in nature, no obligation was actually created. Still, there exists a legal relationship between WTO norms and labour norms that is worth expanding. This Section will therefore scrutinize the interpretation and application of rights and obligations stemming from WTO Agreements in relation to core labour standards.

B. *Trade-Related Human Rights Measures and the GATT*

1. Legal Restrictions on Trade-Related Human Rights Measures

The central focus of the WTO system is the regulation of trade relations between its Members. Hence, the imposition of trade-related human rights measures on a country must always, first and foremost, be in compliance with GATT rules. If a measure does not comply with WTO rules, it is considered 'prima facie' illegitimate under WTO law. A trade embargo imposed for products from a specific country known for its violations of human rights might provide a good example. In principle, the MFN obligation under GATT's Article I would be violated by such a trade embargo since the human rights situation usually does not have a bearing on the quality of the products. Another illustration is an import ban on specific goods produced by child labour and/or under very hard working conditions in violation of basic working standards. The import restriction would violate Article XI, which prohibits all trade restrictions. Last but not least, imposing a specific tax on products produced under poor working conditions would be, again and in principle, a violation of the NT principle found in Article III of the GATT, should a similar tax not being imposed on like domestic products.

2. Justification under Article XX's Exceptions

Possibilities for states to restrict trade are limited, as already explained

379 WTO Panel Report, *Brazil - Measures on Imports of Retreaded Tyres (Brazil - Retreaded Tyres)*, WT/DS332/R, 12 June 2007, para.2.5.

380 *Ibid.*, para.7.1 ff.

381 *Ibid.*, para.7.215.

382 *Ibid.*, paras.7.356-7.357.

383 WTO Appellate Body Report, *Brazil - Measures on Imports of Retreaded Tyres (Brazil - Retreaded Tyres)*, WT/DS332/AB/R, 3 December 2007, para.258.

384 WTO Appellate Body Report, *India - Certain Measures Relating to Solar Cells and Solar Modules (India - Solar Cells)*, WT/DS456/AB/R, 16 September 2016.

385 WTO Panel Report, *India - Certain Measures Relating to Solar Cells and Solar Modules (India - Solar Cells)*, WT/DS456/R, 24 February 2016, paras.7.54, 7.74, 7.135-7.187.

386 WTO Appellate Body Report, *India - Solar Cells*, para.6.2.

387 WTO, *Singapore Ministerial Declaration*, WT/MIN(96)/DEC, 13 December 1996.

in the former section on environment: Article XX of the GATT is the general exception clause and contains strict requirements. This provision lists specific public policy reasons that justify a deviation from GATT principles. Those relevant for trade-related human rights measures are the protection of public morals, contained in paragraph (a), the protection of human, animal or plant life or health (paragraph (b)) and measures relating to prisoner labour (paragraph (e)). Measures taken have yet to fulfil the general requirements of Article XX's *chapeau* by complying with the principle of non-discrimination, and must not constitute a disguised restriction on international trade. Therefore, even if Article XX does not contain any social clause, the violations of some social rights could be covered by the existing specific exceptions.

The public morals exception under Article XX(a) could be interpreted as prohibiting pornographic material produced under the serious mistreatment of women or even children. As far as Article XX(e) is concerned, it covers measures in relation to the products produced by prisoner labour. The exception could possibly be extended to workers' situations, similar to enslavement. Therefore, both exceptions could potentially serve as a justification for trade restrictions on goods related to the violation of labour and social standards. Similarly, paragraph (b) could also be of relevance to human rights protection, with its exception used to justify public health measures, an aspect of the human rights to health. Similarly, this exception could cover measures to prevent extremely dangerous working conditions.

In any case, Article XX's chapeau is intended to prevent any abuse of those exceptions by requiring the fulfilment of two conditions: (i) the measure must not be applied in an arbitrary or discriminating manner between countries where the same conditions prevail; (ii) the measures must not take the form of a disguised restriction on international trade.

In the *EC-Seal Product* case, the complained of measure was the EU Seal Regime, a EU measure prohibiting the placing of seal products on the market unless certain conditions were satisfied. A Panel considered the EU Seal Regime 'necessary' to protect public morals (regarding the welfare and health of seals) within the meaning of Article XX(a),[388] but not justified under the chapeau of Article XX as part of it were not applied in an even-handed manner.[389] The Appellate Body upheld the Panel finding on the measure being justified under Article XX(a) but not under the *chapeau* of this provision (though for a reason different form the one of the Panel, which had erred on this point).[390]

[388] WTO Panel Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R, 25 November 2013, paras.7.7., 7.630-7.639.

[389] *Ibid.*, paras.7.644-7.651.

C. *GATT Case Law*

Labour and social rights are usually violated through working conditions: child labour, a slave-like situation, and the deprivation of basic workers' rights, etc. are just a few examples of possible rights violations. Import restrictions on products manufactured under such conditions have been applied, by requiring the production of goods in a way that satisfies specific process and production standards. Indeed, the manufacturing of products by children, for instance, is a human rights violation but is also, at the same time, what in trade language is called the process and production method ('PPM') of a product.

The question of whether product and production methods that do not affect the quality of the product should be taken into account when determining whether products under scrutiny are 'like' is still open. To be more practical, one might wonder for instance whether a pair of shoes made through child labour in violation of human rights and an identical pair of shoes made by workers in full respect of their human and workers rights should be treated as 'like' products with the purpose of applying NT and MFN obligations. This, in a case where there is no difference in quality, function or end-use between shoes produced by an adult worker and by a child.

Some commentators argue that the exception found in paragraph (e) of Article XX would suggest that PPMs are allowed and measures relating to the products of prison labour are a valid exception. In the *US-Shrimp* case, the Appellate Body stated in a footnote that the provision does not allow importing countries to permit the import of products conditional on the exporting country's policy on prisoner labour.[391] As a result, it is expected that the provision will be interpreted very restrictively.

However, a state's protection of non-economic concerns is allowed under Article XX in the specific case of protection in its 'own'

[390] WTO Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, paras.5.289-5.290, 5.316-5.339.

[391] WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Dispute DS58, http://www.wto.org.

country. For instance, imposing measures to protect workers' health in the country would be allowed under the WTO rules. This was illustrated by the *Asbestos* case, where the import ban for asbestos-containing substances aimed at protecting French workers' health.

On the other hand, the jurisprudence remains restrictive in the context of extraterritorial measures forcing other WTO members to apply the imposing state's national standards. As clarified in the *US-Tuna* case, measures with extraterritorial effects are prohibited. Otherwise, they would allow Members to determine unilaterally the policies other Members have to adopt, so as to enjoy their rights under the GATT.

When considering the territorial scope of human rights obligations, those rights have to be granted to all persons present in a country; there is, though, generally no obligation to promote or protect them extraterritorially. Therefore, the prohibition of child labour is applicable for all children in the territory of a Member and cannot be enforced extraterritorially. The extraterritorial application of national laws is indeed problematic under international law, because it interferes with the sovereignty of other countries.

That said, some human rights conventions provide a more generalized obligation to promote human rights through international cooperation, such as the UN Declaration on the Right to Development. This Declaration stresses the need to promote human rights on the international level. This could be done, of course, also 'in' the context of international organizations, such as the WTO.

3. Bilateral and Regional Trade Agreements

There is a growing number of both bilateral and regional trade agreements. Almost all trading nations are pursuing bilateral and/or regional agreements, and most are WTO members. To mention a few, the North American Agreement on Labour Cooperation ('NAALC') was negotiated as a side agreement to the North American Free Trade Agreement (NAFTA)[392] and entered into force on 1 January 1994. It includes references to eleven basic labour principles and highlights the need for Mexico, the US and Canada to improve performance regarding all of these rights and standards. More precisely, the preamble of the NAALC affirms the importance of improving labour and living standards. The Agreement itself requires 'each party [to] promote compliance with and effectively enforce its labour law through appropriate government action' and outlines the diverse areas in which the parties should cooperate to realize those improvements. It does not, though, establish a set of international labour rights and standards and thus refers only to domestic labour law, by requiring parties to ensure that their domestic law provides for high labour standards. Moreover, it requires parties to provide grievance procedures for claimed domestic law violations. The enforcement mechanism is, unfortunately, weak; none of the cases brought to the NAALC tribunal provided for any enforceable obligation for the offending party to reform its practices.

Since the NAFTA, several agreements negotiated by the US have specified labour rights provisions. Most of those US provisions are limited to the commitment of parties to enforce domestic labour law. For instance, the Dominican Republic-Central America Free Trade Agreement ('CAFTA'), which comprises the US, Honduras, Nicaragua, Costa Rica, Guatemala, El Salvador, and the Dominican Republic, does include workers' rights. The core text of this trade agreement embodies labour obligations. Provisions include the commitment of CAFTA countries to providing workers with improved access to procedures protecting their rights. In general, the Agreement also requires all parties to enforce their own domestic labour laws, in line with international standards. They are required to work with the ILO so as to improve existing labour laws and enforcement. However, the ILO core Convention on Discrimination is not included in the agreement. Besides, there is no obligation for countries to include procedural guarantees or sanctions to correct detected breaches.

MERCOSUR is a customs union established in 1991, to which Argentina, Brazil, Paraguay and Uruguay are Members. The four Member Governments signed a Social and Labour Declaration in 1998, which was very far-reaching. Indeed, it goes beyond the core ILO conventions or statements and covers also social dialogue, employment, promotion, unemployment protection, health and safety, and social protection. A Commission is mandated by the Declaration to monitor adherence to the Declaration and to advise on measures to ensure adherence.

[392] NAFTA is a wide-ranging free trade agreement that covers trade in goods and services, intellectual property, investment, government procurement, the free movement of business people, competition, and a dispute settlement mechanism. *See* Section Three - Chapter Three of the Textbook.

The European Union ('EU') is also particularly active in the field: indeed, the European Commission seeks to promote in many ways the link between trade and social development. The EU actually represents one of the earliest and best developed examples of a trade agreement, which began in the 1950s as a coal and steel trade agreement. The EU has grown in size and scope since then, and has essentially become a single market in goods and services with free movement of workers within the EU. When considering trade agreements, the EU 'Social Chapter' specifies fundamental workers' rights that must be respected across the EU. The relevance of social considerations 'within' the EU is reflected as well 'outside', in the EU external action and its agreements with other countries. EU bilateral agreements focus on human rights, development issues, technical cooperation and political dialogue. But most agreements simply contain paragraphs saying that all parties will respect human rights, without explicitly including enforceable labour rights provisions.

Section Eight. VIET NAM AND WTO's ACCESSION COMMITMENTS

1. Negotiation Process of the Accession of Viet Nam to the WTO[393]

Since 1986, in accordance with the reform policy of the Communist Party and Government, Viet Nam has started economic reform and the open-door process, in which the conversion from a centralized planning economy to a socialist-oriented market economy and integration into the world's economy is one of the major goals that Viet Nam has been targeting.[394] Internally, the renovation policy focuses on the restructuring of the economy, and the strengthening of production toward exporting. Externally, Viet Nam has been implementing the diversification and multi-lateralization of international relationships, from which would come the establishment of economic relations with the rest of the world. In order to strengthen international economic relationships, Viet Nam has established and extended relationships with many nations in the world. In 1994, the US withdrew the economic embargo to Viet Nam, an event that marked an important turn in that bilateral economic relation. At the regional level, Viet Nam joined the ASEAN in 1995, the Asia-Europe Meetings ('ASEM') in 1996, and the Asia-Pacific Economic Cooperation ('APEC') in 1998. It may be said that accession to these regional schemes is the essential preparation for Viet Nam to participate in global economic-trade relationships, of which accession to the WTO is one of its targets since it marks the full integration of Viet Nam into the world's economy.

On 4 January 1995, Viet Nam officially submitted its application to join the WTO. The WTO General Council accepted Viet Nam's application and formally established a Viet Nam accession Working Party. Members of this Working Party included Argentina, Australia, Brazil, Brunei, Bulgaria, Cambodia, Canada, Chile, China, Colombia, Croatia, Cuba, Dominican Republic, Egypt, El Salvador, the European Union and member states, Honduras, Hong Kong (China), Iceland, India, Indonesia, Japan, Republic of Korea, Kyrgyz Republic, Malaysia, Mexico, Morocco, Myanmar, New Zealand, Norway, Pakistan, Panama, Paraguay, Philippines, Romania, Singapore, Sri Lanka, Switzerland, Chinese Taipei, Thailand, Turkey, the US, and Uruguay. The Chairman of the Working Party during 1998-2004 was Ambassador Seung Ho (Republic of Korea) then in the period 2004-2006 was Ambassador Eirij Glene (Norway).[395]

In August 1996, Viet Nam finalized its diplomatic memorandum on the foreign trade regulations of Viet Nam and submitted this document to the WTO Secretariat for dissemination to members of the Working Party. This diplomatic memorandum covered not only a general introduction to the economy, macroeconomic policies, and policy planning and implementation basis; it also provided detailed information on policies related to goods trading, service trading and IPRs. After its submission, Viet Nam received 3,516 questions from members of the Working Party[396]. With those questions, Viet Nam realized that it was not possible to join WTO overnight because, to respond to all of the questions raised, it would be essential to have a system of clear and important changes

[393] On the process of the accession of a nation to the WTO, *see* WTO, *Membership, Alliances and Bureaucracy*, available at: http://wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (accessed on 16 December 2011); WTO, *Understanding the World Trade Organization*, available at: http://wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm (consulted on 16 December 2011). *See* also Peter Van den Bossche, *supra*, at 108-112; GS.TS. Nguyen Thi Mo (Chu bien), *Giao trinh Phap luat thuong mai quoc te*, Ha Noi, (2011).

[394] Dang Cong san Viet Nam, *Phuong huong, muc tieu chu yeu phat trien kinh te, xa hoi trong nam nam 1986-1990, Bao cao cua Ban chap hanh Trung uong Dang Cong san Viet Nam tai Dai hoi toan quoc lan thu VI cua Dang,* available at: http://123.30.190.43:8080/tiengviet/tulieuvankien/vankiendang/details.asp?topic=191&subtopic=8&leader_topic=223&id=BT2540630903 (accessed on 17 December 2011).

[395] MUTRAP II, *Vi tri, vai tro va co che hoat dong cua To chuc Thuong mai The gioi trong he thong thuong mai đa phuong*, (2007), at 72.

[396] MUTRAP II, *supra*, at 73.

to Viet Nam's economy. In addition, concerns over politics as well as requests that Viet Nam should provide larger concessions[397] lengthened the negotiation process of Viet Nam's accession to the WTO.

Although the diplomatic memorandum was finalized and submitted to the Working Party in 1996 the Working Party was, until 1998, unable to complete the planning for multilateral meetings, Viet Nam underwent 14 multilateral negotiation sessions with the Working Party. The first session was on 30-31 July 1998 and the final one was on 26 October 2006.[398]

At the fifth session of the Working Party, on 7 January 2002, Vietnam presented the first proposal on opening its door to the goods and service markets; this proposal was then revised and supplemented three times, in 2004, 2005 and 2006. During those revisions, the proposal presented at the eighth session of the Working Party in June 2004 marked an important change during the negotiation process around Viet Nam's accession to the WTO, with the agreement of members of the Working Party. Viet Nam's trade counterparts agreed to draft a report of the Working Party on Viet Nam's accession to the WTO.

In the aspect of bilateral negotiation, initially approximately 40 members of WTO proposed to hold bilateral negotiations with Viet Nam. However, despite diplomatic efforts, the final number of WTO members proposing to have bilateral negotiations decreased to 28, which included the US, the EU (considered a member representing 25 members states at that moment) and China. In 2004, the year when bilateral negotiations began, Vietnam reached agreements with an important counterpart: the EU. The Agreement with China was completed in 2005. The US and Viet Nam underwent a very difficult bilateral negotiation process since the US required stringent commitments, some of which for Viet Nam were 'impossible to implement'. These requirements were a reason why the plan for Viet Nam to join the WTO by the end of 2005 could not succeed, because it was not the intention of Viet Nam 'to join WTO at all costs'.[399]

[397] MUTRAP II, *Viet Nam gia nhap WTO: Giai thich cac dieu kien gia nhap*, Nxb. Lao dong-Xa hoi, Ha Noi, (2008), at 23.

[398] WTO, *Accessions: Viet Nam*, http://wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm (accessed on 18 December 2011).

[399] *Khong gia nhap WTO bang moi gia*, available at: http://www.tienphong.vn/Kinh-Te/27613/%E2%80%9C Khong-gia-nhap-WTO-bang-moi-gia%E2%80%9D.html (consulted on 19 December 2011).

Agreement from bilateral negotiations with the US was achieved only in May 2006. This is also the twenty-eighth bilateral negotiation agreement Viet Nam has achieved. The agreement allowed the US the necessary authority to trade with Viet Nam as a 'permanent normal trade relation' (hereinafter the 'PNTR').[400] Laws governing the PNTR with Viet Nam were voted for approval by the US House of Representatives and Senate on 9 December 2006 and approved by then the US President Bush on 20 December 2006. Giving Viet Nam PNTR on one hand marked the 'complete normalization of bilateral relations Viet Nam -US' and, on the other, paved the way for Viet Nam to implement its commitment to join the WTO.[401]

Completed bilateral negotiation is a critical condition for the completion of the multilateral negotiation process on Viet Nam's accession to the WTO. On 19 October 2006, the Working Party convened its thirteenth session to review and complete its Report. However, a set of documents, including the Report of the Working Party, draft accession protocol and commitment to Viet Nam's accession to the WTO was completed only at the fourteenth session on 26 October 2006.

The negotiation process was finally completed on 7 November 2006, when the General Council convened its special session to review and vote for the accession of Viet Nam to become a member of the WTO. The Accession Protocol was approved by the National Assembly of Viet Nam on 28 November 2006. On 12 December 2006, the WTO received the approved Protocol of Viet Nam. One month later, on 11 January 2007, Viet Nam officially became the 150th member of this Organization; the following day, the rights and obligations of Viet Nam, as a new member of WTO, would start to be implemented.

2. Summary of Commitments of Viet Nam's Accession to the WTO

The approved set of documents on Viet Nam's accession to the WTO consisted of the Report of the Working Party, the Accession Protocol

[400] *Quy che thuong mai binh thuong vinh vien-Permanent Nornal Trade Relations Status-PNTR*, available at: http://world.hlu.edu.vn/index.php?option=com_content&view=article&id=140:quy-ch-thng-mi-binh-thng-vnh-vin-permanent-normal-trade-relations-status-pntr-&catid=55:goc-hc-tp&Itemid=100 (accessed on 19 December 2011).

[401] About the difficulties faced by Viet Nam in the process of accession to WTO, *see* also: Tư Giang, *Dieu thuoc ong Tuyen*, available at: http://vtc.vn/1-8907/kinh-doanh/dieu-thuoc-ong-tuyen.htm (accessed on 19 December 2011).

approved by the National Assembly of Viet Nam, and a committed index on goods and services.[402] This set of documents, about 1,200 pages, represented all commitments of Viet Nam regarding access to the market of goods, services and other related commitments, as summarized below.

A. *Multilateral Commitments*

Viet Nam agreed to follow fully the binding agreements and regulations of WTO from the accession time. However, being a developing country at a low level of development, also during the transition process, WTO agreed for Viet Nam to have a transitional period, pursuant to Viet Nam's request, in order to implement some commitments related to, among other matters, special consumption tax, subsidy for non-agricultural sector, and trading rights. The multilateral commitments are detailed below:

1. Non-Market Economy ('NME')

Viet Nam accepted being regarded as NME for a maximum of 12 years and until no later than 31 December 2018. However, before that date, if Viet Nam were able to prove to any WTO's member that Viet Nam's economy is able completely to follow market mechanisms then that counterpart would stop its application of the 'non-market' mechanism. The 'non-market' mechanism applies in the context of anti-dumping measures.

2. Textiles

- Members of WTO would not apply a quota on textile products from Viet Nam. In the event that Viet Nam violates the WTO's regulations on forbidden subsidies on textiles, some counterparts could apply specific retaliatory measures.
- Members of the WTO will also not apply special self-defence measures on textile products from Viet Nam.

3. Non-Agriculture Subsidy

- To abrogate totally all prohibited subsidies as regulated by the WTO;
- For investment favors on exported goods granted before Viet Nam's WTO accession date, Viet Nam could retain the transitional period of five years (except on textile products).

4. Agriculture Subsidy

- Export subsidy is not applied to agricultural products from the date of Viet Nam's accession. For subsidized products that have to be reduced as regulated by the WTO rules, Viet Nam obtained an agreement to maintain this at the rate of not more than 10 per cent of the 'Total AMS'. Besides, Viet Nam also maintained other subsidies of about 4,000 billion VND annually.
- Maintain rights to be entitled to some special and specific treatment regulations of the WTO to DCs in this area;
- Agricultural-encouraging subsidies and agricultural-supported subsidies allowed by the WTO could be applied by Viet Nam without limitation.

5. Trading Rights (Import-Export Rights)

- To allow foreign enterprises and individuals to have the rights to import and export goods as Vietnamese since the date of accession, except goods belonging to the state-trading list such as petroleum, cigarettes, cigar, CDs, newspapers and other sensitive goods, such as rice and pharmaceutical products, that Viet Nam is allowed to import or export only after a certain transitional period.
- To allow foreign enterprises and individuals without representatives in Viet Nam to register their import-export rights in Viet Nam. Those rights apply only to customs declarations for export-import procedures.
- In any case, foreign enterprises and individuals would not automatically take part in the domestic distribution system. Commitments to trading rights will not affect the rights of Viet Nam in making decisions to administer the distribution service, especially as regards sensitive products, such as pharmaceutical products, petroleum, newspapers, and magazines.

[402] Multilateral Trade Assistance Project (MUTRAP II), *Viet Nam's WTO Commitments*, Hanoi, (2007), also available at: http://www.mutrap.org.vn/en/library/MUTRAP II/Forms/AllItems.aspx (accessed on 19 December 2011).

6. Special Consumption Tax on Alcoholic Drinks and Beer

- Viet Nam would have a transitional period of not more than three years to adjust the special consumption tax on alcoholic drinks and beer to reach concordance with WTO regulations.
- For wine of more than twenty alcoholic degrees, Viet Nam would either apply the specific tax or 'ad valorem' tax. For beer, Viet Nam would apply only '*ad valorem*' tax.

7. State-Owned Enterprise and State-owned Trade Enterprise

- The state will not interfere directly or indirectly with the operation of State-owned businesses.
- As a shareholder, the State has a right to interfere with the operation of State-owned business equally with those of other stakeholders.
- Viet Nam agreed to the understanding that procurements of the State-owned enterprises are not those of the Government.

8. Shareholder Ratio to Pass Decisions at Enterprise

Viet Nam allows parties in joint ventures to agree on the ratio of capital contribution or ratio of shares in passing decisions on the business charter.

9. Importing Limitation Measures

- Viet Nam agreed to the import of high cylinder capacity motorcycles no later than 31 May 2007.
- For cigarettes and cigars, Viet Nam agreed to withdraw the import ban from the date of its accession. However, only some Stated-owned businesses have the right to import entire cigarettes and cigars.
- For used vehicles, Viet Nam allowed the import of used vehicles less than five years of use.

10. Transparency

Viet Nam committed that immediately from the accession date, it would announce and submit draft constitutional documents issued by the National Assembly, the Standing Committee of the National Assembly and the Government for comment. Comments and revisions will be completed within 60 days. Vietnam also committed to publicizing these legal documents.

11. Other General Commitments

As regards the export tariff, Viet Nam commits itself only to reducing export tariff on black and ferrous metal waste according to the existing 'roadmap', but makes no commitment regarding the export tariff on other products.

Viet Nam also discussed other issues, such as IPRs, especially the use of licensed software by governmental agencies; TRIMs; and technical barriers to trade measures. For those contents, Viet Nam committed to implement the WTO rules from the date of its accession.

B. *Commitments on Import Duties*

1. Common Commitments

- Viet Nam agreed to the ceiling on all tariff schedules (10,600 tariff lines).
- The average tariff of all lines would reduce gradually from the current rate of 17.4 per cent to 13.4 per cent in between five and seven years. The average tariff on agricultural products will be reduced from the current rate of 23.5 per cent to 20.9 per cent within the same period. For industrial products, the reduction will be from 16.8 per cent to 12.6 per cent, mainly in the same period (see Table 2.8.1).

Table 2.8.1: Details of average tariff to which Viet Nam committed when joining the WTO

General average and by sector	Current MFN rate (%)	Committed rate when joining WTO (%)	Final bound rate (%)	Reducing rate to current MFN rate (%)	WTO commitment of China	Common tax reduction at Uruguay Round	
						Developed country	Developing country
Agricultural products	23.5	25.2	21.0	10.6	16.7	Decrease 40%	Decrease 30%
Industrial products	16.6	16.1	12.6	23.9	9.6	Decrease 37%	Decrease 24%
Overall	17.4	17.2	13.4	23.0	10.1		

Source: http://vnexpress.net/Vietnam/Kinh-doanh/Duong-vao-WTO/2006/11/3B9 F0224/ (accessed on 17 December 2011).

2. Specific Commitments

- More than one third of tariff lines will be reduced, mainly for items imposed at more than 20 per cent. Critical, sensitive goods to the economy such as agricultural products, cement, steel, construction materials, and vehicles/motorcycles are maintained at the certain level of protection.
- Sectors with the highest level of tariff reduction include textiles, fish and fishery products, woods and papers, other produced goods, machinery, and electric and electronics products.
- Viet Nam committed to reduce tariff according to WTO's plurilateral agreements to zero per cent or low level. Viet Nam participated in the Information Technology Agreement (ITA) which is a plurilateral agreement. Besides, Viet Nam participated partly in other plurilateral agreements concerning the aircraft equipment, chemicals, and construction materials for the period between three and five years.
- Regarding the tariff-rate-quotas, Viet Nam maintained rights of imposing tariff-rate-quotas to sugar, poultry eggs, cigarette leaves and salt (see Table 2.8.2).

Table 2.8.2: Summary of commitments on the reduction of import duties in the WTO for some essential goods groups of Viet Nam

No	Products/Tariff Rate	Commitment to WTO			
		MFN Rate	Tariff Rate when joining WTO	Final Bound Rate	Implementation Period
1.	**Agricultural products**				
	- Beef	20	20	14	5 years
	- Pork	30	30	15	5 years
	- Material milk	20	20	18	2 years
	- Milk products	30	30	25	5 years
	- Processed meat	50	40	22	5 years
	- Confectionery (average tariff)	39.3	34.4	25.3	3 - 5 years
	- Beer	80	65	35	5 years
	- Wine	65	65	45 - 50	5 - 6 years
	- Cigarettes	100	150	135	5 years
	- Cigars	100	150	100	5 years
	- Livestock foods	10	10	7	2 years
2.	**Industrial products**				
	- Petroleum	0 - 10	38.7	38.7	
	- Steel (average tariff)	7.5	17.7	13	5 - 7 years
	- Cement	40	40	32	2 years
	- Chemical fertilizers (average tariff)	0.7	6.5	6.4	2 years
	- Paper (average tariff)	22.3	20.7	15.1	5 years
	- Television	50	40	25	5 years
	- Air conditioners	50	40	25	3 years
	- Washing machine	40	38	25	4 years
	- Textiles (average tariff)	37.3	13.7	13.7	Right when joining WTO (actually being implemented based on the textile agreements with the US and EU)
	- Footwear	50	40	30	5 years
	- Vehicles				
	+ from 2,500 cc upward, petrol	90	90	52	12 years
	+ from 2,500 cc upward, two bridges	90	90	47	10 years
	+ less than 2,500 cc and others	90	100	70	7 years

	- Truck				
	+ Not more than 5 tones	100	80	50	10 years
	+ Other current tariffs 80%	80	100	70	7 years
	+ Other current tariff 60%	60	60	50	5 years
	- Vehicle spare parts	20.9	24.3	20.5	3 - 5 years
	- Motorcycles				
	+ from 800 cc upward	100	100	40	8 years

Source: http://vnexpress.net/Vietnam/Kinh-doanh/Duong-vao-WTO/2006/11/3B9 F0224/ (accessed on 17 December 2011)

C. *Viet Nam's Special Commitments in Services*

In the agreement with WTO, Viet Nam committed eleven service sectors with about 110 sub-sectors, compared to commitment of eight sectors and 65 sub-sectors in the Viet Nam -US Bilateral Trade Agreement ('BTA').

For almost service sectors, including sensitive ones such as insurance, distribution, and tourism, Viet Nam maintained the same commitments as in the BTA. For telecommunication, banking services and securities, in order speedily to finalize the negotiations, Viet Nam took some steps forward, although in general not far from the current status and relevant to the development orientation as approved for those sectors.

The commitment contents of some critical service sectors are shown below:

1. General Commitment for Service Sectors

- Foreign enterprises would not be presented in Viet Nam in the form of branches, except as approved by Viet Nam for each specific service sector; there are relatively few such commitments.
- Foreign companies could be allowed to bring in management staff to work in Viet Nam, but at least 20 per cent of management staff of the companies must be Vietnamese national.
- Foreign companies and individuals are allowed to buy shares in Vietnamese businesses, but these must be related to the level of openness of that sector. For the banking service, Viet Nam would allow foreign banks to buy only a maximum of 30 per cent of the charter capital of Vietnamese banks.

2. Specific Commitments to Certain Service Sectors

(a) Petroleum exploitation and support services:

- Foreign businesses are allowed to establish business of 100 per cent foreign capital after five years since accession to provide petroleum exploitation support services. Companies entering Viet Nam to provide petroleum exploitation support services must be registered with the authorities.
- Viet Nam maintains administration rights to activities on the sea and its continental shelf, and the right to the nomination of companies in the exploration and exploitation of natural resources. Viet Nam also maintains a list of services reserved for Vietnamese businesses, such as flight services and services of equipment and product provision for offshore exploitation systems.

(b) Telecommunications services

- Viet Nam would allow joint stock companies with major foreign capital to provide telecommunications services without network infrastructure, i.e., they must hire networks administered by Vietnamese businesses.
- For telecommunications services connected to a network infrastructure: only businesses with a majority of capital belonging to the state could invest in infrastructure; foreign businesses could have financial interests only up to 49 per cent, and this applies only to joint-ventures with licensed Vietnamese businesses.

(c) Distribution services

- From 1 January 2009, Viet Nam is allowed to conduct business with 100 per cent of foreign investors.

- The market for the distribution of petroleum, pharmaceutical products, books, newspapers, magazines, CDs, cigarettes, rice, sugar and precious metals will not be opened to foreign businesses.
- After three years from the accession date, Viet Nam will open its doors to some sensitive products, such as steel, cement, and fertilizers.
- The openness of the second and upward retail site of business with 100 per cent foreign capital will be permitted in each specific case.

(d) Insurance services

In general, the commitment level is similar to BTA. However, Viet Nam agreed for the US to establish life insurance branches after five years from the accession date.

(e) Banking services

- To allow establishing subsidiary-bank with 100 per cent foreign capital no later than 1 April 2007.
- A foreign bank could have branches in Viet Nam, but any branch is not allowed to open a sub-branch and must also follow the limitations on the mobilization of funds from Vietnamese individuals within five years from the date where Viet Nam joined the WTO.
- The foreign party will buy only a maximum of 30 per cent of the charter capital of Vietnamese banks.

(f) Stock services

Five years from joining the WTO, Viet Nam will allow stock companies with 100 per cent foreign capital to be established.

(g) Other commitments

For remaining sectors such as tourism, education, legal, accounting, construction, and transportation, the basic commitment levels are no different from those of BTA. In addition, Viet Nam will not open the printing/publication services market.

3. Viet Nam's WTO Commitments after 10 Years of Accession

A. *Implementation by Viet Nam of its WTO commitments*

By the end of August 2017, Viet Nam has not yet been sued by any WTO Member. This does not mean that Viet Nam has fulfilled all its commitments. In fact, in 2013, the WTO's Trade Policy Review Body undertook a first review of Viet Nam's trade policy. The results showed that this Member essentially complied with its commitments. However, WTO as well as some WTO Members raised concerns about its implementation of commitments that Viet Nam should care to avoid the risk of lawsuits.

1. Viet Nam's Compliance with Its WTO Commitments

According to the report prepared by the WTO Secretariat for the first trade policy review of Viet Nam,[403] the implementation of Viet Nam's commitments was described as follows:

- Tariff reduction: After its accession, Viet Nam bound the entire tariff schedule, whereby, the simple average MFN tariff has reduced significantly, from 18.5% in 2007 to 10.4% in 2013.404
- Quotas: in accordance with its commitments, Viet Nam imposed tariff rate quotas on imports of eggs, sugar, tobacco (including unmanufactured tobacco and tobacco refuse) and salt.405
- Some domestic taxes: A special consumption tax is generally applied, regardless of imported or domestically manufactured goods, for certain types of goods, such as cigarettes, alcoholic beverages, motor vehicles, motor cycles, golf and gambling services.406 At the same time, Viet Nam has enacted the Law on Environmental Protection Tax,

403 Trade Policy Review Body, *Trade Policy Review - Report by the Secretariat - Viet Nam,* revision, 4 November 2013, WT/TPR/S/287/Rev.1.

404 *Ibid.,* para. 11.

405 Circular N° 188/2009/TT-BTC of the Ministry of Finance dated 29 September 2009 on the promulgation of the list of goods and import tariffs for the application of tariff quotas; and Circular N° 111/2012/TT-BTC of the Ministry of Finance dated 18 August 2012 on the promulgation of the list of goods and imports tariffs for the application of tariff quotas.

406 *Op. cit.,* WT/TPR/S/287/Rev.1, para. 12.

leading to the environmental protection tax being collected for five commodity groups.[407]

- Non-tariff measures: Viet Nam bans imports of goods deemed to have a negative impact on human health and safety or for reason of national security. Since 2008, Viet Nam has applied automatic import licensing system for many different kinds of goods. Viet Nam also regulates the importation of certain items such as wine, cosmetics and mobile phones that can only be made through three seaports. By the end of 2012, Viet Nam has about 6800 national standards, of which about 40 per cent have been harmonized with international, regional or foreign standards. This number is added to about 813 new standards promulgated in 2013. In relating to SPS measures, Viet Nam's SPS measures are assessed to be compatible with standards adopted by the World Organization for Animal Health, Codex Alimentarius, or mentioned in the International Convention for the Protection of Plants …[408]

- Protection of IPRs: This trade topic has received a great attention from Viet Nam who enacted many legal documents on intellectual property and protection of IPRs. The Council for Trade-Related Aspects of Intellectual Property Rights has carried out a review and evaluation of the Vietnamese legal system on intellectual property in 2008. On this occasion, many WTO Members raised questions and Viet Nam had the opportunity to respond and affirm the compatibility of its domestic law with different provisions of TRIPS.[409]

In addition to these issues, the Secretariat's Report also indicated and analyzed Viet Nam's trade policy in other specific areas. It showed that Viet Nam has made great efforts in opening up its economy and in complying with its WTO commitments.

[407] According to the Article 3 of Law on Environmental Protection Act of 2010, these five commodity groups include: i) gasoline, oil, grease; ii) coal; iii) hydrogen-chlorofluorocarbon liquid (HCFC); iv) Taxable-plastic bag; and v) some types of chemical products affecting environment (including herbicide, pesticide, forest product and warehouse disinfectant which are restricted from use).

[408] *Op. cit.*, WT/TPR/S/287/Rev.1, para. 13-23.

[409] Council for Trade-Related Aspects of Intellectual Property Rights, *Review of Legislation – Viet Nam,* IP/Q/VNM/1, IP/Q2/VNM/1, IP/Q3/VNM/1, IP/Q4/VNM/1, 7 September 2010.

2. Some Concerns about the Implementation of Viet Nam's WTO Commitments

The Report by the Secretariat and minutes of the Trade Policy Review Body meeting[410] mentioned, however, that the WTO as such as many WTO Members raised concerns relating the promulgation and the implementation of a certain number of Viet Nam's trade-related policies and regulations.

On the WTO side, the report pointed out that since Viet Nam's accession to the WTO, Viet Nam has not yet fulfilled its notification obligations in a number of areas, such as subsidies in the agricultural sector, subsidies for the industrial sector; State trade; import license.[411] In relating to the special consumption tax, the difference in determining the taxable price between imported and domestically manufactured goods can create advantages for domestic producers.[412] Counterfeit goods, copyrights infringement or theft of signals transmitted via cable or satellite systems still exist[413]…

On the WTO Members side, Switzerland said that Swiss pharmaceutical companies have faced many barriers to the supply of medicines and medical devices in Viet Nam, as additional obligations imposed by Viet Nam for the import of finished products by foreign-owned pharmaceutical companies, therefore, restricting its imports trading rights; delays in the renewal of market authorization registrations; not recognition of clinical trials for New Chemical Entity registration already conducted under international standards.[414] The United Nations pointed out that, after nearly seven years as a WTO Member, Viet Nam has not yet notified the WTO of import licensing procedures under the Agreement on Import Licensing. At the same time, according to the US, the application of HS codes is sometimes inconsistent: the identical goods are subject to different classification and to different tariff duties, this, therefore, creating a discrimination on imported goods.[415] Republic of Korea raised three main concerns: i) the Government of Viet Nam conducts domestic subsidies for manufacturing activities in the form of tax and non-tax incentives, or through procurement activities; ii) status

[410] Trade Policy Review Body, *Trade Policy Review - Viet Nam - Minutes of the Meeting,* 17 and 19 September 2013, WT/TPR/M/287.

[411] *Op. cit.,* WT/TPR/S/287/Rev.1, para. 9.

[412] *Op. cit.,* WT/TPR/S/287/Rev.1, para. 12.

[413] *Op. cit.,* para. 23.

[414] *Op. cit.,* WT/TPR/M/287, para. 4.14.

[415] *Op. cit.,* WT/TPR/M/287, para. 4.35-4.38.

of state-owned enterprises; and iii) protection of IPRs.[416] Indonesia continued to show that Viet Nam has refused to import many Indonesian agricultural products after adopting some new regulations on plant-based food safety measures in 2011, while not offering a sufficient transition period for its enterprises to adapt to these new regulations.[417] Furthermore, this Member was also concerned about the prolonged process and registration procedures applied by Viet Nam for import of its pharmaceutical products, leading to increased costs and time for its companies.[418]

These findings show that in addition to acknowledging the results achieved in the promulgation and implementation of trade policies and regulations of Viet Nam, the WTO and its Members have identified a number of concerns about Viet Nam's implementation of WTO commitments. In other words, the WTO and WTO Members have closely monitored this process. They are also free to take legal action under the DSM as necessary to protect their commercial interests.

B. *Expansion of Viet Nam's WTO Commitments*

After 10 years of joining the WTO, Viet Nam expanded its commitments by approving the Trade Facilitation Agreement (TFA) and is considering to accede to the Government Procurement Agreement (GPA).

1. Viet Nam's Commitments in the Context of TFA

Over more than 50 official negotiating sessions, together with hundreds of meetings and reunions of discussion and group works,[419] the TFA was officially adopted by the Members at the Bali Minister Conference in December 2013.[420] By December 2014, the WTO Members continued to adopt the Protocol amending the Marrakesh Agreement[421] for the

416 *Op. cit.*, WT/TPR/M/287, para. 4.66.

417 *Op. cit.*, WT/TPR/M/287, para. 4.75.

418 *Op. cit.*, WT/TPR/M/287, para. 4.76.

419 Centre du commerce international, *Accord de facilitation des échanges de l'OMC: Guide du commerce pour les pays en développement,* 2013, pp. 1-6, http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/C-UsersadeagboDesktopFACILITATIONFRENCHWTO%20T%20(1).pdf (accessed on 15 September 2016); Stephen Creskoff, 'The WTO Trade Facilitation Negotiations - It's Time to Agree on Basic Principles', *Global Trade and Customs Journal,* 2008, vol. 3, nº. 5, pp. 149-162.

420 See the content of TFA at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed on 01 September 2016). Habib Gherari, 'L'accord de l'OMC sur la facilitation des échanges', *Journal du droit international (Clunet),* 2015, Nº. 3, pp. 845-857.

421 WTO, General Council, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization,* 28 November 2014, WT/L/940.

inclusion of TFA in Annex 1A on multilateral trade agreements regulating the trade in goods (2014 Protocol). This means that, after entering into force, the TFA will become a binding agreement for all WTO Members who have completed domestic approval procedures.[422] The main content of this agreement cover a wide range of customs matters to promote and facilitate the movement, clearance and release of export and import goods or goods in transit, as well as appropriate measures relating to the customs cooperation and technical assistance. The implementation of the agreement promises to create a new impetus for international trade in goods, thus benefiting all WTO Members.[423]

Viet Nam has been involved in WTO's trade facilitation negotiations since 2008. After the TFA' adoption, on 26 November 2015, the National Assembly of Viet Nam adopted the Resolution Nº. 108/2015/QH13 ratifying the 2014 Protocol. As a result, Viet Nam became the 54th Member to approve the TFA. In terms of politics and foreign affairs, the approval of TFA is in line with the policies of the Party and Vietnamese Government about the active integration in the international economy. It confirms Viet Nam's efforts in strengthening international cooperation and contributes to enhance its position in the region and in the world. At the same time, this also demonstrates Viet Nam's endeavour to improve the business and investment environment, thereby, to enhancing the competitiveness of its economy in general and of enterprises in particular.[424]

As a developing country Member, Viet Nam is not obligated to enforce all provisions from Article 1 to Article 12 of TFA. In accordance with the Article 14.1 of this Agreement, Viet Nam has selected and classified these provisions into three specific categories:

a. Provisions classified into the category A

According to Article 14.1 of TFA,

422 The Word Trade Organization, 'World Trade Report 2015', 2015, p. 33, see at: https://www.wto.org/english/res_e/booksp_e/world_trade_report15_e.pdf (accessed on 06 September 2016).

423 Gary Hufbauer & Jeffrey Schott, *Payoff from the World Trade Agenda 2013,* Peterson Institute for International Economics, Report to the ICC Research Foundation, April 2013, pp. 11-16, see at: https://piie.com/publications/papers/hufbauerschott20130422.pdf (accessed on 10 September 2016).

424 Resolution Nº 19/NQ-CP of Government of 18 March 2014 on major tasks and solutions for improving the business environment and national competitiveness; Resolution Nº. 19/NQ-CP of Government of 12 March 2014 on main tasks, measures for innovation of business environment, improve the national competitiveness in 2015 and 2016.

'category A contains provisions that a developing country Member or a least-developed country Member designates for implementation upon entry into force of this agreement, or in the case of a least-developed country Member within one year after entry into force.

For Viet Nam, TFA provisions designated as category A include (*see table 2.8.3*):

Table 2.8.3: Viet Nam's category A commitments

No	Article	Contents
1	1.3	Enquiry Points
2	1.4	Notification
3	2.1	Opportunity to comment and Information before entry into force
4	2.2	Consultations
5	4.1	Rights to appeal or Review
6	6.1	General disciplines on fees and charges imposed on or in connection with importation and exportation
7	6.2	Specific disciplines on fees and charges imposed on or in connection with importation and exportation
8	7.8	Expedited shipments
9	9	Movement of goods under Customs control intended for Import
10	10.1	Formalities and Documentation Requirements
11	10.2	Acceptance of copies
12	10.6	Use of Customs brokers
13	10.7	Common border procedures and Uniform documentation requirement
14	11.1-3	Transit charges, regulations, and Formalities
15	11.4	Transit Strengthened non-discrimination

Source: WTO - Preparatory Committee on Trade Facilitation, Notification of category A commitments under the Agreement on Trade Facilitation, Communication from Viet Nam, 31 July 2014, WT/PCTF/N/VNM/1, tr. 1-2.

From the above table, it can be seen that the category A commitments of Viet Nam only cover about 15 measures as defined in the TFA. The number of these commitments is smaller than those of many other WTO Members, including some ASEAN Members. However, as it is a new agreement, such a classification reflects the government's caution to ensure that Viet Nam can best fulfil its obligations engaged in this sector.[425]

b. Categories B & C commitments

In addition to the commitments under category A mentioned above, the remaining provisions of TFA will be classified in two categories B & C. Currently, Viet Nam has not notified the WTO of its classification for these categories.

2. Viet Nam - Observer Status of the GPA

The GPA is one of some WTO plurilateral agreements. Originated from the Tokyo Round, the GPA was negotiated in parallel with other agreements in the Uruguay Round and was adopted at the end of this Round. Becoming one of the agreements included in Annex 4 of the Marrakesh Agreement, the GPA entered into force on 1 January 1996 and subsequently revised text entered into force on 4 June 2014.[426] So far, it has 47 members and 29 other WTO Members as observers.

In recognition of the GPA's importance to Viet Nam in the process of integrating into the international economy, on 30 November 2012, Viet Nam sent a request to the Government Procurement Committee to participate in the Committee as an observer.[427] The Committee accepted this request and accorded to Viet Nam observer status on 5 December 2012.[428]

[425] Nguyen Ngoc Ha, 'Thực thi Hiep dinh Tao thuan loi thuong mai cua To chuc Thuong mai the gioi tai Viet Nam', *Tap chi Nha nuoc va Phap luat,* 2017, so 4(348), pp. 50-58.

[426] World Trade Organization, *Government Procurement Agreement - Opening Markets and Promoting Good Governance,* 2015, https://www.wto.org/english/thewto_e/20y_e/gpa_brochure2015_e.pdf *(accessed on 05 August 2017).*

[427] Committee on Government Procurement, *Request for Observer Status - Communication from Viet Nam,* GPA/W/321, 3 December 2012, p. 1.

[428] Committee on Government Procurement, *Minutes of the Formal Meeting of 5 December 2012,* GPA/M/49, 14 January 2013, p. 1.

Participating as an observer to the Committee will give Viet Nam the opportunity to be present in the Committee's meeting, to capture relevant issues and to draw on the lessons learned for the completion and enforcement of its legal framework for public procurement. This is also a necessary step for Viet Nam to decide to accede to the GPA in the future.

Summary of Chapter Two

In international trade law, the rules of the WTO play a vital role because of their coverage and comprehensive nature. The WTO members have continuously negotiated improved rules in various issues of international trade, as seen in its most recent round, the Doha Round. However, its existing disciplines provide fundamental principles constituting the pillars for the multilateral trading system to operate. These also cover major areas of international trade, as discussed in this Chapter, such as trade in goods, trade in services, intellectual property rights and dispute settlement. The issues around environmental protection, human rights and regional trade agreements are posing challenges for the Organization in dealing with the relationship between WTO trade rules and other rules. Together with more than 160 other WTO members, Viet Nam is actively participating in international trade in accordance with the rules laid down in the WTO agreements. The Section on Viet Nam's accession to the WTO in 2007 and its commitments shed a light on the demanding process and its detailed obligations in a wide range of economic activities. This Chapter gives a succinct and clear description of the above-mentioned topics including highly technical subjects such as anti-dumping, subsidies and sanitary and phytosanitary measures. It will serve as a starting point for Vietnamese students from which to study the WTO rules. More readings suggested at the end of the Chapter will be a good accompaniment for them along the path of further exploring the application of specific WTO rules in international trade. Many of those rules have contributed to the development of the WTO jurisprudence, which may easily be accessed on the WTO website on cases and Analytical Index. The system continues to flourish with more accession applications and the essential daily application in international trade of its rules. As a 'player' in this system, Viet Nam needs to be equipped with sufficient human resources capable of mastering the rules of the multilateral trading systems. This Chapter is one of the efforts to meet that need.

QUESTIONS/EXERCISES

1. What sort of entities are eligible to join the WTO?
2. What are the basic principles of the WTO law?
3. Are subsidies absolutely prohibited under the WTO law?
4. Are Articles XX and XXI of the GATT necessary?
5. Why are tariff measures preferred over non-tariff measures in the trade in goods, under the WTO?
6. Why does the WTO need a separate Agreement on Agriculture?
7. How may SPS measures and TBT measures be distinguished?
8. Why are anti-dumping, countervailing and safeguard measures needed? Are they contrary to the WTO's basic principles in terms of the trade liberalization?
9. Why does the WTO not have a comprehensive investment agreement?
10. Is it possible to derogate to MFN according to GATS? Explain the implications of MFN on the scheduling of commitments in services.
11. Why is the TRIPS Agreement regarded as one of the most important pillars of WTO law?
12. Why is it assumed that the TRIPS Agreement is the most comprehensive multilateral agreement on IPRs to date?
13. What are the trade-related aspects of IPRs in the TRIPS Agreement?
14. Do DCs benefit or suffer disadvantages from the TRIPS regime of IPRs protection? Why?
15. What are differences between the WTO and the GATT 1947 dispute settlement systems?
16. What are the opportunities and the challenges of DC members in the WTO dispute settlement system?
17. What are the goals of the WTO agreements?

REQUIRED/SUGGESTED/FURTHER READINGS

1. The WTO Secretariat, *Guide to the Uruguay Round Agreements*, (1999);
2. The WTO Secretariat, *Understanding the World Trade Organization*, (2003);
3. Ministry of Justice, *International Economic Integration - A Training Guidelines for Judicial Agencies*, (2008);
4. Doaa Abdel Motaal, *Overview of the World Trade Organization Agreement on Technical Barriers to Trade*, http://www.wto.org/english/docs_e/legal_ e/ursum_e.htm#gAgreement
5. Aaditya Mattoo *et al.* (eds), *A Handbook of International Trade in Services*, Oxford University Press, (2008);
6. Eric H. Leroux, 'Eleven Years of GATS Case Law: What Have We Learned?', *Journal of International Economic Law* 10(4), (2007);
7. Abbott, Frederik M., *Parallel Importation: Economic and Social Welfare Dimensions*, the International Institute of Sustainable Development, (2007), http://www.iisd.org/pdf/2007/parallel_importation.pdf
8. Daniel C. K. Chow and Edward Lee, *International Intellectual Property: Problems, Cases, and Materials*, Thomson West, (2006);
9. Christopher Heath, *Parallel Imports and International Trade,* www.wipo. int/edocs/mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf
10. Heinemann, 'Antitrust Law of Intellectual Property in the TRIPS Agreement of the World Trade Organization', in Beier, Schricker (ed.), *From GATT to TRIPS*, Weinheim, (1996);
11. Keith E. Maskus, *IPRs in the Global Economy,* Institute for International Economics, Washington, DC (2000);
12. Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge, Cambridge University Press, 2nd edn., (2008);
13. Gabrielle Marceau, 'Trade and Labor', in D. Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law*, Oxford University Press, (2009);
14. Lorand Bartels, 'Trade and Human Rights', in D. Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law*, Oxford University Press, (2009);
15. UNEP/WTO, *Trade and Climate Change*, Geneva, World Trade Organization, (2009);
16. Erich Vranes, *Trade and Environment, Fundamental Issues in International Law, WTO Law and Legal Theory*, Oxford University Press, (2009);
17. Surya P. Subedi, *International Economic Law*, University of London Press, London, (2006);
18. Surya P. Subedi, 'WTO Dispute Settlement Mechanism as A New Technique for Settling Disputes in International Law', in Duncan French *et al.* (eds.), *International Law and Dispute Settlement: New Problems and Techniques*, Hart Publishing, Oxford, (2010);
19. Surya P. Subedi, 'The Challenge of Managing the Second Agricultural Revolution through International Law: Liberalization of Trade in Agriculture and Sustainable Development', in Nico Schrijver and Friedl Weiss (ed.), *International Law and Sustainable Development: Principles and Practice*, Martinus Nijhoff, The Hague, (2004);
20. Surya P. Subedi, 'Sustainable Development Perspectives in International Economic Law', in Asif H. Qureshi (ed.), *Perspectives in International Economic Law*, Kluwer International Law, The Hague, (2002).

USEFUL WEBSITES

WTO, http://www.wto.org

WIPO, http://www.wipo.int

EU-MUTRAP, http://www.mutrap.org.vn

CHAPTER THREE. RULES ON THE REGIONAL ECONOMIC INTEGRATION

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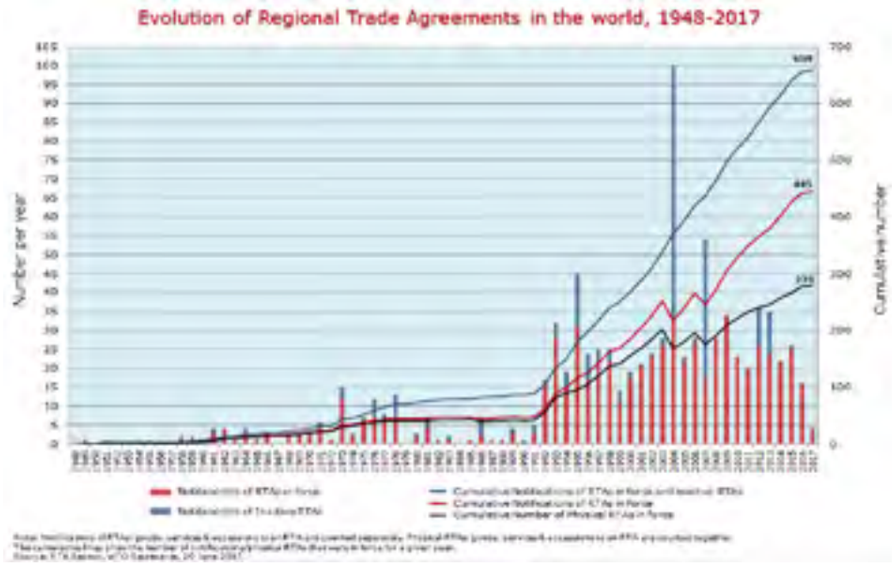
RULES ON THE REGIONAL ECONOMIC INTEGRATION

Section One. INTRODUCTION

Regionalism is usually described as actions by governments to liberalize or facilitate trade on a regional basis, sometimes through free trade areas (hereinafter the 'FTAs') or customs unions (hereinafter the 'CUs') or preferential trade arrangements (hereinafter the 'PTAs').

Since the 1990s, the number of regional trade agreements (hereinafter the 'RTAs') has expanded, and the pace of concluding RTAs has quickened. As of 18 December 2017, 455 RTAs have been notified to the GATT/WTO. Of these, 255 RTAs were notified under Article XXIV of the GATT; 49 RTAs under the 'Enabling Clause'; and 151 RTAs under Article V of the GATS.[1] As of 30 December 2016, 32 PTAs have been notified and in force to the GATT/WTO.[2]

The following Chart shows all RTAs notified to the GATT/WTO (1948-2017), including inactive RTAs, by year of entry into force.



Source: WTO Secretariat, https://www.wto.org/english/tratop_e/region_e/regfac_e.htm, (accessed on 21 December 2017).

[1] WTO, http://rtais.wto.org/UI/publicsummarytable.aspx (accessed on 21 December 2017).

[2] WTO, http://ptadb.wto.org/ptaList.aspx (accessed on 21 December 2017).

Examples of RTAs among the best known are the European Union ('EU'), European Free Trade Association ('EFTA'), North American Free Trade Agreement ('NAFTA'), Southern Common Market ('MERCOSUR'), ASEAN Free Trade Area ('AFTA'), and Common Market of Eastern and Southern Africa ('COMESA').[3]

1. WTO's Rules on the Regional Economic Integration - Exception of the WTO Rules[4]

The key characteristic of RTAs is that the parties to such agreements offer each other more favourable treatment in trade than they offer other trading partners. Such discriminatory treatment is inconsistent with the MFN treatment obligation, one of the basic principles of the WTO law. However, such discrimination is permissible under the WTO rules including mainly Article XXIV of the GATT, Article V of the GATS, the 'Enabling Clause' and other rules following which FTAs or CUs would be established under certain conditions. WTO cases are also significant within the framework of the WTO's rules on this matter, especially the case *Turkey-Restriction on Imports of Textiles and Other Clothing Products* [1999][5] and the case *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* [2002].[6] These rules above are set out for 'regional integration exceptions' of the basic MFN principle.

A. *The Legal Ground of the RTAs*

WTO members are allowed to enter into a RTA under specific conditions, which are set out in following rules:

- Article XXIV of the GATT (paragraphs from 4 to 10) and related rules provide for the creation and operation of FTAs and CUs covering trade in goods;
- The 1979 Decision on differential and more favourable treatment, reciprocity and fuller participation of developing

[3] WTO, http://www.wto.org

[4] WTO, http://www.wto.org

[5] WTO, Appellate Body Report, *Turkey-Restriction on Imports of Textiles and Other Clothing Products* [1999], WT/DS34/AB/R, adopted 19 November 1999, http://www.wto.org.

[6] WTO, Panel Report, *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* [2002], WT/DS202/R, adopted 8 March 2002, http://www.wto.org.

countries, so-called 'Enabling Clause', refers to preferential trade arrangements (hereinafter the 'PTAs') in trade in goods between DCs members;

- Article V of the GATS governs the conclusion of RTAs in the area of trade in services, for both developed and developing countries; and the Article Vbis of the GATS provides for economic integration agreements in services; and
- The related WTO cases, especially the case *Turkey-Restriction on Imports of Textiles and Other Clothing Products* [1999] and the case *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, [2002].

1. Article XXIV of the GATT and Related Rules

The original Article XXIV of the GATT, complemented by an 'Additional Article XXIV', was updated in 1994 with the Uruguay Round Understanding on Article XXIV of the GATT.

According to Article XXIV of the GATT, in the case where a FTA or CU is created, duties and other trade barriers should be reduced or removed on substantially all sectors of trade in the FTA or CU.

Article XXIV(5) of the GATT provides a conditional and limited exception as follows: '[T]he provision of this Agreement shall not prevent … [t]he formation of a customs union or of a free trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area'.

This is so provided that external duties and other regulation of commerce are not 'on the whole … [h]igher or more restrictive than the general incidence prior to the formation of that FTA or CU'. This is the 'external' requirement.

In addition, the availability of the exception (Article XXIV of the GATT) depends on the existence of a FTA or CU, or an interim agreement. If, following Article XXIV of the GATT, the definition of the FTA and CU are also restrictive, then this imposes an 'internal' requirement. This, contained in Article XXIV(8)(a) of the GATT, requires that duties and other restrictive regulations of commerce are eliminated with respect to substantially all trade. The 'internal' and 'external' requirements mentioned above include a number of difficult interpretative issues.[7]

[7] Joel P. Trachtman, 'Chapter on International Trade: Regionalism', *Handbook of International Economic Law*, (2006). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885660.

Besides, the Uruguay Round Understanding on Article XXIV of the GATT provides some clarifications and some additional requirements with respect to RTAs.

2. Article V of the GATS

Article V of the GATS plays a role in GATS parallel to that of Article XXIV of the GATT, yet differs from this. Article V of the GATS provides for economic integration agreements in services. Paragraph 1 of this Article set out: … [T]his Agreement shall not prevent any of its members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement.

Besides, Article Vbis of the GATS regulates labour markets integration agreements.

3. The 'Enabling Clause'

'The 1979 Decision on differential and more favourable treatment, reciprocity and fuller participation of developing countries' or 'Decision of 28 November 1979 (L/4903)', or so-called 'Enabling Clause' allows DCs to enter into regional or global agreements that include the reduction or elimination of tariffs and NTBs on trade among themselves. This allows derogations to the MFN principle in favour of DCs.

The 1979 'Enabling Clause', which became a part of the WTO law pursuant to the Annex 1A of the Marrakesh Agreement, provides exceptions from MFN obligation in two ways. *Firstly*, it allows contracting parties to offer non-reciprocal preferential treatment to imports from DCs. *Secondly*, it allows the establishment of RTAs among LDCs.

4. The WTO Cases

In the case *Turkey-Restriction on Imports of Textiles and Other Clothing Products* [1999], India argued that Turkey's introduction of quantitative restrictions on 19 of its textile and clothing products was 'not necessary' to comply with the terms of Turkey-EC Association Council adopted Decision 1/952 (1995), which sets out the rules for implementing the final phase of the CU between Turkey and the European Communities and includes a provision that Turkey applies 'substantially the same commercial policy as the [European] Communities in the textile sector including the agreements or arrangements on trade in textile and clothing'. Turkey countered by arguing that because its quotas on textile and clothing were taken pursuant to a CU, the measures were justified

under Article XXIV of the GATT. In this case, the Appellate Body examined the relationship between Article XXIV and other GATT's provisions. In particular, the question arose whether Article XXIV of the GATT applied to provide an exception only to the MFN principle, or whether it provides an exception to other requirements of the GATT.[8]

In *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* [2002], Korea claimed that by excluding Mexico and Canada from the line pipe safeguard measure in the form of a tariff quota, the US violated the MFN principle set out in Articles I, XIII(1), and XIX of the GATT, and Article 2.2 of the Safeguard Agreement. The US countered by arguing that its differing treatment of Mexican and Canadian imports (both members of the NAFTA) was justified under the 'limited exception' of Article XXIV of the GATT.[9]

B. Why Are the Rules on RTAs Included in the WTO Law?[10]

There are various explanations why the rules on RTAs are included in the WTO law. Some of them are as follows:

Firstly, RTAs can often support the WTO's multilateral trading system. RTAs have allowed groups of countries to negotiate rules and commitments that go beyond the WTO's commitments.

Secondly, some of these rules have paved the way for agreement in the WTO. Services, intellectual property, environmental standards, investment, and competition policies are all issues that were raised in RTAs negotiations and later developed into agreements of discussion within the framework of the WTO.

Thirdly, the WTO agreements recognize that RTAs and closer economic integration can benefit countries. Normally, the setting up a FTA or CU would be inconsistent with the WTO's principle of equal treatment for all trading partners (the MFN principle). However, Article XXIV GATT allows RTAs to be set up as an exception, provided certain strict criteria are met.

Fourthly, RTAs should help trade flow more freely among the countries in the group without barriers, i.e., should complement the global trading system and not threaten it.

C. Economic Reasons of the RTAs

It is argued that trade liberalization will occur more quickly if it is pursued within regional trading blocs. Although the economic motives play a decisive role in the creation of a RTA, the economic interests are not evaluated the same. For the DCs, the need for expanding export markets is usually the main motive of the decision to negotiate RTAs, particularly in the case of a FTA of which members are important export markets. For the developed countries, such as Japan, the EU, and the US, the economic interests generated from RTAs are usually seen in the wider context. Through FTAs, the developed countries will be able to push the 'economic border' beyond the traditional customs border. The difference of interests between parties themselves is the reason why the FTA's negotiations between DCs and developed countries sometimes become difficult.

D. Political Reasons of the RTAs

Some of the political reasons for RTAs are as follows:

- In the case of European integration, through economic integration, the EU's member states sought to create and were successful in creating 'an ever closer union' among the peoples of Europe to avoid the recurrence of war.
- RTAs can reinforce the participation of their member countries in the WTO, particularly in the case of the DCs, such as the case of Viet Nam's accession to the WTO.
- Through RTAs, a member country can maintain its competition capacity and its influences over trading partners. The recent creations of FTAs between China, Japan, South Korea, Australia, India and ASEAN, the ASEAN-EU FTA, and the Trans-Pacific Partnership Agreement ('TPP') are good examples of this political motivation.
- RTAs often also force change to several areas not fully covered by the WTO's agreements, such as trade and the environment, labour and investment.

[8] Joel P. Trachtman, *Handbook of International Economic Law*, 'Chapter on International Trade: Regionalism', (2006). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885660

[9] WTO, Panel Report, *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, http://www.wto.org.

[10] WTO, http://www.wto.org

2. Regional Economic Integration - Traditional Concept and Evolution

A. *Traditional Levels of Regional Economic Integration*

The first evidence of regional economic integration dated back to the early sixteenth century. Then, a group of cities in the Northern Europe created the Hanseatic League, aimed at the protection of their commercial interests on the basis of the principle of reciprocity.

Since its creation in 1957, the EEC has been a leading example of regionalism. Following the European view on regional economic integration since 1957, the *first step* of the process of such integration begun with a FTA, in which tariffs and NTBs are abolished for imports from within the area, but each member maintains its own external trade barriers. The traditional FTA is

> [A] group of two or more countries that have eliminated tariff and most non-tariff barriers affecting trade among themselves, while each participating country applies its own independent schedule of tariffs to imports from country that are not members.[11]

Article XXIV of the GATT mentioned above set out the meaning of a FTA in the GATT and specifies the applicability of other GATT provisions to FTAs.

The *second step* is to a CU, which is a FTA 'plus' a common external tariff. The *third step* is to a 'common market' (hereinafter the 'CM') including the free movement of capital and labour. A CM may include further coordination of external commercial policy. The *fourth step* is to an 'economic and monetary union' (hereinafter the 'EMU') including the free movement of all economic factors, such as goods, services, labour and capital. Besides, EMU aims at the unification of monetary, fiscal, social policies (*see* Section Two - Chapter Three of the Textbook).

B. *Evolution of Regional Economic Integration Models*

The coverage and depth of preferential treatment varies from one RTA to another. Modern RTAs, and not exclusively those linking the most developed economies, tend to go far beyond tariff-cutting exercises. They provide for increasingly complex regulations governing intra-trade (with respect to, *e.g.*, standards, safeguard provisions, and customs administration) and they often also provide for a preferential regulatory framework for mutual services trade. The most sophisticated RTAs go beyond traditional trade policy mechanisms, to include regional rules on investment, competition, environment and labour. The RTAs is now geographically expanding, with trans-continental agreements spreading forcefully alongside intra-regional agreements. RTAs may be agreements concluded between countries not necessarily belonging to the same geographical region, *for example*, the US-Singapore FTA. Therefore, Joel P. Trachtman suggested that 'the more accurate term … [w]ould be "sub-multilateral integration" or "preferential trade agreement".[12]

The tendency towards FTAs is not a new phenomenon. However, their formation has been accelerating phenomenon since the 1990s.

Before, the 'traditional' FTAs were frequently created between states having certain similarities in their political regime, development level, geographical area, or market structure. These FTAs were called 'North-North' FTAs (such as the former EEC) or 'South-South' FTAs (such as the AFTA and MERCOSUR). Recently, FTAs have more flexibly created and accepted the differences of the geography and political views between member countries, especially where they involve the 'emerging economies' (such as China, India, Russia Federation, and Brazil).

Besides the EU, the NAFTA is another typical example of regional economic integration. NAFTA is a FTA including free movement of goods, services, labour, capital and close cooperation on IPR issue (*see* Section Three - Chapter Three of the Textbook).

Section Two. EU INTERNAL MARKET REGULATIONS[13]

With the accession of Croatia on 1 July 2013, the European Union ('EU'), has 28 member States and 24 official languages. 'Brexit' (i.e. the exit of the United Kingdom from the EU) notwithstanding, the U.K. is still (for the time being)[14] a member State. The EU has created a new legal order, which resembles neither traditional international law, nor the national law of a Federation. It is supra-national law. The EU exists with its motto 'United in diversity'. The 'Europe Day' is 9 May.

[11] Ralph H. Folsom *et al., 2003 Documents Supplement to International Business Transactions - A Problem-Oriented Coursebook*, American Casebook Series, Thomson West, 6th edn., (2003), at 9.

[12] Joel P. Trachtman, *supra.*

[13] EU, http://europa.eu

[14] As of July 2017.

Trading partners of the EU member States, as well as enterprises doing business with enterprises of the EU member States, should understand the EU law in general and EU regulations on both internal and external trades done by the EU member States.

1. EU Law and External Trade Relations - Overview

A. *EU Law - Overview*

1. Evolution of the EU

(a) Ideas and founding members of the EU

The EU was created after the end of the World War II. The first steps for its creation were taken to foster economic cooperation with the philosophy according to which countries that trade with one another are economically interdependent and thus preventing conflict. The founding fathers of this idea were Winston Churchill, Konrad Adenauer, Alcide De Gasperi, Robert Schuman, and Jean Monnet.

(b) EU enlargement: EU enlarged from six to twenty-eight countries.

- In 1951, the European Coal and Steel Community ('ECSC') was established by six foundation Members - France, Germany, Belgium, Netherlands, Luxembourg, and Italy.
- The first enlargement took place in 1973: three new Members joined - Denmark, Ireland, and the UK.
- The second enlargement took place in 1981, adding one new Member - Greece.
- The third enlargement took place in 1986, adding two Members - Spain and Portugal.
- The fourth enlargement took place in 1995, adding three Members - Austria, Finland and Sweden.
- The fifth enlargement took place in 2004, adding ten Members - Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.
- The sixth enlargement took place in 2007, adding two Members - Bulgaria and Romania.
- The seventh enlargement took place in 2013, adding one member - Croatia.

Besides, candidate countries are now Former Yugoslav Republic of Macedonia, Turkey, Iceland, and Montenegro.

(c) Criteria set for a country to join the EU

- Democracy and rule of law;
- Functioning market economy; and
- Ability to implement EU laws.

The road to achieving a Single European Market was not smooth and flat. Beside the relative differences of politics and culture, the different economic levels of member states created certain barriers to the regional integration.

2. EU Institutions

(a) The European Council

The European Council is the Summit of the heads of state and government of all EU countries. It is the major body of the EU, including the governments of 28 EU countries, yet is not an EU institution. The European Council is held at least four times a year. It sets the overall guidelines for the EU policies, and dealing with 'complex or sensitive issues that cannot be resolved at a lower level of the intergovernmental cooperation.'[15] However, it has no 'legislative' powers.

The European Council decides by consensus, except if the treaties provide otherwise. In some cases, it adopts decisions by unanimity or by qualified majority, depending on what the treaties provide for (Treaty of the European Union, TEU, and Treaty on the Functioning of the European Union, TFEU).

(b) The European Parliament

The European Parliament is directly elected by, and is the voice of, the people of the EU for a term of office of five years. The European Parliament is one of the EU's main law-making institutions, and 'decides

[15] European Union, *European Council*, https://europa.eu/european-union/about-eu/institutions-bodies/european-council_en.

EU laws and budget together with the Council of Ministers,'[16] and supervises all of the EU's work. It may dismiss the European Commission and veto applications for entry.

(c) The Council of Ministers (The Council of the EU) - the voice of the member States.

It is the supreme decision-making body of the EU. Member States are usually represented by foreign affairs ministers or ministers responsible for the subject under discussion. One minister from each EU country participates in the Council of Ministers. The presidency rotates every six months. The Council of Ministers decides the EU law and budget together with the Parliament. It manages the common foreign and security policy.

The Council of Ministers - Number of votes per country (2016)[17]

Germany, France, Italy and the UK	29
Spain and Poland	27
Romania	14
Netherlands	13
Belgium, Czech Republic, Greece, Hungary and Portugal	12
Austria, Bulgaria and Sweden	10
Croatia, Denmark, Ireland, Lithuania, Slovakia and Finland	7
Cyprus, Estonia, Latvia, Luxembourg and Slovenia	4
Malta	3
Total:	**352**

From 2014, a 'double majority' will be required with two types of majority: a majority of countries (at least 15), and a majority at least 65 per cent of the total EU population.

Council of Ministers has following tasks:

i) Passes EU legislation;

ii) Coordinates the broad economic policies of EU member countries;

iii) Concludes agreements between the EU and other countries;

iv) Approves the annual EU budget;

v) Develops the EU's foreign and defence policies;

vi) Coordinates cooperation between courts and police forces of member countries.

(d) The European Commission - Promoting the common interest

The European Commission comprises 28 independent members who have commissioners, one from each EU country. The European Commission is the EU's executive body and has competence to propose new legislation. Concurrently, it is the 'guardian of the treaties.'[18] It ensures treaties are not violated by member States, and that legislation is implemented by them. The European Commission represents the EU on the international stage.

(e) Court of Justice of the European Union

The 'Court of Justice of the EU' is the common judicial institution of the EU and of the European Atomic Energy Community (EURATOM). It consists of: i) the 'Court of Justice'; ii) the 'General Court' (created in 1988); and iii) the 'Civil Service Tribunal' (created in 2004). Their primary task is to examine the legality of the EU measures and ensure the uniform interpretation and application of the EU law.

i) The 'Court of Justice': Before entry into force of the Lisbon Treaty on 1 December 2009, this was known as the 'European Court of Jutice' ('ECJ'). It is composed of 28 Judges (one Judge per EU country) and is helped by eight 'Advocates-general' whose job is to present opinions on the cases brought before the Court. They are appointed for a term of office of six years, which is renewable. The 'Court of Justice' has following tasks: (i) interpretation of the EU law to make sure it is applied in the same way in all EU countries; (ii) settlement of legal disputes between EU governments and EU institutions; besides, individuals, companies or organizations can also bring cases before the 'Court of Justice', if their rights have been infringed by an EU institution.

ii) The 'General Court': Before entry into force of the Lisbon

[16] European Union, *The European Parliament - Voice of the People*, https://europa.eu/european-union/sites/europaeu/files/docs/body/eu_parliament_en.pdf.

[17] European Union, *The Council of the EU*, http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/.

[18] European Union, *Monitoring the Application of EU Law*, http://eur-lex.europa.eu/summary/glossary/community_law_application.html.

Treaty on 1 December 2009, this was known as the 'Court of First Instance' ('CFI'). To help the 'Court of Justice' cope with the large number of cases brought before it, and to offer citizens better legal protection, a 'General Court' created in 1988 ('CFI' at that time) and deals with cases brought forward by individuals, companies and some organizations, and cases relating to competition law. The 'General Court' is made up of at least one Judge from each member state. They are appointed for a term of office of six years, which is renewable. Unlike the 'Court of Justice', the 'General Court' does not have permanent Advocates-general. That task may, in exceptional circumstances, be carried out by a Judge.

iii) The 'Civil Service Tribunal': created in 2004 and rules on disputes between the EU and its staff. It is composed of seven Judges appointed by the Council for a period of six years which may be renewed.

(f) The European Court of Auditors: monitors the EU's financial activities. It includes 28 independent members, one from each EU country. Its task is to check that the EU funds are used properly. It is authorized to audit any person or organization dealing with the EU funds.

(g) The European Economic and Social Committee is an advisory committee, representing the voice of civil society. It represents trade unions, employers, farmers, consumers, etc. and advises on new EU law and policies. It promotes the involvement of civil society in the EU matters.

(h) The Committee of the Regions is also an advisory committee, representing the voice of local government. It represents cities and regions, and advises on new EU law and policies. It promotes the involvement of local government in the EU matters.

(i) The European Central Bank ('ECB') is controlling the monetary policy within the Eurozone, consisting of 17 countries. ECB ensures price stability; controls money supply and decides interest rates, and works independently of governments.

(j) Other institutions of the EU are such as the European Investment Bank, and Agencies.

The European Council (Summit), the Council of Ministers (the Council of the EU) and the Council of Europe should not be confused. The name of all three bodies could be translated as similar into Vietnamese - 'Hoi dong chau Au'. The latter is a non-EU body: the Council of Europe is an international organization founded in 1949 to protect human rights and strengthen democracy throughout Europe. It also seeks to promote European cultural identity and is a key link between Eastern and Western Europe.

3. EU's Standard Decision-Making Procedure

The EU's standard decision-making procedure is known as 'Ordinary Legislative Procedure', following which the European Parliament has to approve the EU legislation together with the European Council. The European Commission drafts and implements the EU legislation.

4. EU Law Structure: Three Pillars

The EU law structure is based on three pillars.

- The first pillar is the law concerning economic and social rights. This is found in the Treaty of the European Communities, signed at Rome in 1957 (hereinafter the 'TEC') and subsequently amended by other Treaties concluded between the member states. The first pillar of the EU law is right 'European Communities Law' ('EC Law'). After entry into force of the Lisbon Treaty on 1 December 2009, the EC law became the EU law.

- The second pillar concerning the EU Common Foreign and Security Policy ('CFSP') was established under the Treaty of the European Union, signed at Maastricht in 1992 (hereinafter the 'TEU').

- The third pillar concerning Police and Judicial Cooperation in Criminal Matters (formerly 'Justice and Home Affairs'), was established under the 'TEU'.

All three pillars constitute the 'European Union Law' (the 'EU Law').

5. Sources of the EU Law

(a) Legislation

The EU legislation is divided into 'primary' and 'secondary' legislation. The treaties (primary legislation) are the basis or ground rules for all EU action. Secondary legislation, which includes regulations, directives, decisions, and others, are derived from the principles and objectives set out in the treaties.

i) Primary legislation (Treaties)

The primary legislation, or treaties, are effectively the 'constitutional law' of the EU. They are created by governments from all EU member states' acting in *consensus*. They lay down objectives, rules for EU institutions, how decisions are made, the relationship between the EU and its member countries, the basic policies of the EU, legislative procedures, and the powers of the EU. A treaty is a binding agreement between EU member countries. Under the treaties, EU institutions may adopt legislation that the member countries then implement.

The main treaties are:[19]

- Treaty establishing the European Coal and Steel Community (ECSC), signed at Paris in 1951, entered into force in 1952. The purpose of this Treaty is to create interdependence in coal and steel so that one country could no longer mobilize its armed forces without others' knowing. The Treaty eliminated the barriers to trade in coal and steel, and established a common coal and steel market. The ECSC Treaty expired in 2002.

[19] European Union, *EU Treaties*, https://europa.eu/european-union/law/treaties_en; the official text of the treaties may be freely accessed via 'Europa' (*see* http://eur-lex.europa.eu). Various paper sources reprint the treaties, including *Encyclopedia of European Union Law: Constitutional Texts* and the annual textbook, *Blackstone's EU Treaties and Legislation*.

- The treaties establishing the European Economic Community (EEC) - known as the 'TEC', and the European Atomic Energy Community ('EURATOM'), signed at Rome in 1957, both entered into force in 1958. The 'TEC' set out the basic principles of the Community, Community's institutions, and created a community law governing agricultural policy, transport policy and competition policy.

- The Single European Act 1986: The purpose of this Act was to reform the institutions in preparation for Portugal's and Spain's memberships at that moment and speed up decision-making in preparation for the single market.

- The Treaty on European Union signed at Maastricht on 29 July 1992, called the 'TEU' or the Maastricht Treaty, entered into force on 1 January 1993. The purpose of the 'TEU' was to prepare for European Monetary Union and introduce elements of a political union, such as citizenship, and a common foreign and internal affairs policy.

- The Treaty of Amsterdam amending the Treaty on European Union, the Treaty establishing the European Community and certain related Acts, signed at Amsterdam on 10 November 1997, entered into force on 1999.

- The Treaty of Nice amending the Treaty on European Union, the Treaty establishing the European Community and certain related Acts, signed at Nice on 10 March 2001, entered into force on 2003.

- The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, entered into force on 1 December 2009.

The Treaty of Lisbon amends the EU's two core treaties - the Treaty on European Union (the 'TEU') and the Treaty establishing the European Community (the 'TEC'). The latter is renamed the Treaty on the Functioning of the European Union (the 'TFEU'). In addition, several Protocols and Declarations are attached to the Treaty. The Treaty expects to make the EU more efficient; more democratic; more transparent; more united on the world stage, and more secure with one voice.

The various annexes and protocols attached to these Treaties are also considered a source of primary legislation.

It notes that the heads of state and government of the EU's member states signed the Treaty establishing a Constitution for Europe in 2004, although have never ratified it.

ii) Secondary legislation

The secondary legislation of the EU sets out how the objectives expressed in the treaties (primary legislation) are to be accomplished. The European Parliament, the European Commission and the Council of Ministers are empowered by the Treaties to legislate on all matters within the EU's competence. These bodies issue secondary legislation, including Regulations, Directives, Decisions, Recommendations, Opinions and Inter-institutional agreements.

A '*Regulation*' issued by the European Commission with the Council's approval is a binding legislative act. It must be applied in its entirety across the EU. 'Regulation' is directly applicable to member States, no needs for national legislation. *For example*, Commission Regulation (EC) No. 2/2009 of 5 January 2009 establishing the standard import values for determining the entry price of certain fruit and vegetables.

A '*Directive*' issued by the European Commission with the Council's approval is a legislative act that sets out a goal that all EU member states must achieve, while allowing member states to decide how to achieve the goal. Member States must legislate to implement directives within a fixed period. One instance is the Working Time Directive, which stipulates that too much overtime work is illegal. The Directive sets out minimum rest periods and a maximum number of working hours, and allows each member state decide how to implement these.

A '*Decision*' issued by the Court of Justice or European Commission, is binding upon those to whom it is addressed, for example, an EU member state or an individual company, and is directly applicable. *For example*, Commission Decision No. 2009/78/EC of 23 January 2009 establishing the Committee of European Securities Regulators.

A '*Recommendation*' is not binding. A recommendation allows EU institutions to make their views and to suggest a line of action without imposing any legal obligation on those to whom it is addressed. For example, Commission Recommendation of 11 February 2009 on the implementation of a nuclear material accountancy and control system by operators of nuclear installations.

An '*Opinion*' is not binding. It may be issued by the main EU institutions (such as the European Commission, the European Council, or the European Parliament), the Committee of the Regions, and the European Economic and Social Committee. *For example*, the Committee of the Regions issued an Opinion on how regions contribute to the EU's energy goals.

(b) The case law of the Court of Justice of the European Union[20]

The case law born from the Court of Justice of the EU, including the 'Court of Justice' and the 'General Court', forms a substantive body of law binding EU institutions and member states, and has importantly contributed to creating the EU legal order. All judgments of the 'Court of Justice' and the 'General Court' are freely available on the *Curia* website, within *Europa*.[21]

The case law is significant for creating the EU fundamental principles. Starting with *Van Gend en Loos v. Nederlanse Administratie der Belastingen* [1963],[22] the 'European Court of Justice' (the 'ECJ'), who is now the 'Court of Justice', introduced the principle of the 'direct effect of community law' in the member states, which now enables European citizens to rely directly on rules of the EU law before their national courts. The *Costa v. ENEL* [1964][23] judgment established the 'supremacy of Community law' over domestic law. In 1991, in *Francovich* [1991] and others, the ECJ developed another EU fundamental concept and principle - the 'liability of a member state to individuals for damage caused to them by a breach of Community law by that State'.

The case law is important for strengthening the rules on the EU Single Market. Since the *Cassis de Dijon* judgment [1979] on the principle of free movement of goods, traders can import into their country any product coming from another country within the EU, provided that it was lawfully manufactured and marketed there and that there is no overriding reason relating to the protection of health or the environment to prevent its importation into the country of consumption. Relating to the principle of free movement of persons, there were some good cases, such as *Kraus* [1993] and *Bosman* [1995]. The ECJ issued some important judgments aiming at ensuring the freedom to provide services and equal treatment

[20] EU, http://curia.europa.eu

[21] EU, http://curia.europa.eu

[22] ECJ, it is now the Court of Justice, Case 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen*.

[23] ECJ, it is now the Court of Justice, Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585, 593.

and social rights. In the case *Defrenne v. Sabena* [1976],[24] an air hostess (her name is Defrenne) brought an action against her employer (Belgian Sabena Airline) on the grounds of discrimination in the payment compared with her male colleagues who did the same work. In the case *BECTU* [2001], the ECJ held that the right to paid annual leave is a social right directly conferred on every worker by Community law. This case generated from the fact that in 1999, BECTU, a British trade union, challenged the UK legislation which denied that right to workers on short-term contracts on the ground that it was incompatible with a Community Directive on the organization of working time.

The case law of 'General Court' has developed in particular in the fields of IP (judgment in *Henkel v. OHIM* [2001]), competition (case *Piau v. Commission* [2005], judgment in *Airtours v. Commission* [2002], judgment in *HFB and Others v. Commission* [2002]), and state aid (judgment in *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission* [2003]).

(c) Other sources of the EU law

Other sources of the EU law include such as treaties concluded by EU institutions and foreign countries; international customs and usages; general principles '*in foro domestico*', and general principles of international law.

3. Principles of the EU Law

(a) Supremacy of the EU law

In the event of a divergence between the EU law and the national law of a member state, it is the EU law that prevails. The EU law is superior to national laws in many areas, especially in terms of economic and social policy, and even to member states' constitutions. The principle of the 'supremacy of the EU law' emerged from the ECJ in the case *Costa v. ENEL* [1964].[25]

(b) Direct effect of the EU law

The principle of the 'direct effect of the community law' in the member states was started from *Van Gend en Loos v. Nederlanse Administratie der Belastingen* [1963],[26] which now enables European citizens to rely directly on rules of the EU law before their national courts.

[24] ECJ, it is now the Court of Justice, C-43/75 *Defrenne v. Sabena* [1976] ECR 455.

[25] ECJ, it is now the Court of Justice, Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585, 593.

[26] ECJ, it is now the Court of Justice, Case 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen*.

There are two categories of 'direct effect': 'horizontal' and 'vertical'.

i) The 'Horizontal' direct effect: Some EU acts, such as treaties and regulations, have 'horizontal' direct effect, i.e., member States do not have to 'transpose' (or 'integrate') a treaty or a regulation into national law, and citizens may sue one another on the basis of this act.

ii) The 'Vertical' direct effect: Different from treaties or regulations, directives have 'vertical' direct effect. Directives allow member states to make some choice of how they 'transpose' a directive into national law. Usually, this is done by passing one or more legislative acts, such as in the UK an 'Act of Parliament' or 'statutory instrument'. Citizens may not sue one another on the basis of an EU directive, but may sue the government 'vertically' for failing to implement a directive correctly.

Several other principles, such as subsidiarity, proportionality, the principle of conferral, and the precautionary principle, have become prominent in the development of the EU law.

In order to achieve a successful EU, Member States must voluntarily 'transfer' a part of their state power to EU institutions, as well as accept the supremacy of the EU law to national laws and the direct effect of the EU law in the legal order of member States.

B. *EU External Trade Relations - Overview*

Being one of the leading trade regions, the EU has a strong interest in open markets and clear regulatory frameworks; therefore, it needs to reinforce the EU competitiveness in world markets. The EU External Trade Relations, or Trade Policy, is a public policy governing trade between the EU and other countries. It is does concern relations within the internal market.

The new priority and approach 'Global Europe: Competing in the World', are presented in an ambitious action plan comprising internal and external aspects.[27] This plan will enable the EU trade policy to respond to the growth and employment targets established in the Lisbon Strategy as well as the challenges posed by the globalization.

[27] European Commission - External Trade, *Global Europe: Competing in the World - A Contribution to EU's Growth and Jobs Strategy*, http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf.

Fundamental to the plan is the rejection of protectionism in Europe, the opening up of the principal markets outside Europe and the bringing together of the EU's internal and external policies.

Faced with the challenge posed by the globalization, the EU must reinforce its competitiveness through the use of transparent and effective rules. The European competitive policy is based, *firstly*, on internal policies, i.e., competitive markets, economic openness, social justice; and *secondly*, on the commitment to opening up foreign markets in emerging countries, which account for a growing share of the global trade.

1. Objectives of the EU External Trade Relations or Trade Policy

(a) Two main objectives of the EU Trade Policy

Firstly, lower barriers to the EU export and EU investment through negotiations and, where necessary, dispute settlements;

Secondly, improve conditions for third country operators importing into the EU (especially DCs).

(b) Other objectives

- No longer use merely tariffs, but also other barriers in external trade relations, such as product standards, licensing practices, domestic taxes, government procurement, and IPRs. Commitments relating to government procurement and IPRs become clauses inserted into EU BFTAs as well as into regional FTAs. Strengthening political dialogues on the IP issues.

- New issues of the EU trade policy are relationships between trade and environment, trade and labour rights, and trade and human rights.

2. Dimension of the EU Trade Policy

(a) Multilateral dimension

Concerning external action, the EU maintains its commitment to multilateralism, which offers the means to eliminate trade barriers. The WTO is the framework of choice to achieve these goals and the EU supports resuming the Doha Round of trade negotiations.

(b) Bilateral dimension

As well as multilateralism, the EU must also endeavour to promote faster and more comprehensive trade liberalization within the framework of its bilateral trade relations. The Bilateral Free Trade Agreements ('BFTAs') will be a driving force towards achieving this goal. Besides, the Economic Partnership Agreements ('EPAs') are currently being negotiated with the African, Caribbean and Pacific ('ACP') countries, or the 'Association Agreements' with Latin America and the Andean Community.

The EU must define economic criteria to negotiate and conclude BFTAs and to identify its partners, such as the market potential measured in terms of size and economic growth, and the level of protection *vis-à-vis* exports from the EU. The partners to be privileged are the ASEAN countries, South Korea and India, which fulfil the criteria mentioned, as well as MERCOSUR, Russia, the Gulf Cooperation Council and China. As regards content, these agreements must be more comprehensive, more ambitious and broader to encompass a wide range of areas covering services and investment as well as IPRs.

The trans-Atlantic trade is at the centre of the EU's bilateral relations, in particular with the aim of meeting global challenges. The EU will continue to encourage the elimination of NTBs, given the economic advantages of a comprehensive liberalization of trade between the partners.

The EU and its partners must agree to do more concerning the respect for IPRs. The principal countries concerned will be China, Russia, the ASEAN countries, Republic of Korea, MERCOSUR, Chile, Ukraine, and Turkey in connection with its accession negotiations.

(c) Unilateral dimension

The EU continues its policy of granting Generalized System of Preferences (GSP) to DCs, while adding conditionalities of human rights and good governance.

The EU actively passed new trade remedies legislation, such as regulations on AD, anti-subsidy and safeguard measures, *for example*, the Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community; the Council Regulation (EC) No. 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community.

The EU adopts common rules for exports and imports, such as the Council Regulation (EC) No. 1061/2009 of 19 October 2009 establishing common rules for exports; the Council Regulation (EC) No. 260/2009 of 26 February 2009 on the common rules for imports; and especially the Council Regulation (EC) No. 625/2009 of 7 July 2009 on common rules for imports from certain third countries.

The Regulation (EC) No. 625/2009 of 7 July 2009 establishes common rules for imports into the EU of products originating in certain non-EU countries. It also lays down the procedures enabling the EU to implement the surveillance and safeguard measures necessary to protecting the EU's interests. The imports of products covered by this Regulation are not subject to any quantitative restrictions, but subject to possible safeguard measures. This Regulation applies to products originating in any of the following non-EU countries: Armenia, Azerbaijan, Belarus, Kazakhstan, North Korea, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Viet Nam. The scope of this Regulation excludes textile products covered by special common rules for imports.

2. Regulations on the EU Internal Market

A. *Internal Market - General Framework*

The law on the internal market is one of the pillars of the EU Law. The 'single' or 'internal' market, defined by reference to the 'four freedoms', lies at the very heart of the European Community with policies on the free movement of goods, people, services and capital destined to ensure an ever closer economic, monetary and political union. Since it was created in 1993, the single market has opened more to competition, created new jobs, defined more reasonable prices for consumers, and has enabled businesses and citizens to benefit from a wide choice of goods and services. To ensure that everyone, citizen or business, is able to make the most of the advantages of the single market, the EU focuses on eliminating barriers still preventing its operation. It seeks to harmonize legislation in order to improve its response to the challenges of globalization and technological change.

According to Article 2 of the TEC, the *objective* of the original TEC is as follows: 'The Community shall have as its task, by establishing a common market, to promote throughout the Community a harmonious development of economic activities.'

Following Article 3 of the TEC concerning activities to be undertaken to achieve the TEC's objectives, it shall include the prohibition, as between member States, of customs duties and quantitative restrictions on imports and exports of goods - and all measures having equivalent effect; an internal market characterized by the abolition as between member States of obstacles to the free movement of goods, persons, services and capital ('the four freedoms'); a system ensuring that competition in the internal market is not distorted, and other measures.

Later, Article 26 of the TFEU stipulates:

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

The objective of establishing a common market was set out in the TEC and other treaties, such as Single European Act 1986, and the TFEU. These treaties have given powerful promotion to the development of the European Monetary and Economic Union.

Recently, the Single Market Act of April 2011 aims at improving EU people's work, business and exchanges with one another.

B. *Regulations on 'Four Fundamental Freedoms'*

The core of EU economic and social policy is summed up under the idea of the 'four fundamental freedoms' - free movement of goods, workers, and capital, and the freedom of establishment to provide services.

1. Single Market for Goods - Free Movement of Goods

(a) Overview

The free movement of goods, with the objective of ensuring trade within the EU, is probably the most important freedom in, and of, the internal market. The prohibition on measures restricting imports and exports between member States and the principle of mutual recognition ensure

compliance under the monitoring of the European Commission. Since January 1993, controls on the movement of goods within the internal market have been abolished; the EU is now a single territory with no internal frontiers. The abolition of tariffs promotes intra-Community trade, which accounts for a large part of the total imports and exports of the member States.

There are three aspects to the free movement of goods:

(i) Creation of a customs union (Article 23 of the TEC - Article 28 of the TFEU)

- Prohibition of customs duties and charges having equivalent effect on imports and exports;
- Establishing a common tariff on goods entering the EU.

(ii) Prohibition of discriminatory internal taxes (Article 90 of the TEC - Article 110 of the TFEU)

(iii) Prohibition of quantitative restrictions and measures having equivalent effect on imports and exports.

According to Article 28 of the TEC - Article 34 of the TFEU, 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member States.'

Article 29 of the TEC - Article 35 of the TFEU states the same for exports. It notes that the prohibition of quantitative restrictions is only between member States.

Exception: Article 30 of the TEC - Article 36 of the TFEU sets out the exceptions as follows:

> [T]he provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member States.

On the basis of Article 30 of the TEC - Article 36 of the TFEU, member states may still justify certain trade barriers when public morality, policy, security, health, culture or industrial and commercial property might be threatened by complete abolition. During the 'mad cow disease' crisis in the UK, France imposed a barrier to imports of British beef.

(b) Free movement of goods and Common Agricultural Policy

The Common Agricultural Policy (hereinafter the 'CAP') is governed under Title II of the TEC. Article 34(1) authorising 'compulsory coordination of national market organizations' with common European organization.

The CAP dates back to the early days of the European integration, when member states made a commitment to restructuring and increasing food production, which had been adversely affected as a result of the World War II. Today, the CAP still has a pivotal role in the EU, not just because farmland and forests account for more than 90 per cent of land within the EU, but also because it has become an essential mechanism for facing new challenges in terms of food quality, environmental protection and trade.

There are two main objectives of the CAP: *firstly*, helping European farmers to be competitive; and *secondly*, promoting development in rural areas, particularly in the least-favoured regions.

As mentioned above, the case law is important for strengthening the rules on the EU Single Market. *Cassis de Dijon* case [1979] was one of the important cases of the EU rules on the principle of free movement of goods.

2. Free Movement of Workers

Thanks to the abolition of border controls between EU countries, it is now possible for people to travel freely within most of the EU. It has also become much easier to live and work in another EU country. In the 'Schengen Area', citizens can 'cross internal borders without being subjected to border checks'.[28] However, controls are strengthened at the EU external borders, and there is closer cooperation between the respective police forces of different EU countries.

[28] European Commission - Migration and Home Affairs, *Schengen Area*, http://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en.

3. Free Movement of Capital

The Single European Act 1986 was a decisive step forward for the free movement of capital. It led to the adoption on 24 June 1988 of the Directive 88/361/EEC, designed to give the single market its full financial dimension. The Directive implements Article 67 of the TEC.

The Directive 88/361/EEC protects the principle of full liberalization of capital movements between member states with effect from 1 July 1990. The Commission seeks to abolish the general arrangements for restrictions on movements of capital between people resident in member States. 'Movement of capital' is understood to include all of the operations necessary for the purposes of capital movements carried out by a natural or legal person. This includes direct investments, investments in real estate, operations in securities and in current and deposit accounts, and financial loans and credits.

4. Single Market for Services - Freedom to Provide Services and Freedom of Establishment

The freedom to provide services and freedom of establishment, as set out in Articles 49 and 56 of the TFEU, are essential to the operation of the internal market. In this way, economic operators are able to pursue a stable, continuous activity in one or more member States and/or offer temporary services in another member State without having to be established there. In 2006, the EU adopted the 'Services' Directive, which aims at removing barriers to trade and services, and at facilitating cross-border trade operations.

Article 49 of the TFEU (Article 43 of the TEC) stipulates for the freedom of establishment. Restrictions on the freedom of establishment shall be prohibited. Such prohibition shall apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of a member State established in another member State.

C. *Regulations on Other Fields*

1. Social Chapter

The Social Chapter refers to those parts of the TEC that deal with the equal treatment of men and women under Article 141 of the TEC and the regulation of working time under the Working Time Directive. One recent act of anti-discrimination legislation is the Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Besides, the case *Defrenne v. Sabena* [1976] is also pertinent to this field.[29] In this case, an air hostess (her name is Defrenne) brought an action against her employer (Belgian Sabena Airline) on the grounds of discrimination in the payment compared with her male colleagues who did the same work. In the case *BECTU* [2001], the ECJ held that the right to paid annual leave is a social right directly conferred on every worker by Community law. This case generated from the fact that in 1999, BECTU, a British trade union, challenged the UK legislation which denied that right to workers on short-term contracts on the ground that it was incompatible with a Community Directive on the organization of working time.

2. EU Competition Law

In the EU, competition law is an important part of ensuring the completion of the internal market, meaning the free flow of working people, goods, services and capital in a borderless Europe.

Four main competition policy areas include:

Firstly, cartels, or control of collusion and other anti-competitive practices with an effect on the EU. This is covered under Article 81 of the TEC - Article 101 of the TFEU.

Secondly, monopolies, or preventing the abuse of firms' dominant market positions. This is governed by Article 82 of the TEC - Article of the 102 TFEU.

Thirdly, mergers, control of proposed mergers, acquisitions and joint ventures involving companies with a certain, defined amount of turnover in the EU/EEA. This is governed by the Council Regulation 139/2004 EC (the Merger Regulation).

Fourthly, state aid, control of direct and indirect aid given by EU member states to companies. This is covered under Article 87 of the TEC - Article 107 of the TFEU.

The case law of the 'General Court' has developed in particular in the fields of IP (judgment in *Henkel v. OHIM* [2001]), competition (case *Piau v. Commission* [2005], judgment in *Airtours v. Commission* [2002], judgment in *HFB and Others v. Commission* [2002]), and state aid (judgment in *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission* [2003]).

[29] ECJ, it is now the 'Court of Justice', C-43/75 *Defrenne v. Sabena* [1976] ECR 455.

3. Monetary Policy

Economic and Monetary Union (hereinafter the 'EMU'), as provided for in Title VII of the TEC, involves the close coordination of the economic policies of the member states at the EU level and requires member states to avoid excessive budget deficits ('Stability and Growth Pact'). The EMU has led to the introduction of a single currency: the euro. The euro was launched on 1 January 1999.

The euro is the most tangible proof of the economic and monetary integration within the EU integration (or, better, a part thereof) - the common currency used by some 327 million people every day in 17 out of 28 EU countries. These countries of the 'Eurozone' are Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain.

A single currency offers many advantages, such as eliminating fluctuating exchange rates and exchange costs. Since it is easier for companies to conduct cross-border trade and the economy is more stable, the economy grows and consumers have wider choice. A common currency also encourages people to travel and shop in other countries. At the global level, the euro gives the EU the one of most important international currencies.

D. *Strategies of Legal Integration*

Endeavouring to create a borderless EU, EU institutions have used three main strategies aiming at legal integration.

Firstly, the unification of laws is creating a community law that would be uniformly applied to certain economic and trade areas such as tariffs, customs procedures, competition, transport, company law, etc. in all EU countries.

Secondly, the harmonization of Member States' laws. This strategy is politically easier for member states to accept, applying to areas such as labour law, and internal taxation (Article 114(1) of the TFEU - Article 95(1) of the TEC).

Thirdly, the mutual recognition of the standards, such as product standards, training awards, etc. This mutual recognition guarantees the free movement of goods and services without the need to harmonize member States' national legislation. *For example*: goods lawfully produced in one Member State cannot be prohibited from sale on the territory of another member State, even if they are produced to technical or quality specifications different from those applied to the receiving State's own products.

The EU has delivered more than 60 years of peace, stability, and prosperity, helped raise living standards, and launched a single European currency. It is progressively building a single Europe-wide market in which people, goods, services, and capital move among member states as freely as within one country. This achievement is not God-given. The EU Member States must have transferred some of their law-making authority to the EU in certain policy areas, such as agriculture and fisheries. In other areas, such as culture, policy-making is shared between the EU and national governments.

The EU Member States have chose both two ways - 'enlarging' and 'deepening' of the EU. As noted, the EU has 'enlarged,' now 'comprising' twenty-eight Members and has deepened,' with a stronger economic policy and the use of a common currency (the Euro, for those EU Members States that participate in the Eurozone), and concurrently a common foreign policy, common defence policy, and common justice policy. To find an item of goods 'Made in the EU' would now occur more easily than another 'Made in France' or 'Made in Italy'.

As already signalled, the EU is not a federal government, nor is a traditional intergovernmental organization. Also, the EU law is neither traditional international law, nor a national law of federation. It is supra-national law and it constitutes an original and creative legal order. In the leading case 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen* [1962], the ECJ ruled that the European Community 'constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights albeit within limited fields.'[30]

Thus, the EU is nowadays a typical example of regional economic integration with a powerful voice on different issues of the world.

[30] ECJ, it is now the 'Court of Justice', Case 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen* [1962].

Section Three. NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

1. What Is the NAFTA?

A. *General Introduction to the North American Free Trade Agreement*

The North American Free Trade Agreement or 'NAFTA' is a free trade agreement between Canada, Mexico, and the US. With a combined GDP of 17.6 trillion USD in 2010, the NAFTA is one of the largest free trade areas in the world.[31] The NAFTA was negotiated between 1991 and 1993, and it was approved by the national legislatures of the three countries in 1993 before entering into legal force on 1 January 1994.

The NAFTA is an important model for modern Free Trade Agreements (FTAs) because of the high level of liberalization embodied in the final text. The Agreement immediately eliminated tariffs on the majority of goods trading between the three countries, while other restrictions on trade, services, and investment were eliminated over a 15-year period.

The following introduction to the NAFTA will discuss some key elements including: the liberalization of trade in goods in Chapter 3; the liberalization of investment in Chapter 11 and of trade in services in Chapter 12, and the dispute settlement processes in Chapters 11, 19, and 20 of the NAFTA.

B. *Key Elements of the NAFTA*

The NAFTA eliminates or imposes strict rules on a range of barriers to trade and investment. Key elements of the Agreement include:[32]

- Opening of government purchasing regimes to businesses in all three countries;
- eliminating restrictions on foreign investment (except in a limited number of restricted sectors listed by each party) and ensures non-discriminatory treatment for local companies owned by investors in other NAFTA countries;
- eliminating barriers that prevent services companies from operating across North American borders, including in such key sectors as financial services;
- provides comprehensive rules to protect intellectual property rights; and
- provides three distinct dispute settlement mechanisms for state-to-state disputes, investor-state disputes, and disputes on antidumping measures and countervailing duties.

2. Why Study the NAFTA?

A. *The NAFTA Is A Leading Example of A Comprehensive and Liberalizing FTA*

Commentators have observed that the NAFTA is an early example of a modern FTA and thus has become a template for comprehensive and ambitious FTAs that follow it:

> … [S]ince the mid-1990s, the countries of the Americas have been at the vanguard of the negotiation of NAFTA - type free trade agreements - they are characterized by their ambitious nature and their objective of carrying out trade liberalization and integration not only for goods but also for services, as well as other key issues such as investment, intellectual property, and government procurement.[33]

A Canadian scholar observed that it was the first comprehensive FTA between developed and developing economies:

> … [N]AFTA is a remarkable milestone in the annals of international trade and economic integration. For the first time ever a comprehensive free trade agreement brought together both developed and developing countries. Moreover, it not only broadened the scope of traditional free trade agreements by embracing services, foreign investment and property rights, but as well it recognized the importance of workers' and environmental rights and issues, although it settled for having countries enforce

[31] North American Free Trade Agreement, done December 17 December, 1992 available at http://www.nafta-sec-alena.org; For GDP rankings, *see*: http://en.wikipedia.org/wiki/List_of_countries_by_GDP_%28nominal%29

[32] Summary from: http://www.usembassy-mexico.gov/bbf/bfdossier_NAFTA.htm

[33] S. Stephenson, M. Robert, 'Evaluating the Contributions of Regional Trade Agreements to Governance of Services Trade', *ADBI Working Paper 307*, (2011), available at: http://www.adbi.org/working-paper/2011/08/30/4684.evaluating.contributions.regional.trade. agreements

their existing laws in these two areas rather than advancing some common principles and enforceable practices.[34]

B. *The NAFTA Is An Example of A Commercially Meaningful FTA*

Exporters and service providers assess the value of any FTA in terms of the value of the new market access opportunities provided by the agreement. These businessmen will ask such questions as:

- Does the FTA rapidly eliminate tariffs in foreign markets on commercially important products?
- Does the FTA eliminate NTBs and facilitate procedures such as customs clearance?
- Does the FTA contain obligations effectively to protect IPRs in the export market?
- How does the FTA provide for market access for trade in services? Does the agreement provide meaningful obligations to provide NT of foreign service providers?

The legal text of a FTA provides answers to these commercial questions, and it is only in light of commercial considerations such as these that a FTA may be assessed as providing meaningful market access for the exporting interests of a country. As an attorney or advisor, your analysis of the legal text of a FTA will not be very insightful to your client if you do not consider the meaning of the agreement in light of these commercial export interests, or in light of the interests of stakeholders who do not wish to see their domestic markets liberalized.

The negotiators who negotiate the text of a FTA on behalf of their countries will be able to agree upon a high-quality FTA only if all governments participating in the negotiation share a high level of ambition and the political will to achieve these goals. FTA negotiations may be successfully concluded only if they address both the export interests, and the import sensitivities of all parties. This makes negotiating a high-quality agreement an enormous challenge. In simple terms, negotiators receive a concession from their counterparts only if they make a concession in return.

[34] T. J. Courchene, *FTA at 15, NAFTA at 10: A Canadian Perspective on North American Integration,* (2003), at 271, available at: http://dspace.cigilibrary.org/jspui/bitstream/123456789/710/1/FTA%20at%2015%20NAFTA%20at%2010%20a%20Canadian%20perspective%20on%20North%20American%20integration.pdf?1.

When the NAFTA text is analysed in light of the commercial considerations above, it is a highly liberalizing agreement: the tariffs on virtually all products have been completely eliminated over 15 years (tariffs remain only on certain agricultural products traded between the US and Canada), while important commitments were made to promote investments and trade in services. Understanding how the NAFTA achieved a high level of liberalization may help one reach an understanding of the commercial significance of other FTAs.

C. *The NAFTA Has Frequently Been Litigated*

The dispute settlement procedures outlined in the NAFTA have frequently been used by the NAFTA Member Governments and by their investors. Under the dispute settlement rules of the NAFTA, the final dispute settlement panel determinations are made public, and the Parties may release to the public many of the documents submitted during the proceeding.[35] As a result, these published panel determinations have made significant contributions to the jurisprudence of international trade law, and to investor-State arbitration law in particular. In order to understand this jurisprudence, it is necessary to understand the obligations contained in the NAFTA.

D. *The NAFTA Is A Template for Subsequent FTAs with the US*

Since the NAFTA was negotiated, the US has negotiated FTAs with 18 countries, including several countries in Central America and Middle East, as well as with Singapore and Republic of Korea in Asia.

Although the texts of these subsequent FTAs are each a unique product of negotiations between the trading partners, the structure and content of the NAFTA has become the template for FTA negotiations involving the US and other Western Hemisphere countries.

Elements such as comprehensive tariff elimination and the liberalization of services, commitments on IPRs protection, labour rights, and environmental protection are the continuing negotiating objectives of the US. Studying the text of the NAFTA may provide an understanding of how these objectives are reflected in the Agreement.

[35] *See* Article 20.17 of the NAFTA. *See* also *Supplementary Procedures Pursuant to Rule 35 on the Availability of Information in the Model Rules of Procedure for Chapter Twenty of the NAFTA*, available at: http://www.nafta-sec-alena.org/en/view.aspx?conID=657&mtpiID=ALL.

2. Liberalization of Trade in Goods under the NAFTA

A. *The Challenges of Negotiating Tariff Elimination*

A central focus of any FTA is the reduction and elimination of tariffs on goods traded between the parties. The Harmonized Tariff Schedule, applied by countries around the world, contains more than 5,000 tariff lines for specific product categories at the six-digit level in 96 chapters. National tariff schedules frequently have many more tariff lines that provide more detailed product descriptions at the eight- and 10-digit levels (the US tariff schedule currently has more than 17,000 tariff lines at the 10-digit level).

FTA negotiators must negotiate agreement on the treatment of each of these products. *For example*, if country A has a 20 per cent tariff on rice, will that tariff be eliminated completely? How many years will be allowed for the tariff elimination? Will the tariff reductions be made in equal annual instalments, or be delayed then reduced rapidly at the end of the phase-in period? The decisions made regarding the tariff treatment of each product must be recorded in an annex to the FTA and published so that governments and stakeholders are able to understand these tariff reduction commitments.

Frequently, the negotiating process results in FTA agreements that do not achieve high levels of liberalization. *For example*, the stakeholders for import-sensitive industries in country A will seek exclusions from tariff reductions for their cement products in order that they will not face greater competition from cement imports under the FTA. In a typical scenario, the negotiators for country B will accept an exclusion for country A's import-sensitive cement industry, only if country B receives wider market access for its export priorities, or if country B is able also receive exclusions from liberalization requested by its import-sensitive industries.

If the exclusions are granted for both country A and for country B, then the level of liberalization may be reduced very quickly as the number of exclusions increase. *For example*, if country A seeks permanently to maintain its tariffs on cement, country B may agree to this only if it is bale to maintain its tariffs on rice. This process may spiral downward: if as a result of the negotiation on cement and rice, country A is unable to gain access to the rice market of country B, then country A is unwilling to allow country B lower tariffs on corn. If this spiral continues, the resulting agreement will not provide meaningful opportunities for increased trade.

B. *Tariff Elimination in the NAFTA*

The NAFTA reflects a very strong commitment to trade liberalization because it eliminates tariffs on virtually all products traded among the three countries. The NAFTA incorporates the terms of the US-Canada FTA signed in 1988. Under that FTA, permanent tariffs were maintained on the following agricultural products: dairy, poultry, and eggs entering Canada from the US; sugar, dairy products, and peanuts entering the US from Canada. All other tariffs on trade between NAFTA countries have been eliminated.

The difficulty in negotiating and implementing the elimination of tariffs on all products in the NAFTA may better be understood when the social, political, and economic sensitivities of certain products and sectors are considered. Before the NAFTA was negotiated, some industrial sectors, such as textiles, apparel, steel, and certain types of automobiles benefited from import tariffs ranging from ten per cent to 50 per cent or more. Tariffs on agricultural products were generally higher than the tariffs on industrial products, and some agricultural products benefited from quotas and subsidies that maintained the domestic prices received by farmers for several products including sugar and wheat. Free trade makes it very expensive, if not impossible, for subsidies and marketing restrictions to maintain high domestic prices for agricultural products when competing with lower-priced imports.

One of the most sensitive and complex tariff issues was the elimination of tariffs on sugar and related sweeteners traded between the US and Mexico. The final text of the agreement maintained a tariff-rate quota ('TRQ') for 15 years on imports of Mexican sugar into the US. After 15 years, the TRQs and all tariffs on sugar were removed. The original NAFTA text included, however, a provision that could have allowed Mexico unlimited access to the US sugar market as early as 2001 (instead of 2008). When it became apparent that the US Congress would not approve an agreement with this provision, the US and Mexico had to negotiate new terms on sugar through a 'side letter' limiting Mexican sugar access into the US to 250,000 tons or less per year.[36]

[36] G. C. Huffbauer, *NAFTA Revisited: Achievements and Challenges, Institute for International Economics*, (2006), at 326, available at: http://bookstore.piie.com/book-store/332.html.

After the NAFTA was implemented, Mexico tried to limit imports of a sugar-like product from the US. The product is 'High Fructose Corn Sweetener' (hereinafter the 'HFCS'), a sweetener made from refined corn or maize. The HFCS may be used to sweeten soft drinks. Producers of sugar in Mexico convinced the Mexican Congress to impose a 20 per cent tax on soft drinks containing HFCS, while soft drinks containing sugar made from sugarcane faced no additional tax. In 2006, the US successfully challenged this tax as a violation of the WTO's NT obligations in the WTO dispute settlement proceeding, *Mexico-Taxes on Soft Drinks* [2006].[37]

The difficult negotiations on sugar in a 'side letter' to the Agreement, and the WTO dispute on the HFCS sweetener reflect the complex political economy of sugar in the US and Mexico:

> … [T]he fundamental problem is that neither the US nor Mexico subscribes to free-market principles when it comes to sugar. Both countries seek to maintain sugar prices well above world levels - not to discourage consumption [for health reasons] but rather to augment the revenues of sugar [producers].[38]

For industrial goods, the NAFTA eliminates all tariffs on all products over a period of 10 years. The tariffs on automobiles were some of the highest tariffs on industrial goods. The Statement of Administrative Action (hereinafter the 'SAA') submitted by President Clinton to the US Congress contains a summary of the treatment of tariff reductions on automobiles and auto parts:

> … [A]ll tariffs on North American origin automotive goods will be eliminated within ten years. Mexico will reduce its 20 percent tariffs on passenger cars and light trucks to 10 per cent immediately on implementation of the NAFTA and will phase out the remaining 10 per cent over five years for light trucks and 10 years for passenger automobiles. The United States will eliminate its tariffs on most Mexican-produced parts either upon implementation or over five years. Tariffs on a few parts will be phased out over 10 years. The current U.S. passenger automobile tariff of 2.5 per cent will be eliminated immediately and the light truck tariff [of 25 per cent] will be reduced to 10 per cent immediately upon implementation and phased out over five years.[39]

The elimination of tariffs on automobiles and auto parts in the NAFTA increased the regional integration and competitiveness of the automotive industry in North America with annual production of more than 12 million vehicles per year. Automotive manufacturers from Asia and Europe have opened factories in the NAFTA countries, and part of their motivation for investing in North America was to take advantage of the NAFTA treaty benefits.[40]

C. *Tariff Elimination: Comparing the NAFTA to Some ASEAN FTAs*

In contrast to the comprehensive elimination of virtually all tariffs over 15 years in the NAFTA, the ASEAN FTAs to which Viet Nam is a party allow many tariffs to remain permanently on imports.

In the ASEAN-Korea FTA ('AKFTA'), the parties established a set of 'modalities' or negotiating rules that allowed each party to exempt from any tariff concession as many as 40 tariff lines at the HS six-digit level. These excluded products are identified in an appendix to the agreement entitled: 'Group E (Tariff lines exempted from tariff concession).'[41]

Using these modalities, Korea and Viet Nam each excluded politically sensitive products efficiently produced by the other country. *For example*, Korea did not reduce tariffs on beef, pork, and poultry, many types of seafood, many types of fresh fruits and vegetables, and rice. Vietnam did not reduce tariffs on certain types of steel, nor on virtually all motorcycles, automobiles, trucks, buses, and certain automotive parts.[42] If tariffs had been reduced on all of these products, it is very likely that trade between Korea and Viet Nam for these products would have

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37 WTO, *Mexico - Tax Measures on Soft Drinks and Other Beverages (Mexico - Taxes on Soft Drinks)*, WT/DS308.

38 *Ibid*.

39 United States, *North American Free Trade Agreement Implementation Act, Statement of Administrative Action,* (1993), at 37, available at: http://womenontheborder.org/wp/wp-content/uploads/2011/06/NAFTA- PROVISIONS.pdf

40 I. Studer, *IRPP Working Paper: The American Automobile Industry*, (2004), at 1, available at: http://www.irpp.org/miscpubs/archive/na_integ/wp2004-09o.pdf;

D. Winter, 'North America to See Painfully Slow Climb in 2012.' WardsAuto.com, 28 November 2011, available at: http://wardsauto.com/reports/2011/soi2/2011_year_NorthAmerica_111024/

41 *ASEAN-Korea FTA, Appendix 2 Highly Sensitive List: Group E*, available at: http://www.aseansec.org/AKFTA%20documents%20signed%20at%20aem-rok,24aug06,KL-pdf/ Appendix%202%20to%20Annex%202%20-%20asean%20version%20HSL%20changes-final% 20formatted,%2018aug06.pdf

42 *Ibid. See* Viet Nam's List of Sensitive Products, at 222.

increased substantially. Viet Nam excluded similar items from its schedule of tariff reductions in the ASEAN FTA with Australia and New Zealand (AANZFTA).[43] In the ASEAN FTA with India, Viet Nam also permanently excluded a large number of products from tariff reductions, including birds eggs, sugar, tobacco, salt, petroleum, urea fertilizer, sheet glass, cement, steel, mill products, motorcycles, automobiles, and automobile parts.[44]

The permanent tariffs found in the ASEAN FTAs result in making the FTAs less meaningful to exporters. *For example*, because of the permanent exclusions from tariff reductions in the ASEAN-Korea FTA, Vietnamese rice farmers are unable to gain additional access to the lucrative market for rice in Korea. In December 2010, the average retail price for one kilogram of rice in Korea was 1.76 USD, as compared to 0.44 USD in Viet Nam, according to the Food and Agriculture Organization ('FAO').[45]

D. *NAFTA Rules of Origin*

1. What Are Rules of Origin, and Why Do FTAs Have Them?

Rules of Origin ('RoO') are a part of every FTA in order to ensure that the goods exported from a Party to the FTA are given lower tariff treatment and receive other preferential treatment as agreed to in the FTA. The RoOs are also structured to ensure that preferential treatment is not given to goods that originated in countries that are not a Party to the Agreement. In the simplest form, the RoO may indicate that a product is 'originating' and eligible for preferential treatment if it was entirely manufactured or produced in a country that is a Party to the Agreement. Because the supply chains of so many products are now multinational, RoOs have evolved to allow for some portion of the inputs to be obtained in a third country.

[43] *See* AANZA FTA, Annex 1: Schedule of Tariff Commitments by Viet Nam, available at: http://www.dfat.gov.au/fta/aanzfta/annexes/hs2007/Goods-Vietnam-AANZFTA-HS2007-Tariff-Schedule-and-Appendices-final-confirmed.pdf. For chicken meat, *see* H.S. Chapter 02.07. For steel, *see* H.S. Chapter 72. For autos, *see,* e.g., H.S. Code 8703.24.86.

[44] *See* ASEAN-India FTA ('AIFTA'), Annex 1 - Schedule of Tariff Commitments - Viet Nam. For birds eggs (0407), sugar (HS 1701), tobacco (HS2401), salt (HS 2501), petroleum (HS 2709), urea fertilizer (HS 3102), sheet glass (HS 7003), cement (HS 2523), steel, mill products (HS 72), motorcycles (HS 8711), automobiles (HS 8702), and automobile parts (HS 8409). Available at: http://www.fta.gov.sg/fta_ C_aifta.asp?hl=46

[45] 'FAO Rice Market Monitor - January 2011', at 22, available at: http://www.fao.org/docrep/013/am156e/ am156e00.pdf

The SAA describes the NAFTA RoOs that are applied to most products in the following way:

> … [C]hapter 4 provides that goods wholly produced or obtained in the territory of one or more NAFTA party (*for example*, crops grown in the soil of a country, minerals taken from its mines) are 'originating goods' and thus eligible for preferential treatment.
>
> Goods produced in whole or in part from non-originating (non-NAFTA) materials may become originating goods if the non-originating materials undergo, in one or more of the NAFTA parties, processing or assembly sufficient to result in a designated change in tariff classification under the Harmonized Tariff System, as specified in Annex 401. The change in tariff classification ensures that the processing or assembly within the NAFTA territories results in changes in the product that are physically and commercially significant.[46]

Under the rules described above, goods are 'originating goods' and are eligible for tariff-free treatment if they are 'wholly produced' in a NAFTA party, or if they contain non-NAFTA materials that have been processed or assembled in ways that result in a shift in tariff classification and the processing results in changes that are physically and commercially significant.

The NAFTA, as do many FTAs, provides more restrictive rules of origin for specific products such as textiles, which are traditionally import sensitive products in many countries. The US SAA describes the specific rules of origin for textiles as follows:

> … [T]he general NAFTA rule of origin for most textile and apparel products may be described as a 'yarn forward' rule, which requires North American content from the yarn manufacturing stage to the end product before a particular product is eligible for preferential treatment with regard to duties and quantitative restrictions. *For example*, in order for a garment to meet NAFTA's rule of origin:
>
> - It must be cut and sewn in a NAFTA country;
> - the fabric for the garment must have been manufactured in a NAFTA country; and

[46] SAA, *supra,* at 41.

- the yarn used to produce the fabric must have been made in a NAFTA country.[47]

The 'yarn forward' RoO in the NAFTA prohibits apparel manufacturers from using fabrics from non-NAFTA countries in their manufacture of garments. If certain fabrics are in short supply or are more expensive within the member countries of the FTA, these rules may restrict export opportunities for apparel manufacturers. Similarly, restrictive RoO may also be found in some ASEAN FTAs. One commentator who has analyzed the RoO in ASEAN FTAs has found that textiles and automobiles are among the most sensitive products for the negotiating parties, and these products have been subject to more restrictive RoO.[48] The RoO used for textiles in the ASEAN-Japan Common Economic Partnership ('AJCEP') are very similar to the 'yarn forward' rules of the NAFTA.[49]

4. Liberalization of Trade in Services under the NAFTA

A. *NAFTA Obligations of NT and MFN of Cross-Border Service Providers*

In Chapter 12 of the NAFTA, the three Parties agree to provide MFN under Article 1203 and NT under Article 1204 to the cross-border service providers of the NAFTA Parties.

> Article 1213.2 provides the following definition of cross-border trade in services:
>
> *[C]ross-border provision of a service* or *cross-border trade in services* means the provision of a service:
>
> (a) From the territory of a Party into the territory of another Party;

[47] *Ibid.*

[48] Medalla and Balboa, *ASEAN Rules of Origin: Lessons and Recommendations for Best Practice*, Philippine Institute for Development Studies, (2009), available at: http://www3.pids.gov.ph/ris/dps/pidsdps0936.pdf
In comparing RoOs in ASEAN and ASEAN+1 FTAs, the following has been observed … [t]he most sensitive sectors for most countries include automotive, textile and garments.

[49] Here is an example of the RoO for textiles in the AJCEP:
For the product 'Woven fabrics of artificial filament yarn' contained in tariff heading 54.08, the RoO allows third-country 'non-originating' thread to be used to make the fabric, but only if the thread is spun, or dyed or printed entirely in one or more of the Parties, and the dyeing or printing is accompanied by two or more additional finishing processes.
The specific details of the AJCEP RoO may be found in the schedule and notes of the AJCEP, http://www.mofa.go.jp/policy/economy/fta/asean/annex2.pdf

> (b) in the territory of a Party by a person of that Party to a person of another Party; or
>
> (c) by a national of a Party in the territory of another Party.
>
> The definition above includes the provision of services from one party to another party. *For example*, if an architect in Mexico prepared the design of a building and sent the design plans to his/her customer in the US. The definition also includes the provision of services 'in the territory of another Party'. *For example*, if the Mexican architect travelled to the US in order to design a building there.
>
> The US SAA provides the following summary of the MFN and NT obligations:
>
> > … [A]rticles 1202 and 1203 require each government to accord non-discriminatory treatment to firms that provide services from other NAFTA countries. … [U]nder Article 1202, that NAFTA governments may not discriminate in favor of local firms. At the state, provincial and local level, it requires governments to give service providers from the other NAFTA countries treatment that is 'no less favourable' than that they give domestic service firms in similar circumstances.
> >
> > In addition, Article 1203 requires NAFTA governments to accord 'most-favoured-nation' treatment to service providers from other NAFTA countries. This means that a government must treat such providers as well as they treat firms from any other country (including non-NAFTA countries) in like circumstances.
> >
> > The 'no less favourable' standard applied in Articles 1202 and 1203 does not require that service providers from other NAFTA countries receive the same treatment as or even 'equal' treatment to that provided to local companies or other foreign firms. Foreign service providers may be treated differently if circumstances warrant. For example, a state may impose special requirements on Canadian and Mexican service providers if this is necessary in order to protect consumers to the same degree as consumers are protected in respect of local firms. NAFTA's non-discrimination provisions prohibit the imposition of laws and regulations designed to skew the terms of competition in favour of local firms; they do not bar legitimate regulatory distinctions between such firms and foreign service providers.[50]

[50] SAA, *supra*, at 153.

Under Chapter 12, the NAFTA governments may maintain 'legitimate regulatory distinctions' between domestic and foreign service providers. In addition, the governments may continue to require that providers of professional services such as medicine and law be licenced by the national or provincial licencing authority where the service is being performed, and the NAFTA governments are not required to grant professional licenses in their country simply because the person has a professional licence or was educated or trained for the profession in another NAFTA country.[51]

B. *The 'Negative List' Approach to Services Liberalization in the NAFTA*

The scope and depth of the liberalization in trade in services is quite extensive, because the NAFTA uses a 'negative list' in the structure of the commitments for each country. Under a 'negative list' approach, all types of services are liberalized unless the service sectors are listed in the 'negative list'; this identifies the service sectors it is not agreeing to liberalize. The list is contained in the NAFTA annex of service schedules for each country. *For example*, Mexico included on its 'negative list' an exemption from liberalizing trade in services of 'Specialized Personnel in the Maritime Transportation Sector.' This exemption was listed as follows:

Type of Reservation:

- NT (Article 1202);
- MFN (Article 1203);
- Local Presence (Article 1205).

Only Mexican nationals by birth may serve as:

(a) Captains, pilots, ship masters, machinists, mechanics and crew members manning vessels or aircraft under the Mexican flag;

(b) Harbour pilots, harbor masters and airport administrators; and

(c) Customs brokers.[52]

In this example, Mexico has 'reserved' or excluded from its commitment under Chapter 12 of the NAFTA to provide NT, MFN, and local presence rights to service providers from NAFTA countries.

[51] Article 1210.2 of the NAFTA States: 'Nothing in Article 1203 shall be construed to require the Party to accord such recognition to education, experience, licenses or certifications obtained in the territory of another Party'.

[52] NAFTA, *supra*, at Annex 1 (Mexico's Schedule of Services).

In contrast, most FTAs negotiated by ASEAN and by ASEAN members utilize the 'positive list' approach, liberalizing only those service sectors that are specifically listed in its schedule of service commitments.

FTAs involving the US follow a 'negative list' approach (all items liberalized except those mentioned) and have been found more liberalizing; however, the relative effects of the US negotiating power and the information and other benefits of 'negative lists' have not been well identified. A majority of intra-Asian FTAs either do not commit to MFN treatment (trading opportunities equal to those afforded to the most favoured nation) for treaty partners, or contain only soft obligations in this regard.[53]

Cross-Border Service Providers and Immigration Laws:

In the GATS, the negotiators established four modes of supplying services, with Mode 4 being the provision of services by natural persons who are present in the territory of the other Party. In other words, if country A makes a commitment under Mode 4 to country B, it is committing to allowing people from country B to work in country A by providing services in country A. Immigration may be a sensitive issue in trade negotiations, thus Mode 4 commitments tend to be relatively limited in the WTO and in FTAs.

In the NAFTA, the Parties did not make Mode 4 commitments to allow natural persons to work in their countries under their schedule of service commitments in Chapter 12. Instead, the NAFTA text treats all employment and temporary entry matters in Chapter 16, 'Temporary Entry for Business Persons.' Under Chapter 16, the Parties agree to allow the temporary entry of business visitors, traders and investors, intra-company transferees, and certain categories of professions temporarily to enter the territory of the NAFTA countries on a non-immigrant visa in order to conduct their business. The categories of professions eligible for the visas include accountants, engineers, lawyers, medical professionals, scientists, and university professors.[54]

[53] Trewin *et al*., *East Asian Free Trade Agreements in Services: Facilitating Free Flow of Services in ASEAN,* (2008). Draft report at xi-xii, available at: http://pc-web01.squiz.net/_data/assets/pdf_file/ 0011/95942/sub032-attachment2.pdf

[54] NAFTA, *supra,* at Appendix 1603.D.1.

5. Liberalization of Investment under the NAFTA

Chapter 11 of the NAFTA is divided into two parts. Part A provides four basic protections to NAFTA investors: (i) non-discriminatory treatment; (ii) freedom from 'performance requirements'; (iii) free transfer of funds related to an investment; and (iv) expropriation only in conformity with international law'.[55] Article 1105 of the NAFTA also requires that investors receive a 'minimum standard of treatment … [i]ncluding fair and equitable treatment and full protection and security.' The non-discriminatory treatment obligations are very similar to the NT and MFN obligations accorded to cross-border service providers in Chapter 12.

The obligations regarding expropriation are summarized in the SAA as follows:

> Under Article 1110, a NAFTA government may not expropriate an investment made by an investor from other NAFTA countries other than for a public purpose, one non-discriminatory basis and in accordance with due process of law. Compensation must be paid without delay at the fair market value of the expropriated investment, plus any applicable interest, and must be freely realizable and transferable.[56]
>
> The NAFTA Parties did not agree to allow investments in all economic sectors. *For example*, Mexico included reservations that excluded from liberalization the following sectors: 'satellite and telegraphic communications, railroad transportation, nuclear power generation, the production and distribution of electricity as a public service, and activities related to the production, distribution and sale of energy products and primary petrochemicals.'[57]

6. Dispute Resolution Mechanisms in the NAFTA

A. *The Three Dispute Settlement Procedures in the NAFTA*

The NAFTA contains three distinct dispute settlement procedures in Chapters 11, 19, and 20. The procedures to have received the most attention from scholars is the investor-State dispute settlement system contained in Chapter 11. These investor-State dispute settlement procedures are similar to the international investment arbitration procedures found in many bilateral investment treaties (hereinafter the 'BITs').

1. Investor-State Dispute Settlement under Chapter 11

If a NAFTA investor feels that the actions of a NAFTA government have resulted in the expropriation or discriminatory treatment in violation of the NAFTA obligations under Chapter 11, the investor may seek investor-state arbitration. Chapter 11 allows the investor to seek the establishment of an arbitration panel under the rules of the World Bank's International Center for the Settlement of Investment Disputes (ICSID) and the 'Additional Facility' of the ICSID, or under the rules of the United Nations Commission for International Trade Law (UNCITRAL).

Under these rules, the arbitral tribunal charged with deciding the case is comprised of a panel of three lawyers who are empowered to decide whether to award damages to the foreign investor.

In Article 1122 of the NAFTA, the three NAFTA governments provide their consent to arbitration. This consent ensures that the host country of the investment cannot frustrate an attempt at arbitration by withholding its own consent.[58] Article 1136 of the NAFTA states that 'Each Party shall provide for the enforcement of an award in its territory.' Both Article 1122 and Article 1136 incorporate references to the New York Convention on the Enforcement of Arbitral Awards and the Inter-American Convention International Commercial Arbitration,[59] ensuring that the procedures for recognizing and enforcing an international arbitral award within the domestic courts of NAFTA members established in these conventions may be utilized.

Foreign investors in Viet Nam have similar rights to seek binding investor-state arbitration under the terms of ASEAN investment agreements and under the more than 40 BITs signed by the Government of Viet Nam.

While the investor-state provisions of the NAFTA are very similar to the basic provisions of BITs and other FTAs, the NAFTA provisions have been the subject of extensive scholarly comment. This is due, in part, to the fact that the NAFTA rules and norms of the parties have made

[55] SAA, *supra*, at 141.

[56] SAA, *supra*, at 145.

[57] SAA, *supra*, at 144.

[58] SAA, *supra*, at 147.

[59] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958; Inter-American Convention on International Commercial Arbitration, done at Panama, 30 January 1975.

the NAFTA Chapter 11 proceedings very transparent. Under Annex 1137.4, the final awards of the arbitrators may be made public by the government or by the disputing investor.

To gain a better understanding of how investor-State arbitration has worked under NAFTA Chapter 11 of the NAFTA, we may look at two cases, *Metalclad v. Mexico*[60] and *Thunderbird v. Mexico*.[61]

In *Metalclad v. Mexico*, an American corporation invested in Mexico to build a hazardous waste landfill facility. Before the investment was made, the investor received assurances from the Federal government of Mexico that all necessary permits for the investment would be provided. The investor obtained Federal permits, but did not receive a local municipal construction permit. *Metalclad* requested a municipal construction permit; however, the Municipal Town Council denied the permit 13 months after it had been requested, during at a Municipal Town Council meeting that *Metalclad* was not invited to attend.[62] Once construction had been completed, the local government prevented the facility from operating, and the state governor declared the area surrounding the site to be an ecological reserve zone for the protection of rare cactus, a fact that would permanently prohibit the waste facility from operating within the zone.[63]

In 2000, a NAFTA tribunal determined that the actions of the local government amounted to expropriation without compensation, in violation of Article 110 of the NAFTA. The tribunal also determined that the government of Mexico failed to provide fair and equitable treatment in accordance with international law as required by Article 1105 of the NAFTA. The tribunal awarded *Metalclad* 16,685,000 USD. The Government of Mexico agreed in 2001 to pay 15.6 million USD.

In *Thunderbird v. Mexico*, a Canadian investor requested a licence to operate gaming facilities using electronic gaming machines. The lawyer for *Thunderbird* wrote to the Mexican gambling regulator, requesting a legal opinion letter stating it was legal for *Thunderbird* to provide gaming services to customers using these machines. The Mexican regulator provided a legal opinion in an Official Letter stating that if the machines were used in games involving luck or chance, they would not be legal. However, if the machines involved only games of skill, they would be legal to operate. Subsequently, the Mexican government determined that these machines involved luck and were illegal under the Mexican law on gambling. *Thunderbird* filed an arbitration request alleging that Mexico violated Chapter 11 NT obligations and had expropriated *Thunderbird*'s investment in the gaming machine service industry.

During the arbitration proceeding, Mexico submitted evidence that proved the machines used by *Thunderbird* were in fact based upon luck or chance because the machines contained computers that used a random number generator system to determine the outcome of the game.[64] The panel found that by not disclosing the true function of the machines, *Thunderbird* had submitted incomplete and inaccurate information regarding the gaming machines when it requested a legal opinion from the Government of Mexico.[65] As a result, *Thunderbird* could not claim it had 'legitimate expectations' that the Official Letter from Mexico would prevent the games being declared illegal.[66] *Thunderbird* could not receive compensation for an expropriation because '[c]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.'[67]

The panel determined that Mexico's closure of *Thunderbird*'s facilities because they were found to be illegal gambling facilities was a legitimate use of police power and did not violate Mexico's obligations in the NAFTA.

2. Dispute Settlement for Trade Remedies in Chapter 19

Chapter 19 contains a dispute settlement procedure for reviewing the trade remedy determinations of NAFTA parties. These procedures are an alternative to judicial review of trade remedy determinations by domestic courts. For the US, Chapter 19 dispute settlement system for trade remedies is unique; the US has not agreed to make trade remedies subject to FTA dispute settlement procedures in any FTAs it has negotiated since the NAFTA. However, the trade remedy determinations of the US and all other WTO members are subject to the dispute settlement procedures of the WTO.

60 ICSID, *Metalclad Corporation v. The United Mexican States,* Award of 30 August 2000, (Case No. ARB(AF)/97/1) reproduced in [2001] 16 *ICSID Review-Foreign Investment Law Journal* 168.

61 ICSID, *International Thunderbird Gaming Corp. v. Mexico*, Award of 26 January 2006 (UNCITRAL/NAFTA). Available at: www.italaw.com/documents/ThunderbirdAward.pdf.

62 ICSID, *Metalclad*, *supra*, at 91.

63 ICSID, *Metalclad*, *supra*,, at paras. 59 and 91.

64 ICSID, *Thunderbird, supra*, at para. 136.

65 ICSID, *Thunderbird, supra*, 151.

66 ICSID, *Thunderbird, supra*, 166.

67 ICSID, *Thunderbird, supra*, 208.

3. State-to-State Dispute Settlement under Chapter 20

Chapter 20 of the NAFTA contains dispute settlement procedures for resolving disputes between the NAFTA member governments regarding the interpretation or application of the NAFTA. The dispute settlement procedure under Chapter 20 of the NAFTA is analogous to the dispute settlement system of the WTO's DSB. NAFTA members may seek an arbitration decision to determine whether the actions of a NAFTA member are inconsistent with the NAFTA or otherwise nullify or impair the benefits of the Agreement (the provisions regarding nullification and impairment are contained in Annex 2004 of the NAFTA).

The legal obligations under the NAFTA are 'WTO-plus' because they contain commitments on liberalization that are in addition to the commitments made by NAFTA Members in the WTO. This could suggest that Chapter 20 of the NAFTA would be an active forum for the arbitration of state-to-state disputes as Chapter 20 would be the only forum to enforce these additional 'WTO-plus' obligations. In fact, the WTO has been a much more active forum for the settlement of disputes among the three NAFTA countries. Since the NAFTA entered into force in 1994, there have only been three disputes to result in arbitral reports under Article 20: a 1995 case on Canadian tariffs applied to certain US agricultural products; a 1997 case involving US safeguard tariffs on brooms; and a 1998 case involving the US failure to open its market for cross-border trucking services. In contrast, since 1995 three NAFTA countries have filed WTO dispute settlement consultation requests against each other more than 35 times. These statistics suggest that the WTO Dispute Settlement Body is the preferred forum for settling disputes between NAFTA countries when there is a choice of forum between the WTO Panel and a NAFTA Panel.

7. Conclusion

The NAFTA has successfully liberalized trade and investment among Canada, Mexico, and the US. While the Agreement has increased trade and enhanced the economic integration of the three countries, the implementation process has not always been easy. Since the Agreement entered into force in 1994, there have been trade disputes, political tensions, AD cases, and arbitration cases among the three countries. Nevertheless, the overall record of the NAFTA implementation shows how a comprehensive and ambitious FTA may benefit developed and developing countries.

Section Four. RULES ON ASEAN's ECONOMIC INTEGRATION

The Association of South-east Asian Nations (ASEAN) was established on 8 August 1967 in Bangkok, Thailand by the five founding members of ASEAN, namely, Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei joined the Association on 7 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999. Its constituent instrument, the ASEAN Declaration (or Bangkok Declaration) states that one of the main objectives of ASEAN is to accelerate regional economic growth.

ASEAN member states have concluded various agreements to meet the needs of increasing regional integration. The treaty-making activities on economic matters have been very robust in recent years because of ASEAN determination to enhance the region's competitiveness. The Bali Concord II of 2003 declares the ASEAN Economic Community (hereinafter the 'AEC') shall be the goal of regional economic integration by 2020. It states that

> In moving towards the ASEAN Economic Community, ASEAN shall, '*inter alia*', institute new mechanisms and measures to strengthen the implementation of its existing economic initiatives including the ASEAN Free Trade Area ('AFTA'), ASEAN Framework Agreement on Services ('AFAS') and ASEAN Investment Area ('AIA').

Furthermore, the ASEAN Charter, adopted in 2007, clearly provides for the ASEAN's legal personality and a more sophisticated structure, launching a platform for intensive integration efforts in building ASEAN political-security, economic, social and cultural communities. This Section will examine ASEAN's existing rules governing integration in trade in goods, and trade in services and investment within the ASEAN and between the ASEAN and third parties.

1. Intra-ASEAN Economic Integration

A. *Rules on Trade in Goods*

1. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area ('CEPT')

At the Fourth ASEAN Summit on 28 January 1992, ASEAN member States adopted the Framework Agreement on Enhancing Economic

Cooperation to develop a legal framework for economic integration in trade, industry, minerals, energy, finance, banking, food, agriculture, forestry, transportation, and communications. While other areas of cooperation contain only hortatory undertakings to promote integration, the section of the Agreement addressing trade in goods provides for detailed rules by referring to the Agreement on the Common Effective Preferential Tariff (hereinafter the 'CEPT') Scheme for the ASEAN Free Trade Area (hereinafter the 'AFTA') adopted on the same date. The CEPT scheme serves as the main mechanism for realizing AFTA, under which ASEAN countries undertake to lower or eliminate import tariffs, and to remove quantitative restrictions and other NTBs. The scheme applies to all manufactured products and agricultural products listed in four different lists in the individual schedules of ASEAN countries.

Firstly, the Inclusion List (hereinafter the 'IL') refers to products on which ASEAN countries are ready to commit to eliminate import duties, quantitative restrictions and other NTBs. The schedule for ASEAN-6 countries (Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand) in their respective lists is no later than 1 January 2010, while the deadline for CLMV countries (i.e. Cambodia, Laos, Myanmar and Viet Nam) is no later than 1 January 2015. However, the member states may list a limited number of products in the Temporary Exclusion List (hereinafter the 'TEL') in order to liberalize trade in these products at a slower pace then gradually move them onto the Inclusion List IL.

Secondly, ASEAN Protocol regarding the Implementation of the CEPT Scheme Temporary Exclusion List TEL signed on 23 November 2000 allows 'a member state to temporarily delay the transfer of a product from its TEL into the IL', or 'to temporarily suspend its concession on a product already transferred into the IL.' The Protocol applies only to TEL manufactured products as at 31 December 1999 or the relevant dates applicable to Cambodia, Laos, Myanmar and Viet Nam.[68] To invoke the provisions of the Protocol, an ASEAN country has to make a written submission to the ASEAN Free Trade Area Council (AFTA Council), stating the duration of the delay or the suspension requested, the reason for the request, and the real problems faced.[69]

The *third list* is the Sensitive and Highly Sensitive List (hereinafter the 'SL'). On 30 September 1999, ASEAN countries signed the Protocol

[68] *See* ASEAN Protocol regarding the Implementation of the CEPT Scheme Temporary Exclusion List, Article 1(2).

[69] *Supra*,, Article 2.

on the Special Arrangement for Sensitive and Highly Sensitive Products. Accordingly, ASEAN-6 are required to phase sensitive products into the CEPT Scheme beginning from 1 January 2001, with some flexibility but no later than 1 January 2003, and shall have completed their phasing in by 1 January 2010.[70] For Cambodia, Laos, Myanmar and Viet Nam, the timeframe is adjusted according to their accession dates to ASEAN.[71]

Lastly, ASEAN member states may permanently exclude some products by listing them under the General Exception List (hereinafter the 'GEL') to protect national security, public morals, human, animal or plant life and health, and articles of artistic, historic and archaeological value.[72]

Based on these agreements, since 1 January 2010, ASEAN-6 have eliminated import duties on 99.65 per cent of traded tariff lines, while CLMV countries have reduced 98.86 per cent of their traded tariff lines to between zero and five per cent.[73] In addition to tariff reductions, ASEAN countries also concluded other agreements to eliminate nontariff trade barriers (NTBs) and quantitative restrictions, harmonize customs nomenclature, valuation and procedures, and develop common product certification standards. These treaties include the Agreement on ASEAN Preferential Trading Arrangements 1977, the ASEAN Agreement on Customs 1997, the ASEAN Framework Agreement on Mutual Recognition Arrangements 1998, the e-ASEAN Framework Agreement 2000, the Protocol Governing the Implementation of the ASEAN Harmonized Tariff Nomenclature 2003, the ASEAN Framework Agreement for the Integration of Priority Sectors 2004, and the Agreement to Establish and Implement the ASEAN Single Window 2005. They contribute to the facilitation of free flow of goods in the region.

2. The ASEAN Trade in Goods Agreement ('ATIGA')

To pursue the goal of establishing a single market and production base with free flow of goods by 2015 for the ASEAN Economic Community, the ASEAN Economic Ministers agreed in August 2007

[70] *See* the Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, Article II.

[71] *Ibid.*

[72] *See* Article 9 of the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area.

[73] *See* Joint Media Statement of the 42nd ASEAN Economic Ministers' Meeting (AEM) (AFTA Council - Related Section), Da Nang, Viet Nam, 24-25 August 2010 (para. 6), available at http://www.aseansec.org/25051.htm

to enhance the CEPT-AFTA scheme into a more comprehensive legal instrument. Furthermore, a new ASEAN treaty became highly necessary for strengthening ASEAN comprehensiveness when ASEAN robustly conducted negotiations on Trade in Goods Agreements (hereinafter the 'TIGs') with Dialogue Partners of ASEAN, such as China, the Republic of Korea, Japan, Australia, and New Zealand. Therefore, the ASEAN Trade in Goods Agreement (hereinafter the 'ATIGA'), based on ASEAN existing agreements as mentioned in the previous section, was concluded on 26 February 2009 and entered into force on 17 May 2010.

Its key features are:

- It consolidates all ASEAN's existing initiatives, obligations and commitments on intra-ASEAN trade-in-goods, including both tariff and non-tariff elements, into one single comprehensive document. Agreements superseded by the ATIGA under its Article 91(2), such as the CEPT Agreement and selected Protocols, is listed in Annex 11 of the ATIGA.
- Its Annex 2 provides the detailed and full tariff reduction schedule of each member state and the tariff rates to be applied annually on each product in the ASEAN Harmonised Tariff Nomenclature (AHTN). The ATIGA introduces a new element compared to the CEPT scheme, an article on Temporary Modification and Suspension of Concessions, which provides guidelines for compensation arising from any increase in import duties to the existing commitments (Article 23).
- It comprises elements to ensure the realization of the free flow of goods within ASEAN including tariff liberalization (Chapter 2), rules of origin (Chapter 3), removal of non-tariff barriers (Chapter 4), trade facilitation (Chapter 5), customs (Chapter 6), standards, technical regulations and conformity assessment procedures (Chapter 7), sanitary and phytosanitary measures (Chapter 8), and trade remedy measures (Chapter 9).

The ATIGA 'all-in-one' formula enhances the transparency and predictability of ASEAN legal framework on trade in goods. The treaty will further facilitate and strengthen intra-ASEAN trade. It has been of considerable significance for accelerated economic integration in the realization of the ASEAN Economic Community in 2015.

B. *Rules on Trade in Services*

ASEAN countries signed the ASEAN Framework Agreement on Services (hereinafter the 'AFAS') on 15 December 1995 to facilitate the flow of trade in services within the region.

The main objectives of the AFAS are:[74]

(a) To enhance cooperation in services amongst member states in order to improve their efficiency and competitiveness, diversify production capacity and the supply and distribution of the services of their service suppliers within and outside ASEAN;

(b) to eliminate substantially restrictions to trade in services amongst member states; and

(c) to liberalize trade in services by expanding the depth and scope of liberalization beyond those undertaken by member states under the GATS with the aim to realising a free trade area in services.

The AFAS provides the broad guidelines for ASEAN member countries to progressively improve MA and ensure NT for service suppliers among ASEAN countries in all four modes of services supply, including Mode 1 (Cross-Border Supply), Mode 2 (Consumption Abroad), Mode 3 (Commercial Presence), and Mode 4 (Movement of Natural Persons). The AEC Blueprint requires liberalization with regard to all four modes but AFAS packages of services commitments cover only three modes 1, 2, 3. Mode 4 is governed separately in the ASEAN Agreement on the Movement of Natural Persons concluded on 19 November 2012.

In addition, the AFAS also provides rules for related aspects such as mutual recognition, dispute settlement, and institutional mechanism, as well as other areas of cooperation in services. The AFAS is aimed at achieving commitments beyond member countries' commitments under the GATS. Under this Agreement, ASEAN countries undertake to liberalize a substantial number of sectors within a reasonable timeframe. Since 1996, ASEAN has negotiated and concluded nine packages of services commitments, 6 packages of commitments on financial services and 8 packages of commitments on air transport services. General services commitments are provided in the following Protocols:

[74] Article I of the AFAS.

- Protocol to Implement the Initial Package of Commitments under AFAS signed on 15 December 1997;
- Protocol to Implement the Second Package of Commitments under AFAS signed on 16 December 1998;
- Protocol to Implement the Third Package of Commitments under AFAS signed on 31 December 2001;
- Protocol to Implement the Fourth Package of Commitments under AFAS signed on 3 September 2004;
- Protocol to Implement the Fifth Package of Commitments under AFAS signed on 8 December 2006;
- Protocol to Implement the Sixth Package of Commitments under AFAS signed on 19 November 2007;
- Protocol to Implement the Seventh Package of Commitments under AFAS signed on 26 February 2009; and
- Protocol to Implement the Eighth Package of Commitments under the ASEAN Framework Agreement on Services signed on 28 October 2010.
- Protocol to Implement the Ninth Package of Commitments under the ASEAN Framework Agreement on Services signed on 27 November 2015.

These commitments cover the liberalization of a wide range of service sectors, including business services, professional services, construction, distribution, education, environmental services, healthcare, maritime transport, telecommunications, and tourism. Six packages of commitments on financial services have been concluded by the ASEAN Finance Ministers, and eight packages on air transport services by the ASEAN Transport Ministers.

C. *Rules on Foreign Investment*

Existing ASEAN legal documents regulating intra-investments include:[75]

- The ASEAN Agreement for the Promotion and Protection of Investments (IGA) signed on 15 December 1987 ('1987 Agreement') and its 1996 Protocol;
- The Framework Agreement on the ASEAN Investment Area (AIA) signed on 7 October 1998 and its 2001 Protocol;
- The Enhanced Protocol on Dispute Settlement Mechanism signed on 29 November 2004.[76]
- The ASEAN Comprehensive Investment Agreement (ACIA) signed on 26 February 2009.

The 1987 Agreement contains the generally defined standards of protection in line with many other investment treaties, such as full protection, fair and equitable treatment, an umbrella clause, the repatriation of capital and earnings, and dispute settlement. NT and MFN treatments for ASEAN foreign investors to have better access to ASEAN countries were not provided under the 1987 Agreement. Instead, these standards were introduced 11 years afterwards in the Framework Agreement on the ASEAN Investment Area 1998. The conclusion of this Framework Agreement aims to establish a competitive ASEAN Investment Area with a more liberal and transparent investment environment within ASEAN.

Both agreements, however, need improving since their language is, in some places, very general and vague, which might create too much room for interpretation. Moreover, in order to create a free and open investment regime through the progressive liberalization of investment regimes of ASEAN member states and enhanced protection for intra-ASEAN investors,[77] the ASEAN Comprehensive Investment Agreement was negotiated and signed on 26 February 2009, entered into force on 29 March 2012. This Agreement replaces the 1987 and 1998 agreements upon its entry into force and within three years after the termination of the 1987 and 1998 agreements, investors of the investments covered by all the three agreements, may invoke one of them to settle investment disputes. However, there is no investor resorting to this right.

The ACIA aims to 'create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the AEC [ASEAN Economic Community]'.[78] With 49 provisions and two

[75] *See* also Trinh Hai Yen, 'East Asian Investment Treaties in the Integration Process: Quo Vadis?,' in *East Asian Economic Integration: Law, Trade and Finance*, Ross Buckley, Richard W. Hu and Douglas W. Arner (eds), Cheltenham, Northampton: Edward Elgar Publishing Ltd, (2011).

[76] This Protocol governs state-to-state investment disputes.

[77] Article 1 of the ACIA.

[78] Article 1 of the ACIA,.

annexes, the Agreement clarifies and modifies the short and ambiguous AIA and IGA provisions on the treatment of investments and investor-State arbitration, transfers, and. It also includes new articles on the prohibition of 'performance requirements' and on senior management and board of directors that facilitate the inflow of key foreign managerial and senior management personnel.[79] ACIA also contains general exceptions, security exception, specific exceptions in protection obligations and list of reservations made by ASEAN member states. In general, ACIA is one of the modern investment treaties, which aims to achieve a balance between obligations and preservation of regulatory flexibility and freedom of the host State.

2. ASEAN's FTAs with Third Parties

A. *ASEAN-China*

Trade and economic ties between ASEAN and China have been growing rapidly over the past years. The ASEAN-China Free Trade Area (hereinafter the 'ACFTA') negotiations were formally launched in 2001. After six rounds of negotiations, both sides signed the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China (hereinafter the 'ACFA') at the ASEAN-China Summit on 4 November 2002. The ACFA does not contain detailed rules on economic integration but provides the basis for the conclusion of four detailed agreements between ASEAN countries and China to establish a free trade area.

The Agreement on Trade in Goods concluded on 29 November 2004 provides the modality for tariff reduction and elimination for tariff lines categorized in either the Normal Track or the Sensitive Track. The Agreement on Trade in Services between ASEAN member states and China concluded on 14 January 2007, provides the level of liberalization commitments higher than the commitments made by participating countries under the GATS. Their Agreement on Investment was signed on 15 August 2009 and entered into force on 1 January 2010. State-to-state disputes arising under the Framework Agreement and relevant agreements are governed by the Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China, signed on 29 November 2004.

[79] For a more detailed discussion of the ACIA provisions, *see* also Trinh Hai Yen, 'State Commitments-Controlling Elements in the ASEAN Comprehensive Investment Agreement', in Paul Davidson (ed) *Trading Arrangements in the Pacific Rim: ASEAN and APEC*.

B. *ASEAN-Republic of Korea*

After completing a one-year feasibility study, the Republic of Korea (ROK) announced at the ASEAN+3 Summit in December 2004 that it would in 2005 launch FTA negotiations with ASEAN. The Framework Agreement on Comprehensive Economic Cooperation (hereinafter the 'AKFA') and its Protocol were signed by both sides at the Ninth ASEAN-ROK Summit on 13 December 2005. As did the ACFA, the AKFA entered into force on 1 July 2006 upon ratification by Korea and at least one ASEAN member country. At present, five ASEAN countries have ratified it.[80] Under the AKFA, four other detailed agreements have been concluded these form part of the legal instruments establishing the ASEAN-Korea FTA.[81] The ASEAN-Korea Trade in Goods Agreement (hereinafter the 'AK-TIG'), signed on 24 August 2006, sets out the preferential trade arrangement between the 10 ASEAN member states and Korea. The ASEAN-Korea Trade in Services Agreement (hereinafter the 'AKTIS'), signed on 21 November 2007, provides improved commitments from their existing rules in the GATS. It adds new sectors or sub-sectors into the list of commitments and eases restrictions on entry and treatment on a wide range of service sectors, including business, construction, education, communication services, the environment, tourism services, and transport services. The ASEAN-Korea Agreement on Investment (hereinafter the 'AKAI'), signed on 2 June 2009, shares a great similarity in its terms with other ASEAN agreements on investment to establish a transparent and secure legal environment for ASEAN and Korean investors and their investments. The ASEAN-Korea Agreement on Dispute Settlement Mechanism, signed on 13 December 2005, provides the mechanism for state-to-state disputes related to the mentioned above Agreements including the Framework Agreement except for investor-state disputes under the AKAI.

C. *ASEAN-Japan*

According to ASEAN FDI Statistics Database, as of May 2009, among ASEAN's Dialogue Partners, Japan ranked as the second largest source of FDI flows to ASEAN. Prime Minister Koizumi of Japan proposed the idea of an ASEAN-Japan Comprehensive Economic Partnership (hereinafter the 'AJCEP') Agreement in January 2002. The Framework for Comprehensive Economic Partnership between Japan and ASEAN was

[80] *See* Table of ASEAN treaties/agreements and ratification, http://www.aseansec.org/Ratification.pdf

[81] *See* Article 1.4(1) of the AKFA.

subsequently signed on 8 October 2003. It provides for facilitation and cooperation measures to negotiate rules on trade in goods, services and investments between the parties. Formal negotiations for the AJCEP were launched in Tokyo in April 2005. After three years, ASEAN and Japan signed the ASEAN-Japan Comprehensive Economic Partnership (hereinafter the 'AJCEP') on 7 April 2008. ASEAN and Japan do not follow the approach of ASEAN and China or Republic of Korea. They have not conducted negotiations on three or four detailed agreements in different areas of economic integration. Instead, the AJCEP is a comprehensive agreement with ten chapters and 80 articles, covering facilitation and cooperation measures, the liberalization of trade in goods, services and investments, and dispute settlement. It entered into force on 1 December 2008. Eight ASEAN countries and Japan have ratified it.[82]

D. *ASEAN-India*

The ASEAN-India Framework Agreement on Comprehensive Economic Cooperation, which includes a free trade area in goods, services and investment, was signed on 8 October 2003. Under this Framework Agreement, with a view to establishing a free trade area between ASEAN member states and India, the ASEAN-India Trade in Goods Agreement (hereinafter the 'AITIG') and the ASEAN-India Agreement on Dispute Settlement Mechanism were both signed on 13 August 2009. Agreements on Trade in Services were concluded respectively on 12 November 2014 and 13 November 2014 and entered into force on 1 July 2015.

E. *ASEAN-Australia and New Zealand*

As in the legal relationship in economic integration between ASEAN and Japan, the rules governing economic cooperation between ASEAN and Australia and New Zealand are provided in a comprehensive document, the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (hereinafter the 'AANZFTA'), signed in Thailand on 27 February 2009 and took effect on 1 January 2010.

The AANZFTA covers trade in goods and services, electronic commerce, movement of natural persons, investment, economic cooperation, dispute settlement mechanism and specific provisions on customs procedures, SPS and TBT measures, IPRs, and competition. The parties undertake to:[83]

- Progressively liberalize tariffs from the entry into force of the Agreement and eliminate tariffs on at least 90 per cent of all their tariff lines within specific timeframes;
- progressively liberalize barriers to trade in services and allow for greater market access for the other Parties' service suppliers;
- facilitate the movement of natural persons for those engaged in trade and investment activities in the region;
- accord protection to covered investments; and
- facilitate the movement of goods by implementing specific provisions on rules of origin; customs procedures; sanitary and phytosanitary measures; and technical barriers to trade and conformity assessment procedures.

The annexes to the AANZFTA contain schedules of specific commitments of the parties.

ASEAN has been very active in formulating rules on economic integration within the region and between ASEAN and external partners. The above overview of the ASEAN legal framework demonstrates a determination to build an ASEAN Economic Community (AEC), as stated in the AEC Blueprint:

> The AEC is the realization of the end goal of economic integration as espoused in the Vision 2020, which is based on a convergence of interests of ASEAN member countries to deepen and broaden economic integration through existing and new initiatives with clear timelines. In establishing the AEC, ASEAN shall act in accordance to the principles of an open, outward-looking, inclusive, and market-driven economy consistent with multilateral rules as well as adherence to rules-based systems for effective compliance and implementation of economic commitments.

[82] *See* Table of ASEAN treaties/agreements and ratification http://www.aseansec.org/Ratification.pdf

[83] *See* ASEAN Secretariat, *ASEAN Economic Community Factbook* (Jakarta: ASEAN Secretariat, February 2011), at 89-90.

Section Five. The TRANS-PACIFIC PARTNERSHIP (TPP)

TPP is a free-trade agreement negotiated by twelve countries located in the trans-Pacific region. The Agreement has been negotiated by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Viet Nam and, in line with other recently-negotiated FTAs, it contains several chapters on a number of subjects ranging from customs administration and trade remedies to electronic commerce, state-owned enterprises and anti-corruption.

Though officially signed on 4 February 2016, and already ratified by Japan and New Zealand (as of 2017), at the beginning of 2017, the President of the United States, Donald J. Trump, decided to withdraw from it and the United Sates Government has officially withdrawn from the Agreement. Thus, it is uncertain whether the TPP will ever enter into force. Nonetheless, in this Section, a description of the most important Chapters of the TPP will be provided adopting a 'prescriptive language' ('Parties must', 'parties shall', and so on, as if the Agreement were in force) taking into account the binding nature of obligations stemming from the Agreement, in their current wording. The failure to ratify it notwithstanding, and though the TPP is a rather 'large' FTA for its geographical coverage, the Agreement provides an interesting blueprint for the negotiations of future international trade agreements.

As indicated in its *Preamble*, the Parties to the Agreement wished '[e]stablish a comprehensive regional agreement that promotes economic integration' concerning both trade and investment liberalisation, with the purpose of bringing economic growth, social benefits, opportunities for businesses and workers, benefits to consumers, a rise in living standards and sustainable growth and thus, a reduction in poverty.

1. National Treatment and Market Access Chapter

First and foremost, in its National Treatment and Market Access Chapter, the TPP contains a national treatment obligation (Article 2.3). While it makes reference and incorporates Article III of the GATT 1994, including its interpretative notes, the provision also clarifies that the treatment to be accorded by a Party means 'with respect to a regional level of government, treatment no less favourable than the most favourable treatment that the regional level of government accords to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part' (Article 2.3.2).

Two general principles apply to customs duties. *Firstly*, Parties cannot increase existing customs duties or adopt any new customs duties on originated goods, unless otherwise provided by the Agreement (Article 2.4.1). *Secondly*, all Parties must progressively eliminate their customs duties on originated goods in accordance with their respective Schedule of Tariffs Commitments (Article 2.4.2). The Agreement contains an Annex 2-D with the specific Schedules of Tariffs Commitments of each Party.

One important point of customs duties is that, taking into consideration the current dynamic reality of integrated economies and markets, the Chapter stipulates that a Party cannot apply customs duties

> to a good, regardless of its origin, that re-enters the Party's territory, after that good has been temporarily exported from the Party's territory to the territory of another Party for repair or alteration, regardless of whether that repair or alteration could have been performed in the territory of the Party from which the good was exported for repair or alteration or increase the value of the good (Article 2.6.1).

This is a key provision which provides for a clear understanding of the current status of international trade, where products are worked in more than one country.

The Chapter on market access also makes reference and incorporates Article XI of GATT 1994 and its interpretative notes regarding import and export restrictions (Article 2.10), extending these provisions to prohibitions and restrictions on the importation of remanufactured goods (Article 2.11).

As for the WTO and several other FTAs, agriculture is a sensitive sector also in the TPP. Special rules are set forth for trade in agricultural goods (Chapter 2, Section C), such as those on export subsidies (Article 2.21). Attention is also paid to the pressing concern of food security: under Article 2.24, Parties have the possibility to adopt export restrictions otherwise prohibited under Article XI:1 (on foodstuffs) in order to prevent or relieve a critical shortage of foodstuffs.

2. Rules of Origin and Textiles and Apparels

Chapter 3 of the TPP addresses rules of origin and origin procedures, i.e. the rules to be applied in order to determine which products fall under the Agreement (thus benefitting from preferential treatment) and the procedures to carry out the related determinations and verifications. As a general rule, a good is considered as an 'originating goods' for the purpose of the Agreement if it is wholly obtained or produced entirely in the territory of one or more of the Parties, if its produced exclusively in the territory of one or more of the Parties from originating materials or with non-originating materials provided that it complies with further criteria set forth in Annex 3-D (Product-Specific Rules of Origin) (Article 3.2). Chapter 3 also details what is to be intended as a good wholly obtained or produced in the territory of one or more of the Parties (Article 3.3). The Chapter also addresses issues related to materials used in production and packaging materials and on the management of claims for preferential treatment (Article 3.20), for the verification of the origin (Article 3.27).

As for agriculture, textiles and apparels represent another very sensitive sector dealt with in Chapter 4 of the TPP. In principle, unless otherwise established in Chapter 4, the rules of origin and origin procedures extend and apply to textiles and apparels (Article 4.2.1). Some special rules are however established in particular, among others, for handmade and folkloric goods (Article 4.2.10). In line with the idea that textiles represent a relevant sector of national economies and that the reduction or elimination of customs duties might determine an emergency situation, where serious damage or actual threat thereof is caused to a domestic industry that produces a like or directly competitive good, subject to certain conditions, a Party may increase the rate of duty on the good of the exporting Party or Parties up to a specified level (Article 4.3). Specific rules on verifications on textiles and apparels goods are also set forth (Article 4.6) and on determination of claims for preferential tariff treatment (Article 4.7).

3. Trade Remedies

First and foremost, Chapter 6 of the TPP on trade remedies reconfirms the obligations stemming for the Parties from the WTO Agreement. Under Article 6.2, it is stipulated that the rights and obligations of the Parties under Article XIX of GATT 1994 and the Safeguard Agreement are not affected and that nothing in the Agreement confers rights or obligations on the Parties with regard to actions pursuant to Article XIX of GATT 1994 and the Safeguard Agreement. Chapter 6 however also specifies that '[n]o Party shall apply or maintain a safeguard measure under this Chapter, to any product imported under a tariff rate quota (TRQ) established by the Party under this Agreement' (Article 6.2.4). Specific rules and standards are set forth for the imposition of transitional safeguard measures (Articles 6.3 and 6.4) together with rules on the investigation, the notification and consultations (Articles 6.5 and 6.6).

Somehow similarly, under Article 6.8, Chapter 6 clarifies that Parties retain their rights and obligations under Article VI of GATT 1994, the ADA, SA and SCM. Further, under the same provision, the Agreement does not confer rights or obligations on Parties relating to proceedings or measures taken pursuant to the above-mentioned Article of GATT 1994 and the AD and SCM Agreements. In order to promote transparency and due process in trade-remedies proceedings, Annex 6-A details practices relating to antidumping and countervailing duties proceedings.

4. SPS and TBT

Chapter 7 and Chapter 8 of the TPP regulate, respectively, sanitary and phytosanitary measures and technical barriers to trade.

With regard to sanitary and phytosanitary measures, Chapter 7 refers to and incorporates the definition of SPS measure contained in Annex A to the SPS Agreement of the WTO (Article 7.1). The Chapter clarifies that its objective is to protect human, animal and plant life or health in the territories of the Parties while concurrently facilitating and expanding trade (Article 7.2(a)). Also, Chapter 7 has the explicit objective of reinforcing and building on the WTO SPS Agreement (Article 7.2(b)), which thus remains the reference point for SPS matters (as confirmed by the reaffirmation of obligations under this latter Agreement under Article 7.4). Letter (d) of Article 7.2 resumes the general need for an SPS Chapter, that is to ensure that the pursuance of the objective mentioned under letter (a) through sanitary and phytosanitary measures does not create unjustified obstacles to trade. The Chapter covers all SPS measures of a Party that may affect, directly or indirectly, trade between the Parties, explicitly mentioning that Parties are free to require halal requirements for food and food products in accordance with Islamic law (Article 7.3). The scientific principle (i.e. Parties' SPS measures are to be

based on scientific principles) is of paramount importance for the entire economy of the TPP SPS Chapter, together with the freedom of Parties to establish the level of protection that they deem appropriate and the obligation to conduct a rigorous risk analysis and assessment (Article 7.9). Among others, the Chapter also provide for some conditions for Parties establishing emergency measures necessary for the protection of human, animal and plant life or health (Article 7.14). Special provisions are established with regard to SPS measures-related dispute settlement (Article 7.18).

Similarly to Chapter 7, Chapter 8 refers to and incorporates the definitions of technical barriers to trade contained in Annex 1 of the WTO TBT Agreement (Article 8.1). The Chapter has the explicit objectives of facilitating trade and enhancing transparency and cooperation (Article 8.2) and, to this end, it applies to the preparation, adoption and application of all technical regulations, standards and conformity assessment procedures of central-level government bodies that may affect trade between the Parties (Article 8.3). The WTO TBT Agreement remains an important reference point for the TPP as testified by the incorporation of a high number of its provisions (Article 8.4). Further to the TBT obligations, Parties are obliged to afford national treatment to conformity assessment bodies of other Parties with specific regard to procedures to accredit, approve, license or otherwise recognize them (Article 8.6). Besides, among other, transparency obligations (Article 8.7) and provisions regarding the exchange of information and technical discussions (Article 8.10), Chapter 8 contains a number of annexes. These annexes single out a very high number of products category and provide for certain specific rules on TBT measures applying to them in many respects. Annex 8-A regards wine and distilled spirits, Annex 8-B concerns information and communications technology products, Annex 8-C covers pharmaceuticals, Annex 8-D addresses cosmetics, Annex 8-E regards medical devices, Annex 8-F concerns proprietary formulas for pre-packaged foods and food additives and Annex 8-G covers organic products.

5. Investment Chapter

Chapter 9 of the TPP covers a wide array of investment as made clear by Article 9.1. Investment covered include enterprises, shares, stocks and other forms of equity participation in enterprises, intellectual property rights (thus basically adding to the regulation on IP rights contained in Chapter 18 TPP) and, in general, tangible and intangible, movable and immovable property including leases, mortgages, liens and pledges. Chapter 9 covers measures adopted or maintained by a Party relating to investors from another Party and covered investment in the territory of that Party (Article 9.2). Measures covered include those adopted or maintained by central, regional or local or authorities of that Party (Article 9.2.). Moreover, Chapter 9 does not apply to measures falling under the TPP Chapter 11 (on financial services) and in the event of any inconsistency between Chapter 9 and another Chapter of the TPP, the other Chapter prevails to the extent of inconsistency (Article 9.3).

Articles 9.4 and 9.5 stipulate the NT and MFN treatment obligations, respectively. In addition, under Article 9.6, Parties are obliged to 'accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security'. Special rules are established for treatment in the case armed conflict or civil unrest (Article 9.7) and, as it is common in several bilateral investment treaties and free trade agreements with investment chapters, on expropriation (Article 9.8). Further, each Party is under an obligation to permit all transfer relating to a covered investment to be made freely and without delay into and out of its territory (Article 9.9) and not to impose performance requirement measures (Article 9.10). Specific provisions express the recognition of the legitimacy of environmental, health and regulatory objectives (Article 9.16) together with the importance of Parties' encouragement to corporations operating on their territory to follow corporate social responsibility standards (Article 9.17).

A specific section (Section B) of Chapter 9 is dedicated to ISDS methods. While consultation and negotiation remain the dispute settlement methods to be resorted to initially (Article 9.18), '[i]f an investment dispute has not been resolved within six months of the receipt by the respondent of a written request for consultations', the claimant may alternatively submit a claim under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, or under the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules or any other arbitral institution or any other arbitration rules (Article 9.19). Section B of Chapter 9 also details procedures and rules regarding the consent of the Parties, the selection of arbitrators, the conduct of the arbitration and governing law issues, among others. As in the case of other chapters, Chapter 9 contains various annexes. Annex 9-A concern

the Parties' shared understanding of customary international law, Annex 9-B relates to expropriation, Annex 9-C concerns expropriation relating to land, Annex 9-D regards the service of documents, Annex 9-E covers transfers (already partly addressed under Article 9.9), Annex 9-F regards a Chilean law (Decreto Ley 600), Annex 9-G addresses public debt, while following annexes are more specific in nature.

6. Cross-Border Trade in Services, Financial Services and Temporary Entry for Business Persons

Chapter 10 of the TPP covers cross-border trade or supply in/of services, that is the supply of a service from the territory of a Party into the territory of another Party, or in the territory of a Party to a person of another Party or by a national of a Party in the territory of another Party (Article 10.1). The same provision of Chapter 10 clarifies that the supply of service in the territory of a Party by a covered investment does not fall under the scope of Chapter 10. The Chapter covers all measures adopted or maintained by a Party and that affect cross-border trade in services by service suppliers of another Party including (but not limited to) measures affecting the production, distribution, marketing, sale or delivery of a service, affecting the purchase or use of, or payment for a service, or affecting the provision of a bond or other forms of financial security as a condition for the supply of a service (Article 10.2).

Each Party has an obligation to apply services and service suppliers of another Party NT and MFN treatments (under Articles 10.3 and 10.4, respectively). Specific obligations regard measures limiting or restricting market access (Article 10.5). Special rules apply with regard to professional services (Annex 10-A), express delivery services (Annex 10-B) and non-conforming measures ratchet mechanism (Annex 10-C).

Chapter 11 covers financial services between the Parties, that is any service of a financial nature (Article 11.1). Financial services covered include all insurance and insurance-related services, banking services as well as services incidental or auxiliary to a service of a financial nature. Chapter 11 covers measures adopted or maintained by a Party and relating to financial institutions of another Party, to investors (and their investments) of another Party in financial institutions in the Party's territory and to cross-border trade in financial services (Article 11.2).

Chapter 11 includes the NT and MFN treatment obligations (Articles 11.3 and 11.4 respectively), and rules for market access for financial institutions (Article 11.5). Specific rules are set forth for the treatment of certain information (Article 11.8) and exceptions for Parties (Article 11.11).

Chapter 12 applies to measures that affect the temporary entry of business persons of a Party into the territory of another Party, with the exclusion of those measures that affect natural persons seeking access to the employment market of another Party or 'regarding citizenship, nationality, residence or employment on a permanent basis' (Article 12.2). Specific reference is made in the Chapter to business travels without however any legally binding obligation in this respect being established, at least apparently (Article 12.5).

7. Intellectual Property Chapter

Chapter 18 of the TPP covers IP with the explicit objective of contributing to the promotion of technological innovation and to the transfer and dissemination of technology between the Parties (Article 18.2). In addition, Chapter 18 somehow and somewhat recognizes the legitimacy of a number of objectives such as the protection of public health and nutrition and of technological development (Article 18.3).

Similarly to the TRIPS Agreement, Chapter 18 of the TPP provides for "minimum-level" obligations. Indeed, as clarified under Article 18.5, Parties are obliged to give effect to the provisions of Chapter 18 and they may (but they are not obliged to) provide more extensive protection for, or enforcement of, intellectual property rights than what is required under Chapter 18 - this, provided that such protection or enforcement does not contravene the provisions of Chapter 18. Also, Parties have confirmed their commitment to the Declaration on TRIPS and Public Health and that, therefore, IP-related obligations under Chapter 18 of the TPP 'do not and should not prevent a Party from taking measures to protect public health' (Article 18.6).

It is worth noting that, besides making reference to the TRIPS Agreement, Chapter 18 of the TPP also makes reference to a number of other international IP-related agreements. Hence, under Article 18.7, the TPP makes reference first and foremost to the 1883 Paris Convention for the Protection of Industrial Property and to the 1886 Berne Convention

for the Protection of Literary and Artistic Works, and to the Patent Cooperation Treaty as amended in 1979. Also, the same provision refers to the 1989 Protocol Relating to the Madrid Agreement (i.e. the 1891 Madrid Agreement Concerning the International Registration of Marks), the 1977 Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, the Singapore Treaty on the Law of Trademarks, the 1991 International Convention for the Protection of New Varieties of Plants, and the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

In addition, Chapter 18 provides for a NT obligation (Article 18.8) and certain transparency obligations (Article 18.9), among others. In terms specific IPRs, Chapter 18 covers trademarks (Section C), including collective and certification marks (Article 18.19), domain names (Article 18.28), geographical indications (Section E), patents (Section F), undisclosed test or other data (together with patents in Section F), with special provisions on agricultural chemical products and pharmaceutical products (Subsection B and Subsection C, respectively), industrial design (Section G), copyright and related rights (Section H), trade secrets (Article 18.78), and the protection of encrypted program-carrying satellite and cable signals (Article 18.79). Special attention is also paid to technological protection measures (TPMs) and rights management information (RMI) (Articles 18.68 and 18.69, respectively). Enforcement (Section I) as well as the regulation of internet service provides (Section J) are disciplined in specific sections.

8. Concluding Remarks

As stressed at the beginning of this Section, though the TPP has not yet entered into force due to some political changes, it still qualifies as an interesting experiment in (international trade) treaty-negotiation and treaty-making dealing with the regulation of regional trade and investment. Though, of course, it refers to, builds on and incorporate several provisions of the WTO Agreements, it is also innovative in many respects. The inclusion of specific Chapters on environment (Chapter 20), cooperation and capacity building (Chapter 21), development (Chapter 23), regulatory coherence (Chapter 25), transparency and anti-corruption (Chapter 26), besides and regardless of the real substantive significance of the rights and obligations provided, make it fully a 'last generation' FTA.

Further, its wide geographical scope and ambition and the final text of the agreement provide for interesting examples on how different and at times competing interests (economic, cultural, societal, and so on) might be synthetized. Clearly, the significance of the TPP goes well beyond the trade and economic sphere, embracing the need for further integration at all levels between countries nowadays. Geopolitical imperatives have played an important role in its negotiation and, maybe, and even greater one in the dismissal of its ratification.

Section Six. VIET NAM AND THE REGIONAL ECONOMIC INTEGRATION

1. Viet Nam's Integration into ASEAN

A. *Viet Nam's Participation in AFTA and the CEPT*

Viet Nam had joined AFTA and realized the CEPT since 1 January 1996, and committed to reducing tariffs for 6,130 commodities to between zero and five per cent before 1 January 2006. Viet Nam's lists of commodities for the CEPT implementation had been made on the following fundamental principles:

- Not greatly affecting state budget revenues;
- rationally protecting domestic production;
- encouraging technology transfer and renewal for domestic production;
- cooperating with ASEAN member states under the CEPT regulations with a view to gaining preferential treatment, expanding export markets and attracting foreign investment.
- By the above point in time, Viet Nam had fulfilled the obligation to cut tariffs as committed. By 2010, Viet Nam had completely reduced import duties on 10,054 tariff lines to between zero and five per cent, accounting for 97.8 per cent of tariff lines, 5,488 of which were at the rate of zero per cent.

B. *Viet Nam's Participation in Building and Developing ASEAN Economic Community*

In recent years, ASEAN member states have actively boosted ASEAN's potential and advantages. At the Ninth ASEAN summit held in October 2003 in Bali, Indonesia, leaders of the 10 ASEAN states signed ASEAN Harmonization Declaration II (known as the Bali Declaration II), approving the framework on building ASEAN Community, with as its three pillars namely the Security-Political Community, Economic Community, and Socio-Cultural Community.

At the Thirteenth ASEAN summit held in November 2007 in Singapore, ASEAN approved the Overall Plan and Strategic Roadmap for realizing AEC, regarded as ASEAN's lodestar for attaining the objective to establish AEC.

The year 2009 was the first year in which ASEAN's Charter was realized with different objectives, including the establishment of AEC in 2015. There were ASEAN plans to establish AEC based on qualitative linkage between advantageous or potential major sectors for development within ASEAN's economy; these has happened through such specific measures as accelerating the trade liberalization of relevant products and services, harmonizing standards, simplifying customs procedures, and facilitating trade. Some sectors selected as priorities for accelerating integration within ASEAN include timber products, agricultural products, automobiles, rubber products, electronic products, textiles and garments, aquatic products, e-ASEAN, air transportation, tourism, and health care.

ASEAN's trade linkage and liberalization programmes within AEC's framework are institutionalized by such agreements as ASEAN Trade in Goods Agreement ('ATIGA') in replacement of the Agreement on Common Effective Preferential Tariff Scheme for realizing the ASEAN Free Trade Area ('CEPT'); ASEAN Framework Agreement on Trade in Services ('AFAS'); ASEAN Comprehensive Investment Agreement ('ACIA'), and others.

Viet Nam has proactively joined in building the AEC, specifically:

- By 2010, Viet Nam had reduced import duties on 10,054 tariff lines to between zero and five per cent under the CEPT/AFTA, accounting for 97.8 per cent tariff lines, 5,488 of which were at the rate of zero per cent;
- Viet Nam will complete a gradual inclusion of products onto the List of Sensitive Products into the Tariff Reduction Plan under the CEPT, and reduces tariffs for these products to between zero and five per cent by 1 January 2013.[84]
- Viet Nam joins in comprehensive cooperation with ASEAN Member States in such fields as trade in goods and services, investment, agriculture, transport, telecommunications, IP protection, competition policies, and consumer protection. So far, Viet Nam has been one of the best four ASEAN members to have fulfilled the commitments in the Overall Roadmap for realizing AEC.
- Viet Nam in 2010 still regarded AEC as the most important issue in ASEAN's Agenda. At the Sixteenth ASEAN Summit in Hanoi, hosted by Viet Nam, the ASEAN leaders had issued the 'Declaration on Sustainable Restoration and Development', affirming their determination to consolidate and build AEC by 2015.

AEC Council was unanimous in building a new instrument, AEC Performance Assessment Table, as a mechanism for transparently and closely supervising AEC performance progress of each member state. In 2010, the AEC Performance Assessment Table was for the first time completed for the 2007-2010 period.

C. *Viet Nam's Participation in the Programme of Eliminating Non-Tariff Barriers*

In parallel with the tariff reduction programme, Viet Nam also collaborates with ASEAN countries in implementing the programme of eliminating NTBs, specifically:

- Import quotas (quotas or an import ban) would be eliminated in the case where tariff rates for certain commodities had been reduced to below 20 per cent according to the tariff reduction roadmap;
- Other NTBs would gradually be eliminated within the following five years, but not beyond 2006.

Viet Nam eliminated NTBs relatively rapidly. Before 2000, Viet

[84] *Roadmap for Building the ASEAN Community 2009-2015*, Times Publishing House, at 53-54.

Nam applied NTBs to manage the export and import of the agricultural products, such as export license and quotas for rice; import licenses for rice and coffee; rubber export license at border gates for China, and the restriction of foreign currencies using for the import of consumer goods. By 2006, Viet Nam had completed the elimination of quantitative restrictions for goods' movement within the framework of the CEPT Agreement and proceeded to eliminate other NTBs. Viet Nam retains licenses accompanying tariff-rate quotas ('TRQs') for only four commodities: salt, sugar (refined and crude), poultry eggs, and tobacco materials.[85]

The elimination of NTBs also constitutes an important issue in AEC progress. The ASEAN member States, including Viet Nam, would focus on the complete elimination of NTBs by 2015, especially on transparency in development and application of standards, techniques and procedures for assessing standards and unification complied with the WTO's TBT Agreement and ASEAN Policy Guideline on Standards and Unification.

D. *Viet Nam's Participation in the Programme on Integrated Customs Operations*

Viet Nam has actively joined ASEAN's Programme on integrated customs operations with the following specific contents:

- Harmonizing the nomenclature: Since 1 July 2003, Viet Nam has applied ASEAN Harmonized Tariff Nomenclature (hereinafter the 'AHTN') instead of the current Tariff Nomenclature for calculating import and export duties (the uniform AHTN with eight digits under the World Customs Organization (WCO) Convention on the Harmonized System).
- harmonizing the system for customs valuation under the WTO Agreement on Customs Valuation.
- harmonizing the process of customs procedures: The Customs Offices of ASEAN countries have uniformly set 'the green corridor' with a view to facilitating the circulation of goods under the CEPT. 'ASEAN One-Stop Shop' Mechanism, such as trade and customs simplification, harmonization and standardization, customs process and procedures, as well as the application of information technology in all fields related to trade liberalization, is a core for attaining the final objective - to establish 'ASEAN One-Stop Shop' Mechanism.[86]
- implementing ASEAN Customs Agreement: Viet Nam has promulgated the Customs Law, and its implementation regulations in accordance with regional and global practices and meeting regional and global economic integration requirements.

To accelerate the progress of building AEC, the ASEAN Customs Union should become a reality.

E. *Viet Nam-ASEAN Trade Relationship*

AEC is the ASEAN's strategic policy option with the initial objectives to take advantage and exploit integration potential of each member State, including Viet Nam. To political, economic and trade extents, ASEAN is Viet Nam's leading trading partner and creates major motive force for the Vietnamese economy to retain its growth and export rate over the past years.

With the advantage of being a dynamic development and geographically close region, Viet Nam-ASEAN trade has seen a high growth rate. Compared to 2002, the ASEAN-Viet Nam two-way trade had more tripled, reaching nearly 30 billion USD in 2008, making up 25 per cent of Viet Nam's total turnover. Also in this period, the average growth rate of Viet Nam's export to and import into the ASEAN were 28.4 per cent and 27 per cent, respectively. Viet Nam's turnover of export to the ASEAN increased from 2.9 billion USD in 2003 to 8.9 billion USD in 2009. In 2009, Viet Nam had a turnover of export of over 1 billion USD to Singapore, Thailand, the Philippines, and Cambodia. By November 2011, Viet Nam's export growth rate had seen an impressive figure of nearly 87.2 billion USD, an increase of 34.7 per cent over the same period of 2010, of which the turnover of export to the ASEAN region increased 30.6 per cent against the same period last year and trade deficit tended to reduce from this region. The ASEAN retained the largest trading partner of Viet Nam, even larger than the EU, Japan, China or the US. Viet Nam's structure of export to the ASEAN has seen positive changes in both quality and value. From preliminarily processed agricultural products and raw materials such

[85] *Viet Nam and International Economic Organizations*, Finance Publishing House, (2010), at 131.

[86] *Vietnam and International Economic Organizations*, Finance Publishing House, (2008), at 135-138.

as rice, coffee, rubber and crude oil with low processed content, Viet Nam has exported many consumer goods and industrial products, such as computer components, textiles and garments, processed agricultural products and cosmetics with a high and stable value. Viet Nam and other ASEAN countries together joined the clubs of the world largest rice, rubber, coffee, cashew nut, textile and garment exporting countries.[87]

Apart from advantages and opportunities generated from ASEAN integration, Viet Nam also faces challenges, especially in implementing and applying AEC's commitments.

2. Viet Nam's Integration into APEC

A. *APEC's Operation Objectives and Principles*

Asia-Pacific Economic Cooperation Forum (hereinafter the 'APEC') was established in November 1989 in Canberra (Australia) with a view to boosting economic growth and prosperity in the region and concurrently tightening relationships within the Asian-Pacific Community as well as meeting the globalization trend in the world economic-trade life. The APEC has 21 members, including Australia, the US, Canada, Japan, Korea, Brunei, Indonesia, Singapore, Malaysia, the Philippines, Thailand, New Zealand, China, Hong Kong, Taiwan, Chile, Mexico, Papua New Guinea, Viet Nam, Russia and Peru. The APEC has decided to cease admitting new members to consolidate its Organization.

1. Fundamental Principles of APEC's Operation

- Comprehensiveness: Liberalization and facilitation in all fields;
- GATT/WTO consistency;
- comparability among members in trade and investment liberalization and facilitation;
- non-discrimination: Applicable not only to APEC members but also to non-member economies;
- transparency: Making transparent all current policies and regulations applicable to APEC members;
- 'standstill': Reducing only but not increasing the protection level;
- simultaneous start, continuous process and differentiated timetables: Member economies have differentiated timetables, and compared to developed economies, developing economies have a 10-year priority timetable;
- flexibility, because the APEC members' economic development levels differ;
- technical cooperation.

2. Fundamental Characteristics of the APEC

- The APEC is a dialogue forum, but not a negotiation forum. The commitments within the APEC are generally not as closely binding as within the ASEAN and WTO;
- APEC closely associates its commitments with realization of the commitments within the WTO framework in the direction of deeper and sooner realization within APEC framework;
- always associating the APEC's activities with the world's major political events on the basis of friendship and cooperation.

B. *Viet Nam's Participation in APEC*

Within APEC, Viet Nam is a dynamic and active member with its deeper and wider participation in the APEC's cooperation programmes on the liberalization and facilitation of trade and investment, economic and technical cooperation, and facilitation for the business community.

APEC's participation has brought many benefits to Viet Nam. In recent years, Viet Nam has attracted around 75 per cent of FDI and over 50 per cent of ODA from the APEC member economies. Viet Nam's turnover of export to this market with its population of nearly three billion accounts for around 70 per cent of Viet Nam's total export turnover. Vietnamese products that are advantageous for export or are strategic are imported from many importing partners from APEC member economies. Viet Nam also has such important partners within

[87] Ministry of Industry and Trade (MOIT), *Report on Industrial and Trade Activities*, November 2011; Ministry of Industry and Trade (MOIT), *Report on the 2012 Plan and the 2011-2015 Five-Year Plan*.

APEC as the ASEAN countries, Japan, China, the US, and Australia. Some APEC members have gradually become strategic partners in Viet Nam's plans to develop closer and more comprehensive economic, trade and investment relationships.

1. Tariff and Non-Tariff Barriers Issues

Viet Nam's APEC commitments are to reduce tariffs and make transparent tariff policies in the long term, gradually eliminate NTBs that obstruct international trade in compliance with its commitments within ASEAN and the WTO.

2. Customs Issues

Viet Nam, together with other members, has implemented the Action Plan on Trade Facilitation for reducing transaction expenses within APEC region. Viet Nam's APEC commitments is to harmonize customs procedures in compliance with international practices, especially the WTO's rules. Viet Nam has also joined the Initiative on 'One-Stop Shop' Customs aiming at facilitating trade and investment.

3. Trade in Services

Viet Nam has committed to continuously reduce restrictions and to open the market of trade in services, and apply MFN and NT aiming at creating favourable conditions, equality and transparency for service providers of APEC member economies, as the aim is also to allow Vietnamese service providers to access markets within the whole region. Viet Nam has protected data in e-transactions and joined the APEC Business Travel Card Scheme so as to create facilities for APEC businessmen to entry Viet Nam for business, trade and investment purposes.

4. Standards and Harmonization

Viet Nam has gradually included standards prioritized such that they are harmonized within APEC in its standard formulation plan, many standards of which have been accepted as Viet Nam's national standards. So far Viet Nam has harmonized over 200 of its national standards with international ones.

Viet Nam has joined the Mutual Recognition Agreement within APEC ('APEC-MRA') for electric and electronic products, toys, and food, among others, which facilitates the country in accessing 'fastidious' markets of APEC economies such as the US, Japan, Australia and New Zealand, etc.[88]

5. Cooperation in the Future

Viet Nam continues to cooperate with APEC member economies towards reaching the objective described in Bogor's Conference on free and open trade and investment by 2020 and improving the business environment for enterprises through the following activities:

- Eliminating barriers at borders, including the reduction of tariffs and the elimination of NTBs within the Individual Action Plan ('IAP') to boost trade and investment within the APEC region; coordinating with APEC economies in studying the harmonization of RoOs to facilitate export goods; carrying out 'One-Stop Shop' Customs procedures to shorten customs clearance for goods and reduce expenses for enterprises; joining in the programme on business travel facilitation within APEC region;
- eliminating post-border barriers through implementing programmes to reform management mechanisms for facilitating the business environment, including the establishment of enterprises and procedures to facilitate production and business activities of enterprises;
- enhancing 'cross-border' linkage to facilitate the transportation of goods among members, including the elimination of logistics barriers;
- increasing cooperation with APEC members in building capacity for small- and medium-sized enterprises within the framework operation of APEC's Small- and Medium-sized Enterprise Working Group ('SMEWG');
- boosting business cooperation through APEC Business Advisory Council ('ABAC') as a channel for exchange of information and recommendations between the Government and enterprises and a focal point for linking enterprises of Viet Nam and APEC members.[89]

[88] *Viet Nam and International Economic Organizations*, Finance Publishing House, (2008), at 189-192.

[89] Ministry of Industry and Trade's speech at the ABAC Conference on 25 August 2009, in Viet Nam.

3. ASEM's Participation of Viet Nam

A. *Objectives and Principles of ASEM*

The Asia-Europe Meeting (hereinafter the 'ASEM') was established in March 1995 in Bangkok, Thailand, with a view to boosting political dialogue to improve mutual understanding and unanimous viewpoints of the two continents with regard to political and social affairs of the world; boosting trade and investment exchange among member states and enhancing cooperation in scientific, technical, environmental and human resource development affairs so as to create sustainable growth in both Asia and Europe.

1. Fundamental Objectives

- To boost exchange and support among enterprises;
- to improve the business environment with a view to boosting trade and investment;
- to create stable and sustainable economic growth.

2. Some Fundamental Principles

- Equality, mutual respect and mutual benefit;
- consensus;
- dialogue;
- equal cooperation in different fields: enhancing political dialogue, consolidating economic cooperation and boosting cooperation in other fields;
- voluntary in nature.

B. *Viet Nam's Participation*

1. Political Issues

- Viet Nam has fully and actively joined in political activities of the ASEM at summits, ministerial conferences, ASEM senior officials' meetings (SOMs) and coordinator meetings.
- Viet Nam has joined in formulating such documents as the Asia-Europe cooperation framework and declarations of conference presidents with a view to determining objectives, principles, mechanisms, priorities, and orientations for ASEM cooperation.
- Viet Nam's proposal to make practical ASEM cooperation, especially economic cooperation, at the Fifth ASEM Summit, has been backed by members.
- Viet Nam hosted the Fifth ASEM Summit in Hanoi in 2004.

2. Economic Issues

- Viet Nam has joined in formulating and implementing the Trade Facilitation Action Plan ('TFAP'): Making the List of common barriers to trade in the TFAP's eight initial priority fields and some other common barriers.
- Viet Nam has joined in formulating and implementing the Investment Promotion Action Plan ('IPAP'), including the establishment of the network of information on ASEM investment, provision of updated information on foreign investment situation, legal documents, and policies to promote foreign investment in Viet Nam; sending persons to join the Investment Experts Group ('IEG').
- Viet Nam has actively conducted financial exchange and joined in cooperation programs on money laundering control and exchange of experience in public debt management. Viet Nam has taken advantage of the ASEM Fund of Trust ('AFT') for the process of reforming financial-banking and social protection systems with support granted for over 20 projects worth over 13 million USD. Some effective projects provide examples, such as 'Reforming and Developing the Banking System'; 'Reforming Vietnamese State-owned Enterprises'; 'Boosting and Equitizing State-owned Enterprises in the transport sector'; 'Programme to Develop Social Assurance Networks and Create Jobs'; 'Structure of the Banking System'; 'Providing Healthcare Services for the Poors', and 'Training Business Administration Leaders and Managers', among others.

3. Difficulties in ASEM Cooperation

Since the Fifth ASEM done in Hanoi, ASEM economic cooperation has seen few changes. Official annual economic conferences such as the ASEM Economic Ministers Meeting and ASEM Meeting of Trade and Investment Senior Officials, either could not be held or were held unsuccessfully for different reasons, such as some ASEM members' divergence of opinions in orientation and ASEM cooperation mechanism itself.

Since early 2004, large-scale problems related to economic affairs have not been mentioned. Only three official economic meetings of ASEM had been held (after they had been postponed many times), *e.g.*, the Tenth Departmental-Level Senior Officials Meeting on Trade and Investment (SOMTI-10) in China in July 2005; the Non-Official Meeting of ASEM Senior Officials in the Netherlands in October 2005; and most recently the Eleventh Departmental-Level Senior Officials Meeting on Trade and Investment (SOMTI-11) in Slovenia in April 2008. However, they were held only for members to meet and exchange ideas with one another.

Viet Nam participated in the departmental-level ASEM Senior Officials Meeting on Trade and Investment held in Brussels, Belgium, in February 2011, where the country took the opportunity to mobilize the ASEM members to resume economic cooperation, including the organization of ASEM Economic Ministers Meeting, which had been postponed for a few years.

4. Viet Nam and FTAs

For Viet Nam, FTAs are not new 'playing ground'. Viet Nam has experienced AFTA since 1996 and the country participates and is currently negotiating 12 of regional and bilateral FTAs which vary widely as for the commitments laid down. In particular, in 2016, Viet Nam has completed the negotiation of an FTA with the EU and it is currently negotiating FTAs with other trade partners such as the EFTA countries (Norway, Iceland, Liechtenstein and Switzerland) and Israel.

Within the framework of the ASEAN, Viet Nam has concluded and implemented ASEAN FTA ('AFTA'), ASEAN-China FTA ('ACFTA'), ASEAN-Korea FTA ('AKFTA'), ASEAN-Japan Comprehensive Economic Partnership Agreement ('AJCEP'), ASEAN-Australia-New Zealand FTA ('AANZFTA'), and ASEAN-India FTA ('AIFTA'). Besides, up to February 2012, ASEAN-EU FTA is in the process of negotiation.

Viet Nam-Japan Comprehensive Economic Partnership Agreement is first bilateral FTA of Viet Nam, subsequently the bilateral FTA with Chile.

Some commitments of Viet Nam within the FTAs' framework are beyond WTO's commitments and in coming years, Viet Nam has opportunities to participate in many more complex 'playing ground' always taking into consideration that Viet Nam's participation in FTAs is aiming at the implementation of international economic integration policies of Government of Viet Nam.

Summary of Chapter Three

RTAs are generally aimed at economic integration: the reduction of barriers to movement of economic factors across borders. RTAs may implicate one, some or all of the 'four fundamental freedoms' - free movement of goods, free movement of services, free movement of investment, and free movement of labour. Besides, political ideas play a leading role in the conclusion of RTAs.

One of the most important questions in international trade policy today is the relationship between regional and global integrations. RTAs are regulated by WTO rules. The relationship between RTAs and the WTO law is complex in the application of both the rules of RTAs and the law of the WTO. WTO rules should ensure that RTAs create rather than discourage trade. However, it is not clear whether RTAs encourage trade in reality.

Pascal Lamy, Director-General of the WTO, noted:

> I find the debate about whether regionalism is good or bad thing sterile. This is not the point. We need to look at the manner in which RTAs operate, and what effects they have on trade opening and on the creation of new economic opportunities …[90]

In fact, RTAs may both divert and support global economic integration. Regional and bilateral agreements (*see* the Chapter Four of the Textbook) are now a complement to the global trading system, although they are not necessarily an alternative. The success of the

[90] Peter Van den Bossche, *supra*, at 699.

regional integration, although it is the EU, NAFTA or ASEAN, must be on the ground of mutual agreement between members about political and economic interests, as well as legal rules.

QUESTIONS/EXERICISES

1. Why RTAs?
2. Comment on the relationship between regional and global integrations.
3. Compare the three RTA's models - the EU, NAFTA and ASEAN's FTAs.
4. Comment on Vietnam's regional economic integration.

REQUIRED/SUGGESTED/FURTHER READINGS

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9. WTO, Appellate Body Report, *Turkey-Restriction on Imports of Textiles and Other Clothing Products*, WT/DS34/AB/R, adopted 19/11/1999, http://www.wto.org;
10. WTO, Appellate Body Report, *Argentina-Footwear (EC)*, http://www. worldtradelaw.net.

USEFUL WEBSITES

WTO, http://www.wto.org

EU-MUTRAP, http://www.mutrap.org.vn

EU, http://europa.eu

EU, http://trade.ec.europa.eu

EU, http://eur-lex.europa.eu

EU, http://curia.europa.eu

ASEAN, http://www.aseansec.org

NAFTA, http://www.nafta-sec-alena.org

http://www.worldtradelaw.net

USTR, http://www.ustr.gov/tpp

CHAPTER FOUR. AGREEMENTS ON BILATERAL TRADE COOPERATION BETWEEN VIET NAM AND SOME PARTNERS

AGREEMENTS ON BILATERAL TRADE COOPERATION BETWEEN VIET NAM AND SOME PARTNERS

In the implementation of the foreign policy of active and proactive integration of Viet Nam into the world, the successes in global and regional integration are truly opportunities to deepen bilateral trade relations between Viet Nam and its partners through increasing conclusions of bilateral trade cooperation agreements. The following are bilateral trade cooperation agreements between Viet Nam and the EU, US and China.

Section One. VIET NAM-EUROPEAN UNION

1. The History of the Viet Nam-European Union Economic Relations

Viet Nam's engagement with the European Union ('EU') dates back to 1992 when Viet Nam signed with the European Community ('EC,' now 'replaced' by the EU) the Textile Agreement, one of its first trade agreements with a non-Communist partner. Two years before, the European Community had established its first diplomatic ties with Viet Nam, by giving development support to the newly reformed economy.

The level of political and economic engagement between the two partners increased progressively. On 17 July 1995, Viet Nam and the EC signed a Framework Cooperation Agreement. The Agreement, which entered into force on 1 June 1996, structured the relationship between the two partners based on four objectives: (1) increased bilateral trade and investment; (2) support for the sustainable economic development of Viet Nam and improvement of living conditions of the poor; (3) support for Viet Nam's efforts of economic restructuring and move towards a market economy; and (4) environmental protection. From a trade perspective, the most important achievement for Viet Nam was the granting of the MFN treatment to Vietnamese exports; these reduced consistently the trade barriers faced by Vietnamese producers exporting to the EU and consequently increased the trade flow between the two countries. The Agreement created the Viet Nam -EC Joint Commission, establishing a forum for high-level discussions on political and economic developments in the EU and Viet Nam. In particular, the Joint Commission discusses how to improve trade and investment relationship, how to increase Vietnamese efforts to enhance governance and institutional reforms, and how to improve development cooperation, including in science and technology.

In the framework of the cooperation, the EU has constantly been involved in improving Viet Nam's economy through various projects and development programmes. One of the most important areas of focus was international trade. In this respect, a leading project was the Multilateral Trade Assistance Project (hereinafter the 'MUTRAP'), which ran on the Period III, up to 2012, then continued with the European Trade Policy and Investment Support Project (the 'EU-MUTRAP'), up to 2017. It has paved the way for Viet Nam's accession and integration to the WTO. Indeed, the EU has always been a great supporter of Viet Nam's accession to the WTO, and the EU became the first partner to conclude with Viet Nam the rounds of bilateral negotiations in the WTO. This was the result of a deepening level of trade cooperation between two partners: indeed, already in 2004, the EU signed a Market Access Agreement, which removed all quotas on textiles from Viet Nam and increased the market access to European investors and traders to Viet Nam.

On 11 January 2007, Viet Nam acceded into the WTO. The trade relationship between two partners is, from that time, governed by a complex set of rules enshrined in the various WTO agreements. This has not prevented them from entering into a deeper level of cooperation on trade issues. Indeed, on the occasion of the first official visit to Viet Nam by the President of the European Commission on 25-27 November 2007, it was agreed further to strengthen bilateral relations via the launch of negotiations of a Comprehensive Partnership and Cooperation Agreement ('PCA') between Viet Nam and the EU. The first round of negotiations was held in June 2008; by July 2009, Viet Nam and the EU had already completed four rounds of negotiations. Within the Eighty ASEM Senior Officers Meeting ('ASEM SOM') held in Belgium, on 4 October 2010, Viet Nam has signed the Framework Agreement on Partnership and Comprehensive Cooperation with the EU.[1]

From 2012, the European Trade Policy and Investment Support Project (EU-MUTRAP) has been running. It will run until the end of 2017, with the aim of furthering 'Viet Nam's integration into the global, ASEAN and sub-regional trading system and to enhance EU- Viet Nam trade and investment relations […].'[2]

[1] Voice of Viet Nam, *Viet Nam-EU: Bright Prospect*, http://english.vov.vn/Home/VietnamEU-bright-prospect/201011/121814.vov, 11:52 AM, 28 November 2010.

[2] MUTRAP EU-VIETNAM, *European Trade Policy and Investment Support Project*, http://mutrap.org.vn/index.php/en/about-eu-mutrap-2.

2. The EU Engagement in South-east Asia and the 'Global Europe' Strategy

The EU has always been engaged in PTAs with various countries. In 2007, the European Commission launched a new trade strategy aimed at negotiating ambitious free trade agreements (FTAs) with strategic partner countries. The new European strategy was set officially by the European Commission in the communication 'Global Europe - Competing in the World', which spells out the new trade policy of the EU. In the framework of such policy, the signing of new and ambitious FTAs with strategic partners is among its priorities. In terms of content, *Global Europe*'s goal is to have strong, comprehensive 'WTO-plus' FTAs. Tariffs and quantitative restrictions should be eliminated. Presumably, this should apply to at least between 90 and 95 per cent of tariff lines and trade volumes in order to comply safely with the 'substantially-all-trade' criterion in Article XXIV of the GATT. There should be 'far-reaching' liberalization of services and investment. Services provisions should presumably be compatible with the 'substantial sectorial-coverage' criterion in Article V of the GATS. A model EU investment agreement, developed in coordination with EU Member States, is envisaged. There should be provisions going beyond WTO disciplines on competition, government procurement, IPRs, trade facilitation, labour and environmental standards. Rules of origin ('RoO') should be simplified. More generally, there should be strong regulatory disciplines and regulatory cooperation, especially to tackle NTBs. This should involve improved transparency obligations, mutual recognition agreements, regulatory harmonization, regulatory dialogues and technical assistance.

On the basis of such new strategy, on 23 April 2007, the Council of the EU authorized the EU Commission to start negotiating a FTA with ASEAN. Negotiations were officially launched at the EU-ASEAN Economic Ministers Consultations held in Brunei Darussalam on 4 May 2007. Negotiations between the EU and ASEAN were intended to take place on a region-to-region approach, while recognizing and taking into account the different levels of development and capacity of individual ASEAN members. As progress in the EU-ASEAN negotiations was slow, both sides agreed in March 2009 to suspend the negotiations. On 22 December 2009, the European Commission announced that EU member states authorized the European Commission to pursue negotiations towards FTAs with individual ASEAN countries. The negotiations for the FTA between Viet Nam and the EU began within the framework of this new strategy and were concluded in 2016. As of December 2017, the EU-Viet Nam FTA is awaiting ratification.

3. The Viet Nam-EU Free Trade Agreement (Viet Nam-EU FTA)

FTAs are becoming increasingly sophisticated and complex trade policy instruments. The EU began in the 1990s systematically to use FTAs in order to extend its sphere of economic influence into neighbouring countries. Over time, FTAs evolved to address also non-trade concerns. The new generation of FTAs may be described as mature economic and foreign policy instruments that go well beyond the reduction of trade barriers. The new wave of FTAs negotiated in the framework of the 'Global Europe' initiative present a fairly structured regulatory architecture that, in addition to classical trade issues such as trade in goods or services, contain also provisions on environment, competition, government procurement, and investment. This Section will focus on the main contents of the EU-Viet Nam FTA ('EVFTA').[3]

The EVFTA is a complex instrument featuring 18 chapters addressing a number of different issues, from trade in goods and services to State-owned enterprises, intellectual property and transparency.

The explicit objectives of the EVFTA are to facilitate trade and investment between the EU and Viet Nam (Article 1.2 EVFTA). In this sense, a free trade area 'consistent with Article XXIV of the GATT 1994 and Article V of the GATS' is established (Article 1.1 EVFTA). Also, as highlighted in the *Preamble* (Alinea 4) of the EVFTA, the EU and Viet Nam are:

> [determined] to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment under this Agreement in a manner mindful of high levels of environmental and labour protection and relevant internationally recognised standards and agreement.

The EVFTA is also accompanied by a 'provision' (Article X) concerning 'Specific Measures Concerning Management of Preferential Treatment' (regarding trade in goods and market access), by a Protocol on Mutual Administrative Assistance in Customs Matters, and a Budget Clause on Management of Administrative Errors.

[3] This Section considers the EU-Viet Nam FTA as concluded between the Parties with reference to the text available as of July 2017 at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

A. *General Trade Situations between the EU and Viet Nam*

Trade between the EU and Viet Nam has been characterized by a high level of 'specialization' in the 'Ricardian' sense of the term. Indeed, while high-tech products, machineries (such as equipment and vehicles) and pharmaceuticals have constituted a big chunk of the EU exports to Viet Nam, Viet Nam's exports to the EU have been mainly in the electronic products, footwear and textiles and food (coffee, rice and seafood) sectors.[4] According to data updated as of March 2017, the EU is the fifth largest foreign investing country in Viet Nam.[5]

In the context of the EVFTA, with regard to tariffs, the EU and Viet Nam have agreed that over 99 per cent of tariff lines will be eliminated over different periods of time. The EU will eliminate its tariff lines over a 7-year period, while Viet Nam will do that over a 10-year period.

After detailing its own objectives, the EVFTA immediately addresses 'National Treatment and Market Access for Goods' in its Chapter 2, and includes specific rules (within Annexes), among others, for two sectors sensitive for both Parties. Annex 2-a concerns pharmaceutical products and medical devices and Annex 2-b concerns motor-vehicles and motor-vehicles parts. Overall, these two Annexes affirm that trade between the EU and Viet Nam in these products has to be based on transparency, mutual recognition and use of international standards.

B. *Rules of Origin*

In order to identify the products to which the Agreement itself applies, the EVFTA sets forth a number of rules to define 'originating products', together with several sub-rules, as those concerning cumulation of origin in its Protocol Concerning the Definition of the Concept of 'Originating Products' and Methods of Administrative Co-operation.

As general requirements, in order to apply the EVFTA, the Agreement considers as products originating in a Party those products wholly obtained in a Party (according to Articles 2 and 4 of the Protocol) and those products obtained in a Party 'incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the Party' (according to Articles 2 and 5 of the Protocol).

[4] European Commission - Trade, *Viet Nam*, http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/.

[5] *Ibid*.

In addition, importantly, the Protocol identifies a number of operations that are to be considered as insufficient working or processing in order for a product to have the status of 'originating product' (Article 6 of the Protocol) and identifies certain proofs of origin (such as origin declarations or certificates or origin) to be produced in order to import products into Viet Nam or into the EU from the other Party benefitting from the EVFTA (Article 15 of the Protocol).

C. *Non-tariff Barriers (NTBs)*

Chapters 6 and 7 of the EVFTA focus on TBT and SPS, respectively.

Under Chapter 6 on TBT, the Parties reaffirm their rights and obligations under the TBT Agreement (Article 1). The Chapter applies to the 'preparation, adoption and application of standards, technical regulations and conformity assessment procedures as defined in the TBT Agreement' (Article 3), with the objective of 'preventing, identifying and eliminating unnecessary obstacles to trade […] and enhancing cooperation between the Parties' (Article 2). Provisions on transparency in the preparation, adoption and application of technical barriers to trade and on market surveillance and enforcement activities have a central role within the TBT Chapter of the EVFTA (Articles 8 and 9, respectively).

Somehow similarly, Chapter 7 on SPS applies to the preparation, adoption and application of SPS measures that may directly or indirectly affect trade among the Parties. To reach this objective, Chapter 7 is careful in identifying the competent authorities in each Party and in setting forth Parties' rights and obligations regarding SPS-related import requirements, procedures and verifications. It is worth noting that Parties may adopt proportional and non-discriminatory measures that are 'scientifically justified, consistent with the risk involved and represent the least restrictive measures available and result in the minimum impediment to trade' (Article on Import Requirements and Procedures). The echo of the SPS Agreement within Chapter 7 of the EVFTA is thus clear.

D. *Trade in Services, Investment and E-Commerce*

As already noted, negotiations of the EVFTA were concluded in 2016. The timing of its conclusion is not irrelevant. Indeed, Chapter 8 of the EVFTA is dedicated to trade in services, investment and e-commerce

altogether. Though this Chapter is composed and divided into other (sub-)chapters, it implicitly recognizes and 'embraces' the (only) now well-exposed connection and partial overlap between the international regulation of trade in services, foreign investment and e-commerce. Indeed, the Parties 'lay down the necessary arrangements for the progressive liberalisation of trade in services and investment and for cooperation in e-commerce' (Article on Objectives, Coverage and Definitions).

Two points regarding investment are worth of attention. *Firstly*, with regard to the liberalisation of investment, the Chapter applies to measures adopted or maintained by a Party concerning the establishment of an enterprise or the operation of an investor of one Party into the territory of the other Party (Article 1.1, Scope and Definitions). However, a number of sectors are excluded from this Chapter of the Agreement including audio-visual services, national maritime cabotage, the selling and marketing of air transportation services and computer reservation system services (Article 1.2). Thus, some important sectors are excluded from the provisions of the Agreement regarding investment liberalisation - but the list of specific sectors excluded only strengthens the idea that trade in services, investment and e-commerce are heavily intertwined. *Secondly*, Chapter 8 includes a general exceptions provisions allowing Parties to adopt or enforce certain measures to pursue important public and/or societal values, where certain conditions are complied with. Hence, the EVFTA seem to 'keep open' a relevant regulatory space for both Parties.

E. *Government Procurement*

As it is has been the case for the EU FTAs with Central America, Chile, Colombia, Iraq, Korea, Mexico and Peru,[6] the EVFTA includes a Chapter 9 on government procurement as well. The inclusion of a specific Chapter on government procurement in the EVFTA is all the more important if one bears in mind that, since 5 December 2012, Viet Nam is an observer in the Government Procurement Committee at the WTO, but not a Party to the (plurilateral) WTO Agreement on Government Procurement.

The Chapter applies to government procurement of goods and services and any combination thereof, by any contractual means, for value(s) corresponding to the Agreement specifications and not otherwise excluded from the application of the Agreement (Article II). Arguably, the most important principles applying to government procurement are the national treatment and most-favoured nation obligations (Article IV).

That said, the EVFTA maintains a certain regulatory room for manoeuver for both Parties even in the government procurement sector: indeed, the Chapter on government procurement contains a security and general exceptions provision (Article III). The EVFTA puts emphasis as well on obligations regarding transparency, information sharing and notices (Articles V and VI), among others. These provisions are indeed key in order to obtain significant results in the opening of the government procurement sector and in the application of other obligations, such as those concerning non-discrimination.

F. *State-owned Enterprises and Competition*

Chapter 10 and 11 of the EVFTA are dedicated, respectively, to State-owned enterprises and competition policy.

In identifying state-owned enterprises, Chapter 10 uses both a 'quantitative' criterion based on capital or votes, and 'qualitative' criteria referring to the power to appoint members with relevant positions and the exercise of control. Indeed, under Article 1, a State-owned enterprise is an enterprise (including a subsidiary):

> In which a Party, directly or indirectly: (a) owns ore than 50% of the enterprise's subscribed capital or the votes attached to the shares issued by the enterprise; or (b) can appoint more than half of the members of the enterprise's board of directors or an equivalent body; or (c) can exercise control over the strategic decision of the enterprise.

Besides State-owned enterprises, Chapter 10 addresses as well other somehow 'comparable' situations such as that of enterprises to which certain rights or privileges have been granted and designated monopolies. However, Chapter 10 only covers the commercial activities of these enterprises, i.e. if an enterprise engages in both commercial and non-commercial activities, only commercial activities of that enterprise fall under Chapter 10 of the EVFTA (Article 2.2). Also, a revenue 'cap' is established so that enterprises whose revenues from commercial

[6] European Commission - Trade, *Public Procurement*, http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/.

activities are less than 200 million Special Drawing Rights (SDR) for the three consecutive previous years are excluded from the application of the Chapter (Article 2.3). Enterprises in charge of national defence, public order, public security are excluded as well from the scope of Chapter 10 (Article 2.4).

The most important obligation concerning Chapter 10 is arguably the one for Parties to ensure that enterprises falling under the Chapter 'act in accordance with commercial considerations in their purchases or sales of goods and services' and that enterprises of the other Party or that are investments of investors of the other Party are not discriminated (Article 4).

This main obligation is accompanied by a rather 'loose' obligation for Parties to ensure that enterprises falling under Chapter 10 observe internationally recognised standards of corporate governance (Article 5) and to respect some transparency standards (Article 6).

Though formally separated, the provisions on State-owned enterprises are of course directly related to the provisions of Chapter 11 on competition policy. Chapter 11 is divided into three sections: Section I on anticompetitive conducts, Section II on Subsidies and Section III on definitions and common principles.

Section I on anticompetitive conducts addresses distorted competition in the Parties' trade and investment relations (Article 1). That said, the obligations stemming from Section 1 are general, revolving around Article 2. This latter provision prescribes Parties to adopt or maintain comprehensive competition legislations effectively addressing agreements, decisions or concerted practices of enterprises preventing, restricting or distorting competition, abuses of dominant position and concentrations between enterprises impeding effective competition (Article 2). It is worth mentioning however that, though its provisions are general in content, Section 1 of Chapter 11 is excluded from the dispute settlement mechanism provided by the EVFTA itself (Article 4).

Section II of Chapter 11 addresses subsidies. Parties agree that subsidies can be granted by a Party when they are necessary to achieve a public policy objective but, in principle, they should not be granted when they negatively affect or are likely to affect trade and competition (Article 1.1). Public policy objectives include promoting economic development

of certain areas and facilitating the development of certain economic activities in certain economic areas (Article 1.2). Besides transparency and consultations obligations (under Articles 4 and 5, respectively), some conditions are attached to subsidies consisting of legal arrangements whereby a government or any public body is responsible to cover enterprises' debts or liabilities and where support is given to certain ailing enterprises under specific circumstances (Article 1.6).

Lastly, Section III contains three provisions on definitions, confidentiality and cooperation between the Parties.

G. *Intellectual Property Rights (IPRs)*

Chapter 12 of the EVFTA focuses on intellectual property. The express objectives of Chapter 12 are to facilitate the 'creation, production and commercialization of innovative and creative products' in order to contribute to a more sustainable and inclusive economy between the Parties and 'to achieve an adequate level of protection and enforcement of intellectual property rights' (Article 1).

Chapter 12 is intended as complementing and further specifying the Parties' rights and obligations under the WTO TRIPS Agreement (and other international IP agreements): the EVFTA covers indeed the same IP rights regulated by this latter WTO Agreement (Article 2). It si wroth noting already at the outset that Chapter 12 sets forth not only obligations but also rights for the Parties, providing for instance for the possibility for Parties to establish exceptions to IP rights in their national legislations.

Two important general provisions are Article X, concerning the MFN obligation, and Article 3, according to which each Party is free to establish 'its own regime for the exhaustion of intellectual property rights'.

Articles 4.1 to 4.12 of Chapter 12 address copyright and related rights. One important obligation is the one for Parties to access (and comply with) the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (Article 4.1.2). This obligation clarifies already what becomes clear for instance under Article 4.8 on the protection of technological measures and Article 4.9 on the protection of rights management information and other provisions: that is, the will to address copyright and related rights regulation with regard to technological environments. This is further confirmed by Article XX,

at the end of Chapter 12, concerning liability of intermediary service providers.

Distinctive signs (i.e. trademarks and geographical indications) are disciplined in Article(s) 5 (from Article 5.1 to Article 5.6) and Article(s) 6 (from Article 6.1 to 6.11) of Chapter 12. On this point, Chapter 12 includes annexes regarding the specific geographical indications of the EU and of Viet Nam to be protected by the other Party (under, in particular, Articles 6.3 and 6.5, explicitly referring to GIs listed in the Annexes). The EVFTA addresses as well industrial designs, patents, the protection of undisclosed information and plant varieties rights.

Lastly, the EVFTA adopts a TRIPS-like approach where substantive protection of IP rights is accompanied by effective enforcement of these rights both within the territories of the Parties and at the border. In general, these provisions appear to merely reflect the obligations stemming for the Parties from the TRIPS Agreement.

H. *Dispute Settlement; Trade and Development; and Other Issues*

Chapter 13 of the EVFTA sets forth rules concerning dispute settlement, should a dispute between the Parties arise with regard to the interpretation and application of the EVFTA. The dispute settlement methods and procedures of the EVFTA somehow recall the WTO dispute settlement mechanism.

When a dispute arises, a mutually agreed solution, where possible, appears to be the preferred solution (Article 1). Parties are obliged to enter into consultations (Article 3) and, should consultations fail to resolve the dispute, Parties may request the establishment of an arbitration panel (Article 5). Chapter 13 also addresses compliance with the arbitration panel report, the procedures to review any measure taken to comply with the arbitration panel report and temporary actions (i.e. remedies) allowed in the case of non compliance (Articles 12-16).

In line with the idea that a mutually agreed solution is to be preferred, Parties 'may at any time agree to enter into a mediation procedure with respect to any measure adversely affecting trade and investment' between them (Article 4).

In addition, the EVFTA contains two chapters focusing on two important issues for both the EU and Viet Nam. *On the one hand*, Chapter 14 contains provisions on non-tariff barriers to trade and investment in renewable energy generation, and, *on the other hand*, Chapter 15 addresses trade and sustainable development. This latter Chapter recognizes, in particular, 'the importance of full and productive employment and decent work for all' and Parties reaffirm the obligations deriving from the membership of the International Labour Organization (Article 3). Also, environmental concerns are addressed by reaffirming Parties' commitments under multilateral environmental agreements (Article 4), under the United Nations Framework Convention on Climate Change and its Kyoto Protocol (Article 5) and to the conservation and sustainable use of biological diversity under the Convention on Biological Diversity and the Convention on International trade in Endangered Species of Wild Fauna and Flora (CITES) (Article 6). Attention is also paid to sustainable forest management and trade in forest products (Article 7) and to the sustainable management and trade in living marine resources and aquaculture products (Article 8).

Moreover, though some transparency and cooperation obligations are contained in specific chapters of the EVFTA, the final EVFTA Chapters (16 to 18) are dedicated as well to these subjects.

Section Two. VIETNAM-UNITED STATES

1. Overview of Viet Nam-United States Bilateral Trade Cooperation and Agreements

The trade relations between Viet Nam and the United States (hereinafter the 'US') started to develop during the 1990s. Both sides signed the Viet Nam -US Agreement on the Establishment of Copyright Relations in 1997. An important milestone for the Viet Nam-US trade relations is the conclusion of a bilateral trade agreement (hereinafter the 'BTA') in 2000, covering all main areas of their economic cooperation. Under this Agreement, the US extended to Viet Nam 'conditional MFN' trade status, known as 'Normal Trade Relations' (hereinafter the 'NTR').[7]

In 2003, they signed the Viet Nam-US Bilateral Textile Agreement. Their economic and trade relations were further enhanced when the US granted Viet Nam 'Permanent Normal Trade Relations' (hereinafter the 'PNTR') on 29 December 2006, as part of Viet Nam's accession to the WTO.[8] Viet Nam formally requested to be added to the US 'Generalized

[7] Article 1, Chapter 1 of the BTA.

[8] Michael F. Martin, CRS Report for Congress R41550, *US-Viet Nam Economic and Trade Relations: Issues for the 112th Congress*, 5 April 2011, at. 1.

System of Preferences' ('GSP') programme as a 'beneficiary developing country' (hereinafter the 'BDC') in May 2008, although there has as yet been no formal decision regarding the status of Viet Nam's GSP application.[9] The two countries concluded a Trade and Investment Framework Agreement (hereinafter the 'TIFA') in 2007 and have been negotiating detailed agreements. With such efforts, the bilateral trade between both sides has risen from about 220 million USD in 1994 to over 47 billion USD in the end of 2016.[10] This Section will focus on the evolving legal framework on the Viet Nam-US trade cooperation.

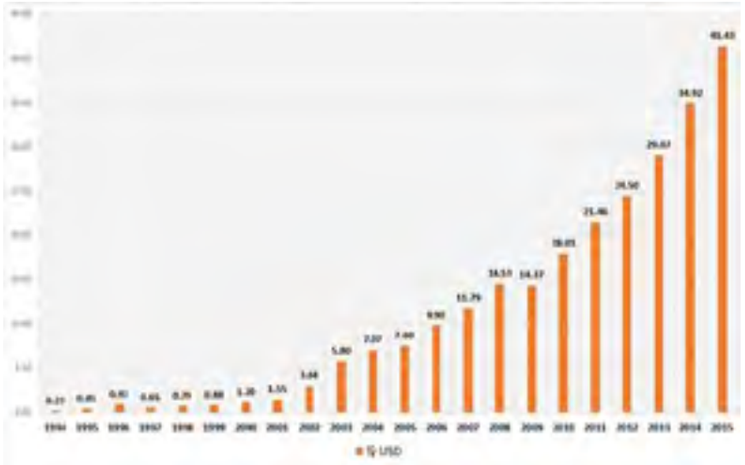

Table 4.2.1. Growth of Viet Nam-US bilateral trade relations[11]

2. The Viet Nam-US Agreement on the Establishment of Copyright Relations 1997

The Agreement between Viet Nam and the US on the Establishment of Copyright Relations was signed on 27 June 1997. It entered into force on 23 December 1998. The Agreement protects all types of copyrightable works and sound recordings, regardless of the medium in which they are fixed, including in electronic form. The protected works are defined as those

> [F]or which a national or domiciliary of either Contracting Party owns economic rights granted by the copyright law in the territory of the other Party or where such rights are owned by a judicial entity directly or indirectly controlled by, or the majority of whose shares or other proprietary interest is owned by, any national or domiciliary of either Contracting Party, provided that ownership of such rights was acquired within one year following first publication of such works in a country belonging to a multilateral copyright treaty to which either Contracting Party belongs on the effective date of this Agreement.[12]

The Agreement requires the Parties to NT. Accordingly, each party shall, in accordance with its respective laws and procedures, accord to the works of authors, creators, and artists who are nationals or domiciliaries of the other party, and to works first published in the territory of the other party copyright protection no less favourable than that it accords to its own nationals.[13] It also clarifies the exclusive rights of the right holder in a work in Article 5, according to which the right holder shall have

> the exclusive right to authorize or prohibit:
>
> - the reproduction of a work, preparation of derivative works based upon the work, and the distribution of copies of works;
> - in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual work, the public performance of the work; and
> - in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, the public display of the work.

3. The Viet Nam-US Bilateral Trade Agreement 2001

On 13 July 2000, the Agreement between the Viet Nam and the US on Trade Relations (hereinafter the 'BTA') was signed, which has advanced the bilateral trade and investment relations between the two countries to new heights.[14] It created opportunities for Vietnamese enterprises

[9] Michael F. Martin, CRS Report for Congress R41550, *US-Viet Nam Economic và Trade Relations: Issues for the 114th Congress*, 20 May 2016, p. 20.

[10] Phan Thu, *Thuc day quan he thuong mai Viet - My*, http://www.baohaiquan.vn/Pages/Thuc-day-quan-he-thuong-mai-Viet-My.aspx, Thu Ba, 30 May 2017.

[11] Trade Statistics, The Department of Commerce, 2016.

[12] Articles 1.3 and 3 of the Viet Nam-US Agreement on the Establishment of Copyright Relations.

[13] Article 2 of the Viet Nam-US Agreement on the Establishment of Copyright Relations.

[14] Viet Nam's Ministry of Planning and Investment's Central Institute of Economic Management and Foreign Investment Agency and the US Agency for International Development-Funded Support for Trade Acceleration (STAR) Project, *Assessment of the Five-Year Impact of the US-Viet Nam Bilateral Trade Agreement on Viet Nam's Trade, Investment, and Economic Structure* July 2007.

to enter into the vast markets of the US and encourage Viet Nam to improve its business environment.[15] The BTA entered into force on 10 December 2001, laying down the foundation for conducting and enhancing all their bilateral trade and investment ties. Consisting of 100 pages of text and tables,[16] it provides detailed obligations on major areas of trade cooperation between the two sides: trade in goods, IPRs, trade in services, investment, business facilitation, transparency and dispute settlement.

Its chapters and annexes include:

- Chapter I: Trade in Goods
- Chapter II: IPRs
- Chapter III: Trade in Services
- Chapter IV: Development of Investment Relations
- Chapter V: Business Facilitation
- Chapter VI: Transparency-Related Provisions and Right to Appeal
- Chapter VII: General Articles

- Annexes:

+ Annex A: Viet Nam: Exceptions on National Treatment
+ Annex B: Viet Nam: Phase-Out Periods (Quantitative Restrictions)
    # Annex B1: Import Quantitative Restrictions - Agricultural Products
    # Annex B1: Import Quantitative Restrictions - Industrial Products
    # Annex B2: Export Quantitative Restrictions
    # Annex B3: Prohibited Imports
    # Annex B4: Export Prohibitions
+ Annex C: Viet Nam: Phase-Out Periods (State Trading)
    # Annex C1: Imports Subject to State Trading
    # Annex C2: Exports Subject to State Trading
+ Annex D: Viet Nam: Phase-Out Periods (Import Trading Rights and Distribution Rights)
    # Annex D1: Import Trading Rights and Distribution Rights - Agricultural Products
    # Annex D2: Import Trading Rights and Distribution Rights - Industrial Products
    # Annex D3: Export Trading Rights
+ Annex E: Viet Nam: Tariffs
+ Annex F: Annex on Financial Services, Movement of Natural Persons, Telecom, and Telecom Reference Paper
+ Annex G: United States: Listing of Article 2 Exemptions and Schedule of Specific Commitment of Trade in Services
+ Annex H: Viet Nam, United States: Exceptions
+ Annex I: TRIMs - Illustrative List

The main rules of the BTA are briefly summarized below.[17]

A. *Rules on Trade in Goods*

Viet Nam and the US agreed to extend to each other MFN treatment. Accordingly, the Parties will provide each other's goods the same treatment as they offer like goods produced by other countries. Exceptions to the MFN principle include special treatment accorded other countries within a FTA, such as AFTA or NAFTA and special procedures for border trade.[18] Furthermore, the BTA requires Viet Nam and the US to provide NT to one another's imports. They are obligated to treat each other's imports no less favourably than they treat like goods produced by their own nationals.[19] The Parties have to eliminate all NTBs, including import and export restrictions, quotas, licensing requirements, and controls for all product and service categories over a period of three

[15] *bid.*

[16] The English version of the BTA is available on the USTR webpage (www.ustr.gov). The Vietnamese version is published in the Official Gazette of the Vietnamese Government and also available at the webpage of the National Committee for International Economic Cooperation of Viet Nam.

[17] In addition to the text of the agreement itself, this part is based on the Summary of the Viet Nam-US Bilateral Trade Agreement published on the webpage of the Viet Nam-US Trade Council.

[18] Article 1, Chapter I of the BTA.

[19] Article 2, Chapter I of the BTA.

to seven years, depending on the product.[20] No administrative fee or charge imposed by customs authorities and relevant agencies of the Parties in connection with importing or exporting a good will exceed the actual cost of the service provided by that authority.[21] Viet Nam shall provide tariff treatment to products originating in the customs territory of the US in accordance with the provisions of Annex E.[22]

Regarding safeguards,

> [T]he Parties agree to consult promptly at the request of either Party whenever either actual or prospective imports of products originating in the territory of the other Party cause or threaten to cause or significantly contribute to market disruption.

'Market disruptions' may occur due to rapid increases in the imports of one another's like products when such increases are a significant cause of, or threaten to be a significant cause of, material injury to the domestic industry.[23] In the event the Parties are unable to remedy the problem through consultations, the BTA permits a Party to protect its domestic industry by imposing so-called safeguard measures on imports, in the form of quantitative restrictions, increased tariffs or other restrictions, to counteract the disruption. Concerning the commercial dispute settlement, the BTA provides NT in the dispute settlement by all competent courts and administrative bodies in the territory of the Parties, encourages the use of arbitration under internationally recognized rules, and provides for enforcement of arbitral awards.[24]

B. *Rules on Intellectual Property Rights (IPRs)*

Chapter II on IPRs of the BTA is modelled after the WTO's TRIPS Agreement. It requires the Parties to comply with the substantive provisions of the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. In addition, the Parties must also comply with the substantive economic provisions of the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, the International Convention for the Protection of New Varieties of Plants (UPOV Convention), and the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Convention).[25] The BTA provides NT with respect to the acquisition, protection, enjoyment and enforcement of IPRs, except in limited circumstances.[26] However, unlike the TRIPS, it does not require the Parties to accord MFN treatment with regard to the obligations in this chapter. Chapter II provides minimum standards for the protection and enforcement of IPRs, including copyrights and related rights, encrypted programme-carrying satellite signals, trademarks, patents, layout designs (topographies) of integrated circuits, confidential information (trade secrets) and industrial designs. This chapter also requires enforcement measures to provide expeditious remedies to prevent infringement and remedies sufficient to deter future infringement.

C. *Rules on Trade in Services*

Chapter III on trade in services is modelled on the WTO's GATS. It defines trade in services in terms of four modes of supply:

- Cross-border (the supply of a service from the territory of one Party into the territory of the other Party);
- Consumption abroad (the supply of a service in the territory of one Party to the service consumer of the other Party);
- Commercial presence (the supply of a service by a service supplier of one Party, through commercial presence in the territory of the other Party); and
- Presence of a natural person (the supply of a service by a service supplier of one Party, through presence of natural persons of a Party in the territory of the other Party).

The Parties agree to extend MFN treatment to one another's services and service suppliers.[27] Each Party must provide market access to services and service suppliers of other Party in the service sectors identified in its Schedule. The BTA prohibits six types of MA restrictions in these sectors, among which: limitations on the number of service suppliers; limitations on the total value of service transactions; limitations on the total quantity of service output, and restrictions on the type of legal entity or joint-venture through which a service may be supplied.[28]

[20] Articles 3.1 and 3.2, Chapter I of the BTA.

[21] Article 3.3, Chapter I of the BTA.

[22] Article 3.6, Chapter I of the BTA and Annex E.

[23] Article 6.1, Chapter I of the BTA.

[24] Article 7, Chapter I of the BTA.

[25] Article 1, Chapter II of the BTA.

[26] Article 3.1, Chapter II of the BTA.

[27] Articles 2 and 7, Chapter II of the BTA.

[28] Article 6, Chapter II of the BTA.

In addition, the Parties incorporate by reference the Annex on Financial Services, the Annex on Movement of Natural Persons, and the Annex on Telecommunications of the GATS and the WTO Telecommunications Reference Paper.

D. *Rules on Investment*

Chapter IV of the BTA contains rules to facilitate cross-border investment between the two countries. The main standards on investment protection and promotion under the chapter are:

- MFN;
- NT;
- A prohibition against expropriation without payment of prompt, adequate and effective compensation;
- The right to select senior management;
- The repatriation of capital;
- Guarantees of fair and equitable treatment, full protection and security, treatment in accordance with customary international law, and freedom from arbitrary and discriminatory measures; and
- Prohibitions on technology transfer requirements and TRIMs.
- Regarding the settlement of disputes between investors and the host State, the chapter provides various choices for investors including the competent courts or administrative tribunals of the host State or any applicable, previously agreed dispute settlement procedures and investor-State arbitration of disputes.

E. *Business Facilitation*

Both parties undertake to develop investment relations and to facilitate business activities regarding trade in goods and services. Each party agrees to:[29]

- [P]ermit nationals and companies of the other Party to import and use, in accordance with normal commercial practices, office and other equipment, such as typewriters, photocopiers, computers and facsimile machines in connection with the conduct of their activities in the territory of such Party;
- subject to its laws and procedures governing immigration and foreign missions, permit, on a non-discriminatory basis and at market prices, nationals and companies of the other Party access to and use of office space and living accommodations;
- subject to its laws, regulations and procedures governing immigration and foreign missions, permit nationals and companies of the other Party to engage agents, consultants and distributors of either Party, on prices and terms mutually agreed between the parties, for their production and covered investments;
- permit nationals and companies of the other Party to advertise their products and services (i) through direct agreement with the advertising media, including television, radio, print and billboard; and (ii) by direct mail, including the use of enclosed envelopes and cards pre-addressed to that national or company;
- encourage direct contact, and permit direct sales, between nationals and companies of the other Party and end-users and other customers of their goods and services, and encourage direct contacts with agencies and organizations whose decisions will affect potential sales;
- permit nationals and companies of the other Party to conduct market studies, either directly or by contract, within its territory;
- permit nationals and companies of the other Party to stock an adequate supply of samples and replacement parts for after-sales service for covered investment products; and
- provide non-discriminatory access to governmentally-provided products and services, including public utilities, to nationals and companies of the other Party at fair and equitable prices (and in no event at prices greater than those charged to any nationals or companies of third countries where such prices are set or controlled by the government in connection with the operation of their commercial representations).

[29] Article 1, Chapter V of the BTA.

F. *Transparency-Related Provisions and Right to Appeal*

The Parties are obligated to publish on a regular and prompt basis all laws, regulations and administrative procedures of general application pertaining to any matter covered by the BTA.[30] To the extent possible, each party will permit comment from the other Party and its nationals on the formulation of such laws, regulations and administrative procedures.[31] It shall also provide nationals and companies of other Party with access to data on the national economy and individual sectors, including information on foreign trade.[32] The Parties agree to designate an official journal for the publication of all measures of general application and will administer such measures in a uniform, impartial, and reasonable manner.[33] They will maintain administrative and judicial tribunals for the prompt review of administrative action related to the Agreement, and they will permit the right to appeal, without penalty, by persons affected by the relevant decision.[34] Finally, the Parties shall ensure that all import-licensing procedures are implemented in accordance with the internationally accepted standards of the WTO's ILP.

4. The Viet Nam-US Textile Agreement 2003

Under the auspices of the BTA, on 25 April 2003, after nearly three weeks of negotiations, Viet Nam and the US signed a Bilateral Textile Agreement.[35] It placed quotas on 38 categories of clothing imports from Viet Nam. Both parties agree to cooperate on enforcement, including information-sharing and facilitating plant visits and to investigate and punish circumvention.

The Viet Nam-US Textile Agreement was effective from 1 May 2003 to 31 December 2004. It provided for annual renewals and was renewed twice, in 2004 and 2005. Article 20 of the Agreement provides that upon Viet Nam's accession to the WTO, the provisions of the WTO supersede those of the Bilateral Agreement. The Agreement expired when Viet Nam entered the WTO in January 2007.

30 Article 1, Chapter VI of the BTA

31 Article 3, Chapter VI of the BTA.

32 Article 2, Chapter VI of the BTA.

33 Articles 5 and 6, Chapter VI of the BTA.

34 Article 7, Chapter VI of the BTA.

35 Mark Manyin and Amanda Douglas, CRS Report for Congress, *The Viet Nam-US Textile Agreement* (18 June 2003). *See* also Nicole J. Sayres, CRS Report for Congress RL31470, *The Viet Nam-US Textile Agreement Debate: Trade Patterns, Interests, and Labour Rights*, 1 June 2002.

5. The Viet Nam-US Trade and Investment Framework Agreement 2007

Soon after Viet Nam's accession to the WTO, in June 2007, Viet Nam and the US concluded the Trade and Investment Framework Agreement between the US and Viet Nam (hereinafter the 'TIFA') to promote 'attractive investment climates' and to 'expand and diversify their trade in products and services.'[36] The TIFA provides for the establishment of a Viet Nam-US Council on Trade and Investment, which considers a wide range of issues in trade and investment relations between the Parties including:[37]

- [I]mplementation of obligations under the WTO Agreement and the BTA;
- protection of IPRs;
- regulatory issues affecting trade policy and investment;
- trade in services;
- TBT issues;
- SPS issues;
- issues related to internationally recognized labour rights;
- trade remedies, including issues related to designation of Viet Nam as a market economy;
- GSP;
- coordination on the WTO and APEC matters of mutual interest;
- technical assistance and capacity building; and
- other areas of mutual interest to promote trade, investment and economic cooperation between the Parties.

Under the TIFA, Viet Nam and the US have held frequent meetings and dialogues to review Viet Nam's implementation of its WTO commitments and consider additional initiatives to improve their trade and investment relations. The TIFA with the mechanism it established

36 Article 1 of the TIFA.

37 Articles 2 and 3 of the TIFA and Annex.

lays a foundation to negotiate comprehensive agreements on trade and investment between the two countries.

6. Ongoing Viet Nam-US Negotiations of Trade and Investment Agreements

In June 2008, Viet Nam and the US launched negotiations on a Bilateral Investment Treaty ('BIT') to improve the investment climate for their investors. It aims to establish detailed dispute settlement procedures and to protect their investors from performance requirements, restrictions on transferring funds, and arbitrary expropriation in the other party's territory. Generally, the US negotiations regarding BITs are based on the US effective model BITs, the most recent of which is the 2012 version. Nonetheless, since the two countries started their negotiations on the TPP, both sides suspended their discussion on the BIT presumably because TPP contains a chapter addresses comprehensively their investment relations.[38] With the US withdrawal from TPP, their BIT negotiation is likely to resume soon so as to develop the existing legal framework in Chapter 4 of the BTA.

Section Three. VIET NAM-CHINA

1. The Viet Nam-China Trade Relations - Overview

Since the initiation of the economic reforms in 1978, the People's Republic of China (hereinafter the 'China') has continuously followed the trade liberalization policy, exportation-oriented production, then reached high growth and poverty reduction, building a socialist-market economy. China, started from agricultural economy, has quickly became one of the most dynamic economy and gradually became one of the world's fastest-growing economies. By 2015, China is the fastest growing economy in the world, with an average annual GDP growth rate of 10 per cent over 30 years.[39] The average annual growth target of the 13th Five-year Plan (2016-2020) is 6.5 per cent, indicating a rebalancing of the economy and a focus on quality growth, while maintaining the goal is to build a 'moderately prosperous society' by 2020. According to the IMF, estimated in 2017, China's PPP (purchasing power parity) reached 23.2 trillion USD - the world's top, PPP per capita reached 16.6 thousand USD - ranked 83rd, nominal GDP (gross domestic product) reached 11.8 trillion USD - ranked second in the world, GDP per capita reached 8.4 thousand USD - ranked 72nd.[40] Thus, China is the largest economy in the world, considering the PPP criteria; and it is the second largest economy in the world, on the basis of GDP. The Human Development Index (HDI) in 2015 reached 0.738 - ranking 90th in the world.[41]

Figure 4.3.1: A graph comparing the 2014 GDPs of major economies (unit: billion USD), according to IMF data.[42]

China accessed to the APEC on 1991, and became a member of the WTO on 2001 (after 16 years of negotiation),[43] at the same time concluded several FTAs with different partners, as ASEAN, Australia, New Zealand, Pakistan, Republic of Korea, Swizerland.

International trade plays a major role in China's booming economy. In 2016, China exported 2.09 trillion USD and imported 1.58 trillion USD, with key partners such as the US, the EU, Hong Kong, Japan, South Korea, Taiwan and ASEAN.[44]

By 2015, services accounted for 12.3 per cent of total exports and 22.9 per cent of total imports of China. China exports services such as travel, construction, telecommunications, finance and business services; at the same time, China also imports travel services. China remains one of the largest FDI recipients in the world. In 2014, FDI into China reached 119.6 billion USD, focusing on manufacturing, manufacturing, real estate, rental and business, wholesale and retail. China is constantly seeking to

[38] Michael F. Martin, CRS Report for Congress R41550, *US-Viet Nam Economic và Trade Relations: Issues for the 114th Congress*, 20 May 2016, p. 21.

[39] Nelson D. Schwartz; Rachel Abrams (24 August 2015), 'Advisers Work to Calm Fearful Investors". *The New York Times*. Retrieved 25 August 2015.

[40] IMF, 'Report for Selected Countries and Subjects: China', *World Economic Outlook*, April 2017. Retrieved 31 May 2017.

[41] UNDP, *Human Development Report 2016 (PDF)*. Retrieved 21 March 2017.

[42] IMF, 'Nominal GDP Comparison of China, Germany, France, Japan and USA', *World Economic Outlook*, October 2014. Retrieved 18 February 2015.

[43] WTO, www.wto.org, *China - Member Information*.

[44] WTO, *China - WTO Statistics Database*. Retrieved 01 March 2017.

attract FDI by facilitating procedures, increasing incentives for FDI and liberalizing investment, with four pilot Free Trade Areas. Hong Kong (China) continues to be a major investor in China, accounting for 73 per cent of total FDI into China by 2015. The next positions are Singapore, Taiwan, Korea, Japan and the US.[45] Two-way investment between China and ASEAN has increased sharply since the signing of the ACFTA in 2002. By May 2017, China's bilateral investment with ASEAN countries reached 183 billion USD (compared to 30.1 billion USD in 2002).[46] China continues to unilateral aid favour for LDCs. As of December 2015, China has granted preferential tariffs to 97 per cent tariff lines of the 33 LDCs.[47]

Similarly to China, 'Doi moi' ('*Renovation*') in Viet Nam starting from 1986 gave rise to a gradual transition from a planned economy to a socialist-oriented market economy. The Vietnamese economy subsequently achieved rapid growth in agricultural and industrial production, construction, exports and foreign investment.

From a poor country, severely war-torn and centralized planning, Viet Nam has emerged from the situation of a LDC, becoming a middle-income DC and a dynamic market economy, strong and deep integration into the global economy. Economic growth of Viet Nam is quite high, continous and stable. Viet Nam has reduced its extreme poverty rate from nearly 60 per cent in the 1990s to less than 3 per cent in 2016.[48]

Viet Nam became a member of the WTO on 11 January 2007. Viet Nam is now one of Asia's most open economies. Viet Nam's chief trading partners include China, Japan, Australia, the ASEAN countries, the US and the EU.

After the normalization of the Viet Nam-China diplomatic relations in 1991, bilateral trade relations between the two countries have been greatly developing. Both countries have reopened airlines, railways, sea routes and roads, facilitating the transportation of goods and passengers, and created seven pairs of national-level border gates in their border regions. Since 2004, China has become a leading trade partner of Viet Nam.

45 WTO, www.wto.org, Report TPR, 2016.

46 Government of China, http://english.gov.cn/policies/infographics/2017/11/13/content_281475941282322.htm, accessed on 21 November 2017.

47 WTO, www.wto.org, Report TPR, 2016.

48 WBG and MPI, *Viet Nam 2035*, 2016.

After the visit by the Vietnamese President Nguyen Minh Triet to China in May 2007, the projects within the cooperation framework of 'Two corridors and one economic circle' between the two countries were put forth.[49]

A. *The Viet Nam-China Trade in Goods*

The Viet Nam-China trade in goods is conducted principally in two ways, namely official trade and border trade.

China has a clear advantage in terms of economic size and foreign exchange reserves, but it is also experiencing energy and food insecurity, which has forced them to push up purchasing from Viet Nam and other neighbouring countries. According to EIA, China is the world's largest oil importer in 2014. According to WASDE, China is the world's largest rice importer in 2014.

1. Official Trade

In 1991, the bilateral trade volume between Viet Nam and China was only 32 million USD. Since then, the two countries' two-way trade has been rapidly growing.

According to statistics of General Office of Customs of Viet Nam, total trade turnover of Viet Nam-China in 2016 reached 71.9 billion USD, of which Viet Nam's exports to China reached 21.97 billion USD, import from China is 49.93 billion USD, trade deficit is 27.9 billion USD, down 13.67 per cent compared to 2015. According to statistics of China's Customs, in 2016, Viet Nam has become a major trading partner of first rank in ASEAN, and China's ninth largest trading partner. In recent years, Viet Nam's trade deficit from China has strongly diminished. This is due to the rapid growth of export turnover from Viet Nam to China.[50]

49 Viet Nam's Embassy in China, http://www.vnemba.org.cn/en; http://en.wikipedia.org/wiki/Foreign_relations_of_Vietnam

50 *Quan he thuong mai Viet Nam - Trung Quoc phat trien tich cuc*, http://bnews.vn/quan-he-thuong-mai-viet-nam-trung-quoc-phat-trien-tich-cuc/58310.html, accessed on 29 September 2017.

Figure 4.3.2: Viet Nam-China Trade Data (Unit: million USD)[51]

Year	Trade Volume	Growth (%)	Viet Nam Export	Viet Nam Import
2000	2,957	132.9	1,534	1,423
2001	3,047	3.04	1,418	1,629
2002	3,654	19.9	1,495	2,158
2003	4,870	33.3	1,747	3,120
2004	7,191	47.6	2,735	4,456
2005	8,739.9	21.52	2,961	5,778.9
2006	9,950	21.4	2,490	7,460
2007	15,858	51.9	3,356	12,502
2008	19,464	28.8	4,343	15,122
2009	21,048	8.1	4,747	16,301
2010	27,328	29.8	7,309	20,019
2011	35,721		11,127	24,594
2012	41,173		12,388	28,785
2013	50,171		13,233	36,938
2014	58,642		14,931	43,711
2015	66,620		17,100	49,520

The main exports from Viet Nam to China include: (i) Computers, electronic products and components; (ii) Textile fibers and yarns; (iii) Crude oil; (iv) cassava and cassava products; (v) Timber and wood products. The main imports from China into Viet Nam include: (i) Machinery, equipment, tools, spare parts; (ii) Phones of all kinds and components; (iii) fabrics of all kinds; (iv) Computers, electronic products and components; (v) Iron and steel.[52]

2. Border Trade

The border trade, in general, refers to the flow of goods and services across international land borders. In this sense, it is a part of the normal international trade between neighbouring countries. However, the economic, social and political implications of the border trade are far greater than the normal trade that flows through seaports and airports.

[51] MOIT and EU-MUTRAP Project, *Handbook on Viet Nam's External Economic Relations*, 2015, p. 83.

[52] MOIT and EU-MUTRAP Project, *Handbook on Viet Nam's External Economic Relations*, 2015, p. 83.

Viet Nam and China have a land border line of over 1,280 km running through two provinces of China (Yunnam, Guangxi) and 7 provinces of Viet Nam (Quang Ninh, Lang Son, Cao Bang, Ha Giang, Lao Cai, Lai Chau, Dien Bien), with 21 border gates, four international border gates, seven main border gates and 10 sub-gates, 56 trails, and 13 border markets. The two Chinese provinces, namely Guangxi and Yunnan, enjoy a greatly favourable geographical position for the economic and trade development with Viet Nam. In fact, the Viet Nam-China border trade has made a positive contribution to the development of the bilateral trade.

Since the economic reforms of 1978, China's Government has followed the policy of prioritizing the development of the border regions' economies and considering border trade as a 'breakthrough', aiming at the exploitation of the comparative advantage of these regions to the neighbouring countries. The two provinces of Guangxi and Yunnan situate in the 'Great West-South' economic circle of China, which runs through Sichuan, Yunnan, Guizhou, Tibet and Guangxi, with the latter being considered as the 'corridor' toward the sea.

The Viet Nam-China border trade increased with an average annual growth rate of 29 per cent between 2006 and 2011,[53] contributing significantly to the two-way trade between two countries. The total turnover of the Viet Nam-China border trade reached 2.8 billion USD, over 7.1 billion USD, and over 6.3 billion USD in 2006, 2010 and 2011 respectively.[54] Total import-export volume across borders, for many years, accounted for a relatively high proportion of total trade turnover of the two countries, an average of 25-26 per cent. Viet Nam's exports to China by rail are mainly iron ore, extracted iron ore, dust coal, extract lead ore). Viet Nam's exports along the land border to China are mainly agricultural products, rubber, cashew nuts, fresh fruits, cassava, dried and frozen seafood (such as fish, squid, shrimp, crabs), handicrafts, poultry. Goods imported from China through the border gate into Viet Nam include: machinery for agricultural production such as small agricultural machinery, water pumps, machinery and equipment for a number of industrial production, food processing, medical instruments, raw materials for tobacco production, textiles and garments, chemicals for many manufacturing industries, consumer goods such as labor tools, electronics, and vegetables.[55]

[53] *2006-2011 Sino-Vietnamese Border Trade with An Average Annual Growth Rate of 29%*, http://www.bdex.cn.

[54] People Army Newspaper, *Boosting Vietnam-China Border Trade*, Sunday, 20 November 2011, 20:56 (GMT+7), http://www.qdnd.vn.

[55] Le Dang Minh, *Quan he thuong mai Viet Nam-Trung Quoc: Thuc trang, van de va giai phap*, Van Hien University Journal of Science, Vol. 4, No. 3, 2016.

In recent years, customs clearance procedures for border trade between the two countries have improved significantly. In 2016, with the joint efforts of the concerned agencies, the two sides re-signed the Viet Nam-China Border Trade Agreement. This helps the two sides to standardize one more step, promote more border trade, and at the same time basically solve the problem of agricultural commodity congestion of enterprises and people in border areas for many years.[56]

The border trade between Viet Nam and China has the following remarkable points:

- Smuggling is quite common and it is difficult to accurately control the small trade along the border between the two countries, so statistics between the two countries about this type of trade is not accurate and the data are often not the same;
- Enterprises, especially Vietnamese enterprises, are often passive because the policy mechanism between the two countries still have many different approaches, especially because the Chinese side frequently changes trade mechanisms and policies;
- In the long run, border trade policy with China and state management has not created fair competition among Vietnamese enterprises.

The large development of the Viet Nam-China border trade has made a positive contribution to transforming the poor economy of the border regions, to increasing the international trade and to improving the living standards of the border regions' population of both countries. However, many complicated problems arising from their border trade must be resolved in due course by proper policies and regulations of the two countries, so as to stabilize and develop these fairly specific trade activities in the interest of both countries as well as to comply with the international law, notably in the context that both Viet Nam and China are now full members of the WTO and ACFTA. An effective long-term strategy for developing the Viet Nam-China border trade should be established to support export of both countries.

[56] 'Thuong mai Viet Nam-Trung Quoc sap can moc 100 ty USD', *The gioi va Viet Nam*, 13 January 2017, http://baoquocte.vn/thuong-mai-viet-nam-trung-quoc-sap-can-moc-100-ty-usd-42680.html

B. *The Viet Nam-China Trade in Services*

The Viet Nam-China tourism cooperation is one of the emergent points in bilateral trade. The Agreement on the Viet Nam-China tourism cooperation dated 8 April 1994 created the legal basis for the tourism cooperation between two countries. The number of Chinese tourists has continuously increased. From 1996 up to now, Chinese tourists have been always in the top of the list of foreign tourists to Viet Nam. Also, the number of Vietnamese tourists to China has been continuously increasing.

The fast growth of the Viet Nam-China trade in services is already foreseen. Amongst the service sectors, the transport and seaport service would grow very quickly, especially after 2010.

C. *The Viet Nam-China Investment Relation*

Viet Nam and China signed the BIT on 02 December 1992, effective on 01 September 1993. Since then, the bilateral investment relationship between Viet Nam and China has continued to grow.

By 2016, China has 1,529 investment projects in Viet Nam with an agreed capital of 10.14 billion USD, ranking eighth among countries and territories investing in Viet Nam. Many large scale and high quality projects have been implemented. *For example*: Van Trung industrial zone (Bac Giang province);[57] the Steel Fuco Project located in Ba Ria-Vung Tau with the total capital of 180 million USD; the Viet Nam-China Minerals and Metallurgy Limited Company with the investment capital of 175 million USD; the Industrial Zone An Duong (Hai Phong) with the investment capital of 175 million USD.

By only 2016, China's FDI into Viet Nam is close to 5 billion USD, ranking fourth among ASEAN's recipients of investment, behind Singapore, Indonesia and Laos.[58] However, China's FDI accounts for only 3 per cent of total investment in Viet Nam, far away from major investors in Viet Nam (*e. g*. Japan, Korea, Taiwan and Singapore). The main cause of the above FDI situation is that China has been present mainly in investment projects as a contractor, especially for Viet Nam's thermal

[57] 'Thuong mai Viet Nam-Trung Quoc sap can moc 100 ty USD', *The gioi va Viet Nam*, 13 January 2017, http://baoquocte.vn/thuong-mai-viet-nam-trung-quoc-sap-can-moc-100-ty-usd-42680.html

[58] Government of China, http://english.gov.cn/policies/infographics/2017/11/13/content_281475941282322.htm, accessed on 21 November 2017.

power projects.[59] Major areas of investment from China to Viet Nam are (i) Processing, manufacturing; (ii) electricity, gas, water, air conditioning; (iii) Construction.[60]

According to statistics from China, by September 2016, Viet Nam had 518 projects invested in China with the capital of 120 million USD. In fact, in recent years, although the number of investment projects of Viet Nam into China increased rapidly, but not corresponding with the potential and current status of economic and trade cooperation of the two countries. The cause may be because Vietnamese companies are not familiar with the Chinese market and the Vietnamese media coverage of the Chinese market is not much. In recent years, Hanoi Milk Company is always trying to enter the Chinese market with high quality dairy products. In 2016, this enterprise invested to build a factory in Bang Tuong (Guangxi) bonded zone, becoming the first dairy enterprise in Viet Nam in China.[61]

Some characteristics of the Viet Nam-China investment relation are as follows:

Firstly, different from the two-way trade in goods, the investment relation is mainly one-way from China to Viet Nam, since China's economy is stronger than that of Viet Nam. Vietnamese investment in China is inconsiderable and limited geographically in only two provinces Guangxi and Yunnan.

Secondly, the number and speed of investment have been moderate. Up to now, China has not been a major investor in Viet Nam yet.

Thirdly, the investment quality has not been of a high standard.

Fourthly, besides FDI, China has invested in ODA's projects to Viet Nam.

Fifthly, Chinese investment to Viet Nam has partly contributed to Viet Nam's economic development. However, in regard to the potential as well as the development of both countries, such bilateral investment relation has not yet corresponded to the bilateral trade potential, notably the Chinese trade potential.

China has already become a 'member of the GDP's trillion USD club'. However, the figures of Chinese investment to Viet Nam in the previous years were not adequate to the geo-economic position of Viet Nam, a country generally seen as a bridge between the huge and potential Chinese market and South-east Asian market.

2. Viet Nam-China Trade Agreements - Overview

Two countries have signed over 50 agreements, laying legal basis for long-lasting cooperation between them. Notable amongst these agreements are those regulating or facilitating trade, such as the Trade Agreement; the Agreement on the trade in goods in the border regions; the Agreement on the tourism cooperation; the Agreement on the creation of the Economic Cooperation Committee; the Agreement on the payment; agreements on traffic, railway, land and air transports. Since February 2002, China has granted the MFN treatment to Viet Nam in order to facilitate Vietnamese businesses to export to the Chinese market.

In regard to the Viet Nam-China border trade, there are some agreements, such as the Viet Nam-China Trade Agreement of 1991; The Agreement on the Trade in Goods in the Viet Nam-China Border Regions of 1998; the Agreement on the Plants Protection and Quarantine between Viet Nam and China of 2007; etc. In 2016, the two parties re-signed the Viet Nam-China border trade agreement. In addition, the two countries have signed many other important agreements such as Viet Nam-China BIT of 1992, Double Tax Avoidance Agreement of 1995. On 11 November 2006, the two parties signed the Agreement to set up the Viet Nam-China Steering Committee for Bilateral Cooperation.

In 2017, both countries have agreed to continue to broaden and deepen the bilateral economic and trade relations by concluding the 'Five-year Development Plan for the Economic and Trade Cooperation between 2017 and 2021'. This Plan will give a new impetus to the bilateral economic and trade cooperation. Its main objectives are to continue broadening and deepening the bilateral economic and trade relations as well as to enrich the content of the cooperation. It also aims to create new modes of the cooperation, to seek solutions to the disequilibrium of the trade balance between two countries. According to this Plan, both

[59] *Tuong quan kinh te Viet Nam-Trung Quoc*, thu nam, 15 May 2014, https://kinhdoanh.vnexpress.net/tin-tuc/doanh-nghiep/tuong-quan-kinh-te-viet-nam-trung-quoc-2990777.html

[60] Sổ tay Chính sách kinh tế đối ngoại của Việt Nam.

[61] 'Thuong mai Viet Nam-Trung Quoc sap can moc 100 ty USD', *The gioi va Viet Nam*, 13 January 2017, http://baoquocte.vn/thuong-mai-viet-nam-trung-quoc-sap-can-moc-100-ty-usd-42680.html

countries have established seven major cooperation fields, namely: (i) agriculture and fishing; (ii) traffic and transport; (iii) energy; (iv) minerals; (v) manufacture and supplementary industries; (vi) ervice; and (vii) 'two corridors and one economic circle' cooperation.[62]

Among the bilateral agreements recently signed (January 2017), the following must be mentioned:

- The framework agreement on land border-gate cooperation between the Ministry of National Defense of Viet Nam and the General Department of Customs of China.
- A Memorandum of Understanding (MoU) for the implementation of the public health assistance program between the Ministry of Planning and Investment (MPI) and the Ministry of Commerce of China.
- A Memorandum of Understanding between the Ministry of Industry and Trade of Viet Nam and the General Administration of Quality Supervision and Quarantine of China on enhancing cooperation in the field of technical barriers to trade.
- An agreement on breeding and breeding aquatic resources in the Tonkin Gulf of Viet Nam-China.
- Viet Nam-China tourism cooperation plan for 2017-2019.
- Memorandum of Understanding between the Bank for Investment and Development of Viet Nam and the China Development Bank for medium- to long-term bilateral and project financing cooperation between 2017-2019.

3. Domestic Laws of Viet Nam and China Related to the Bilateral Trade between Two Countries

Firstly, it is necessary to mention national regulations governing general bilateral trade, such as the Law on Foreign Trade of China 2004, and the Law on Foreign Trade Management of Viet Nam 2017.

Secondly, it should be noted that some of China's legal fields are related to bilateral trade between the two countries. As of 1 June 2009, China's Food Safety Act has officially come into force, replacing the previous Food Hygiene Act. In the area of customs, China continues to try to facilitate trade by launching a series of reforms to make customs procedures more efficient for both import and export. Paperless customs clearance has been practiced all over China since 2014, except for those requiring licenses and other restrictions. In the years 2014-2016, the application of trade remedies (AD, CVD, safeguard) decreased. However, these measures are still mainly applied to a few areas, particularly chemical products (accounting for more than 60 per cent of AD cases).[63]

Thirdly, there are also regulations which especially focus on the Viet Nam-China border trade.

On the basis of the Agreement on the trade in goods in the Viet Nam-China border regions 1998, each country issued regulations governing the Viet Nam-China border trade aimed at the following principal objectives:

- To stimulate border trade of both countries on an equal and win-win basis;
- to stimulate and promote the fair, continuous and stable sales of goods in the border regions; to apply measures against the smuggling and commercial fraud;
- to establish facilities for trade promotion activities in the border regions;
- the sales of goods in the border regions must be done in compliance with the bilateral agreements and domestic laws of each country.

Fourthly, China's border trade system is a combination of centralized and decentralized management. Local governments play a significant role in the border trade management, however as part of China's foreign trade, an unified and consistent management is also imposed. The border trade has became a dominant economic force and played a substantial role in achieving China's goal of 'vitalizing border regions, building a well-off society, benefiting the people and bringing stability to the country.' The main legal ground of China's border trade policy is the Law on Autonomous Regions for Ethnic Minorities of China, and Law on Foreign Trade of China. Article 42 of the Law on Foreign Trade

[62] Khanh An, 'Viet Nam-Trung Quoc: Nam 2012 co nhieu viec phai lam', *The World & Vietnam Report - The gioi va Viet Nam, Bao Xuan 2012*, Thu Nam, 19 January 2012 - 3:29 PM, http://www.tgvn.com.vn.

[63] WTO, *China's TPR Report*, 2016. www.wto.org.

of China stipulates: '[T]he state applies flexible measures and provides favourable conditions and convenience to the trade between the towns on the border regions and those towns of neighbouring countries as well as trade among border residents'.

China's border trade with Viet Nam has been characterized by the small-scale and flexible trading arrangements.[64]

Fifthly, according to the Decision No 1151/QD-TTg of the Prime Minister of Viet Nam dated 30 August 2007 approving the Plan for the Establishment of the Viet Nam-China Border Regions up to 2020, Viet Nam has issued a series of policies and regulations governing the Viet Nam-China border trade. An open and clear legal framework of Viet Nam has facilitated the development of the Viet Nam-China border trade.

Trade between Viet Nam and other countries in general as well as the border trade in particular has now been considerably affected by the deep economic integration of Viet Nam, especially after the Viet Nam's accession to the WTO. Besides, both Viet Nam and China have been members of the ACFTA Agreement. In the past, the export-import between the two countries had been mainly regulated by bilateral agreements. But now, besides bilateral agreements, these trade relations must be in compliance with the strict WTO's and regional economic integration commitments. Both countries therefore must revise their trade policies and laws in order to comply with the basic principles of the international trade law (such as MFN, NT, MA, fair trade and transparency) to all trade activities without distinction of where these activities are done, in the border regions or inland, regardless of trading partners who is China or other WTO's members.

The Viet Nam-China relations have a great potential. China continues to be Viet Nam's largest trading partner. At the same time, Viet Nam has also become China's largest trading partner within ASEAN, and is China's ninth largest trading partner compared to its all other trading partners.[65] With the common endeavour of both countries, these relations will be continuously strengthened and developed on the basis of the golden guideline which is 'good-neighbourliness, comprehensive cooperation, long-term stability, future orientation', leading the two countries to become the 'good neighbours, good friends, good comrades and good partners'. In this way, the Viet Nam-China trade continues to play an important role in the bilateral cooperation between two countries not only in the field of trade but also in cultural and socio-political fields.

[64] Hao Hongmay, 'Chapter 6. China's Trade and Economic Relations with CLMV', at. 171-208, http://*www.eria.org*

[65] 'Quan hệ thương mại Việt Nam-Trung Quốc phát triển tích cực', ngày 29/9/2017, http://bnews.vn/quan-he-thuong-mai-viet-nam-trung-quoc-phat-trien-tich-cuc/58310.html

Summary of Chapter Four

The bilateral trade relations between Viet Nam and the EU has consistently developed since 1990s. The EU has been a leading champion of Viet Nam's integration into the global economy, and remains the Viet Nam's leading trade and investment partner. Vietnamese exports to the EU benefit from the EU's Generalized System of Preferences ('GSP'), a factor which has contributed to Viet Nam's impressive export performance. The EU continues to provide important FDI for Viet Nam. The EU has supported Viet Nam on difficult journey of international integration through a number of the EU-Viet Nam cooperation programmes, among which the EU-MUTRAP Project, which has been instrument in supporting Viet Nam's efforts in the WTO's commitment implementation period.

Viet Nam's 1992 Textile Agreement with the European Community (it is now the EU) was the first trade agreement between Viet Nam and the EU. This was followed by the Framework Cooperation Agreement, a broader cooperation agreement in 1995, which granted Viet Nam the MFN treatment in its trade relations with the EU. The EU was a reliable supporter of Viet Nam's endeavour to join the WTO. In October 2004, the EU became the first main trading partner to conclude bilateral WTO's accession negotiations with Viet Nam, a step which gave significant impetus to the overall accession process. In addition, a Market Access Agreement in December 2004 lifted all the EU quantitative restrictions for Vietnamese textiles as of 1 January 2005, a very important step to put Viet Nam well ahead of its WTO entry. In return, Viet Nam agreed to open its market further in a number of areas of interest to the EU. Then, Viet Nam and the EU continued their bilateral relations by the conclusion of a new Comprehensive Partnership and Cooperation Agreement on 4 October 2010, aiming at deeper bilateral trade activities, and which will extend the previous aid and trade agreements to cover new areas. In addition, the EVFTA signed in 2016 would represent a significant milestone in the relationship between Viet Nam and the EU in terms of market access opportunities for both sides. It would also contribute to

deeper trade liberalization in the regional and global scales.[66]

With regard to the US partner, since the normalization of the diplomatic relation between Viet Nam and the US of 1995, the trade relationship between two countries has increasingly developed. Nowadays, American consumers know textile and clothing, footwear, coffee, woodenware, shrimps and fishes made in Viet Nam; and Vietnamese people also know Citibank, Intel, Microsoft, GE, Chevron, Boeing aircrafts made in the USA. Such first successes were achieved thank to the Bilateral Trade Agreement of 2000 ('BTA'), Permanent Normal Trade Relation Status granted in 2006 ('PNTR'), Trade and Investment Framework Agreement of 2007 ('TIFA'), and different agreements concluded by two countries. In the future, it would expect to conclude Bilateral Investment Treaty ('BIT'). In Viet Nam-US trade relation, it remains some issues to improve, such as negotiations about Viet Nam's market economy status and the granting of the GSP by the US to Vietnamese exports.

Within Viet Nam-China trade relations, up to 2017, two countries have signed over 50 agreements, laying legal basis for long-lasting cooperation between them. Notable amongst these agreements are those regulating or facilitating trade, such as the Trade Agreement; the Agreement on the trade in goods in the border regions; the Agreement on the tourism cooperation; the Agreement on the creation of the Economic Cooperation Committee; the Agreement on the payment; agreements on traffic, railway, land and air transports. It is unlikely to the trade relations with the EU or US, besides the official (normal) international trade, Viet Nam-China trade relations also contain other important part of international trade which is border trade. Both countries concluded some agreements regulating their border trade, such as the Viet Nam-China Trade Agreement 1991; The Agreement on the Trade in Goods in the Viet Nam-China Border Regions 1998; the Agreement on the Plants Protection and Quarantine between Viet Nam and China 2007; etc. Both countries have agreed to continue to broaden and deepen the bilateral economic and trade relations by concluding the 'Five-year Development Plan for the Economic and Trade Cooperation between 2017 and 2021'. This Plan will give a new impetus to the bilateral economic and trade cooperation. Its main objectives are to continue broadening and deepening the bilateral economic and trade relations as well as to enrich the content of the cooperation. It also aims to create new modes of the cooperation, to seek solutions to the disequilibrium of the trade balance between two countries.

Continuing the policy of multilateralization and diversification of foreign relations, in coming years, with regard to the bilateral trade relations, Viet Nam will give priority to improving the cooperation and traditional friendship relations with the neighbouring countries having common borders, *i.e.* China, Laos, and Cambodia, and endeavour to deepen relations with the main trading partners based on the interests of both Viet Nam and partners within the bilateral trade relations.

[66] Delegation of the European Union to Viet Nam, http://eeas.europa.eu/delegations/vietnam/eu_ vietnam/political_relations/index_en.htm

QUESTIONS/EXERCISES

1. Why did the EU decide to pursue bilateral trade negotiations with Viet Nam?
2. What are the implications of the EU's TBT regulations on Viet Nam? Which strategy shall Viet Nam adopt to overcome these barriers?
3. How will the Viet Nam-EU FTA deal with AD? What are the main issues for Viet Nam?
4. Comment on agreements governing the Viet Nam -US trade relations.
5. Comment on agreements governing the Viet Nam -China trade relations.

REQUIRED/SUGGESTED/FURTHER READINGS

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2. Razeen, Sally, *Looking East: The European Union's New FTA Negotiations in Asia*, Jan Tumlir Policy Essays No 3, ECIPE, (2007).
3. Stephen Woolcock, *European Union Policy Towards Free Trade Agreements*, ECIPE Working Paper No 3/2007, ECIPE, (2007).

4. Stephen Woolcock, *The Treaty of Lisbon and the European Union as An Actor in International Trade*, ECIPE Working Paper No 01/2010, ECIPE, (2010).

5. Jennifer Hillman and David Kleimann, *Trading Places: The New Dynamics of EU Trade Policy under the Treaty of Lisbon*, Economic Policy Paper Series, (2010), The German Marshall Fund of the United States, (2010).

6. Sung-Hoon Park and Heungchong Kim, *Asia Strategy of the European Union and Asia-EU Economic Relations: Basic Concepts and New Developments*.

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EU, http://europa.eu

EU, http://eeas.europa.eu/delegations/vietnam/eu_vietnam/political_relations/index_en.

EU-MUTRAP, http://www.mutrap.org.vn

USVTC, http://www.usvtc.org

USTR, http://www.ustr.gov

Governement of Viet Nam, http://www.chinhphu.vn

MOFA, http://www.mofa.gov.vn

NCIEC, http://www.nciec.gov.vn

PART TWO.
INTERNATIONAL BUSINESS LAW

Elite
advertising & printing

CHAPTER FIVE.
RULES GOVERNING INTERNATIONAL SALE OF GOODS

Section One. INTRODUCTION

1. What Is the International Sale of Goods?

In business operations in general and international business in particular, the sale of goods are key transactions. On the domestic scale, it is the exchange of goods within a country, while on the international scale, it is the exchange of goods among different countries through the import and export transactions.

Despite the increasing emergence of new international business transactions, such as international service provision and international investment, the international sale of goods, as traditional transactions, still have its important position in international business.

According to Article 27 of the Commercial Law of Viet Nam 2005, the international sale of goods 'are performed in the forms of export; import; temporary import for re-export; temporary export for re-import; and international sale of goods without import-export procedures at border-gates' ('chuyen khau' in Vietnamese).

The international sale of goods are business transactions that usually take place beyond the territory of a country. It is performed in different countries with different elements of geography, history, climate, economy, policy, law, culture and religion. Therefore, it is much more complicated and more risky than the sale of goods within a country. Cultural barriers may cause disagreement or conflicts between points of view, working styles, business practices, or consumer tastes. The geography and climate of a country are sometimes important issues that are paid attention by international businessmen, because they may have a direct effect on the acceptance of a new product in the market.[1]

International factors in sale of goods may also cause specific legal issues, compared with the domestic sale of goods, such as

[1] The altitude, humidity and temperature are climatic conditions that affect the use and function of products. A product considered to be perfect in temperate countries may quickly be damaged in tropical countries. *For example*, producers found that if they wish to sell construction equipment from the US to the Sahara, major changes in the products must be made such that they can withstand the intense dust and heat of the desert. Different climates in Europe forced Bosch-Siemens to modify their washing machine. Since there is relatively little sunlight in Germany, the washing machines need to have a high-speed spin-drier function of 1000-1600rpm. Clothes must be drier when they come out of the washing machine since users cannot wait for their clothes to dry by hanging them outside all day while it may rain. In contrast, the annual amount of sunlight in Italy and Spain is much higher, thus the rotation speed of a washing machine's spin-drying function is around 500rpm.

risks in transportation of goods from one country to another, risks in international payment or money transfer, etc. These are issues that must be resolved by the law on the international sale of goods.

2. Regulations on International Sale of Goods

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

A. *Domestic Law*

The sale of goods have been always basic business transactions, therefore each country has created its own rules governing the sale contracts. In several countries, there have been particular regulations on the sale contracts, *e.g.*, The British Sale of Goods Act 1979. In certain other countries, *for example*, Vietnamese law on sale of goods now is a part of Commercial Law. In China, the law on sale contracts has been a chapter within Contract Law 1999.

However, a sale contract may be governed simultaneously by the laws of many countries. *For example*, a Vietnamese company exports goods to the US by sea. Unfortunately, during the journey, the ship encounters a storm and needs to seek refuge in a Malaysian seaport. The insurance company for the consignment is in Hong Kong. Such a transaction would be governed not only by one, but several different legal systems in different countries. Due to its 'international nature', it may be governed by the national laws of the parties in the contract, or the law of the country where the contract was concluded, or the contract was performed, or the disputes arise, or the asset which is the object of the contract locates.

In the case where the laws of these countries comprise different rules on the same issue under dispute, it may cause a conflict of laws, for example on the contract forms, or the content of contract.

- *Conflict of laws on contract forms*: It is the case where the laws of different countries comprise different rules on the form of the sale contracts. According to the law of several countries, including the UK, France, the US and Germany, the sale contracts may be made in written form, or verbal form or a specific deed, except for sale of real estate.[2] Meanwhile, according to the law of other countries such as Viet Nam and China, the sale contracts must be concluded in written form.[3] Thus, verbal contracts or contracts based on deeds[4] would be valid under the law of some countries, but not under that of others.

- *Conflict of laws on the content of contracts*: It is the case where the laws of different countries comprise different rules on the various and complex issues, such as the rights and obligations of parties, principal contract terms, or the application of remedies in the case of breach of contract. *For example*, according to the laws of France, Germany and Japan, the principal contract terms include both the contract's objects and price, while the laws of the UK, US and Australia rule that it would be enough for parties to define only the contract's objects.[5] Regarding the rights and obligations of the seller and buyer within a sale contract, French law gives greater protection in favour of the buyer (consumer), while German law gives greater protection to the seller.[6] Regarding the *force majeure* event, strikes are considered as a *force majeure* according to the law of some countries, yet not of others.

In order to resolve the conflict of laws, it is the best way for parties to agree to choose a national law applied to their contract. Domestic law, as far as it relates to international treaties,[7] states the freedom of the choice of law applied to parties involved in a international business transaction. This freedom is recognized in many Vietnamese regulations on different types of contract.[8] However, it is necessary to note that this freedom is always limited within such general rules as 'international public order', or 'general principles of law' or 'imperative norms' as these apply to some specific situations regardless of the applicable law.

[2] Prof. Dr. Nguyen Thi Mo, *Textbook on 'Overview of Law',* Education Publishing House, Hanoi, (2005), at 191.

[3] Article 27(2) of Commercial Law of Viet Nam 2005 provides: 'International sales of goods must be performed based on a written contract or other forms of equivalent legal validity'. These forms may include telegraph, telex, fax, data messages and other forms provided by law (Article 3(15)). Data messages are information that are generated, sent, received and stored via an electronic medium (Article 3(5)).

[4] *For example*, a person accepts offers by opening a L/C and sending advance payment for a commercial traveller (the person who makes an offer).

[5] Prof. Dr. Nguyen Thi Mo, *supra*, at 192.

[6] VCCI and Danida, *Handbook of Commercial Contracts*, Hanoi, (2007), at 93-94.

[7] Article 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations.

[8] Article 759(3)(2) of the Civil Code 2005; Article 5(2) of the Commercial Law 2005; and Article 4(2) of the Maritime Code 2005.

If parties to an international sale contract did not choose the applicable law, then according to the general principles of private international law, the law applying to that contract will be identified via the rules of conflict. The rules of conflict are those that point out the legal system to be applied to the international business transactions in question.[9]

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

Most countries provide their own rules of conflict in order to support their courts to choose the law applied to the international business disputes in general, and disputes on the international sale contracts in particular. Vietnamese rules of conflict may be found in many different regulations, such as Civil Code 2015, Law on Investment 2015, and Commercial Law 2005. Some countries choose to issue a separate Private International Law Code, such as the Polish Private International Law Code 1965 governing civil relations, marriage and family, and labour[10], and the Belgian Private International Law Code 2004.

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

B. *International Treaties*

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

[9] Prof. Dr. Nguyen Thi Mo, *supra*, at 195; Hanoi Law University, *Textbook 'Private International Law',* Judicial Publishing House, (2006), at 39.

[10] Prof. Dr. Nguyen Thi Mo, *supra*, at 174.

1. Treaties to Unify the Substantive Rules

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

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

- *The two The Hague Conventions 1964 on the international sale of tangible property*

The *first* is the Convention on Uniform Law on the Formation of Contracts for the International Sale (hereinafter the 'ULF'). The *second* is the Convention on Uniform Law on the International Sale of Goods (hereinafter the 'ULIS').[11] In fact, these two conventions are rarely applied. Nowadays, countries that joined the Vienna Convention 1980 (*see* below) have already declared their abandonment of these two conventions.

- *The Vienna Convention 1980 - the United Nations Convention on Contracts for International Sale of Goods (hereinafter the 'CISG')*

The CISG was adopted in Vienna on 11 April 1980 and officially came into effect on 1 January 1988. The CISG was drafted by the United Nations Commission on International Trade Law (UNCITRAL) in an effort to create an uniform legal document for substantive rules on the international sale contracts. It is nowadays the most widely applied the CISG and has the strongest influence on the international sale of goods. As of 25 December 2017, UNCITRAL reported that 88 States have adopted the CISG.[12] The CISG is estimated to govern three quarters of their international commercial transactions of goods. It plays an important role in removing the conflicts of laws among member countries. Contracts concluded between parties of which the commercial headquarters are located in member countries shall be governed uniformly by the CISG, thus there will be no more disputes on the applicable law. The CISG contains specific provisions on the rights

[11] These two conventions were approved by seven countries, such as Germany, Belgium, the Gambia, Italy, the Netherlands, the UK, Saint Martin and Israel.

[12] UNCITRAL Website.

and obligations of the seller and buyer, the responsibilities of each party in cases of breach of contract or others. The provisions of the CISG usually help the parties to foresee the potential legal problems concerning the sale of goods transactions, and these provisions do not depend on any national legal system. Therefore, the Convention provides secure and fair solutions for parties to the contract (*see* the Section Three of this Chapter).

2. Treaties to Unify the Rules of Conflict

For a certain transactions, the national rules of conflict may differ among countries. If there exist different national rules of conflict to resolve the same issue, there might occur 'the conflict of rules of conflict'. Applying rules of conflict therefore causes considerable difficulties and risks in resolving the conflicts of laws. *For example*, if a certain dispute over an international business contract is brought to the national court of the state A with A's rules of conflict, the law applicable to the contract may be different from the law that national court of the state B might choose according to B's rules of conflict. It will cause difficulties for parties in predicting the applicable law, since their disputes may be resolved in many different national courts. This is a great obstacle in applying the rules of conflict to resolving disputes over international sale of goods. Therefore, nowadays, countries tend to negotiate and adopt international treaties to unify the rules of conflict.

The uniform rules of conflict may be specified in bilateral or multilateral treaties.

The bilateral treaties related to this issue are mutual legal assistance agreements. Before 1990s, when the Soviet Union and the former Est-European socialist countries still existed, Viet Nam adopted six mutual legal assistance agreements with the countries, such as the German Democratic Republic, the Soviet Union, Czechoslovakia, Cuba, Hungary and Bulgaria.[13] Later, in 1992, after the new Vietnamese Constitution took effect, Viet Nam adopted nine more mutual legal assistance agreements with the Poland, Laos, China, Russia, France, Ukraine, Mongolia, Belarus and the People's Democratic Republic of Korea. According to these agreements (except those with France and China), the rules of conflict

[13] The Agreement with the German Democratic Republic ceased to be effective; the Agreement with the Soviet Union has been inherited by the Federation of Russia (even though Viet Nam and the Federation of Russia have already concluded a new Agreement, this new Agreement has not yet come to effect), and the Agreement with Czechoslovakia has been inherited by both the Czech and the Slovak Republics.

were uniformly applied to the member countries, for example, the rules to identify the law applicable to foreign-related relations relating to civil matters, and the rules to identify the competent jurisdiction. However, these rules usually related to marriage, family and heritage relations, but not international commercial transactions.

The multilateral international agreements to unify the rules of conflict were usually adopted within the framework of an international organization, the most important of which was The Hague Conference on Private International Law. The Hague Conference is a permanent institution responsible for the unification of private international law on a global scale.[14] The Conference has compiled and adopted many international treaties, among which some international agreements have been widely applied and had considerable importance in resolving conflicts over the international sale of goods.

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

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

According to this Convention, a sale contract must be in compliance with the law chosen by the involved parties. If there is no agreement on the applicable law, the law of the country where the seller has his/her office upon received orders shall apply, with the following exceptions: (i) if an order is assigned to be performed by a branch of the seller, the law where the branch locates shall apply; (ii) if an order is received by the seller or his/her agent in the buyer's country, the law of the country where the buyer has his/her permanent residence shall apply (Article 3). The Hague Convention took effect in 1964 and currently has eight member countries (such as Denmark, Finland, France, Italy, Norway, Sweden, Switzerland and Niger).[15]

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

There are nine European member countries participating in this Convention, including Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands and the UK. Later, six more countries

[14] List of 69 member countries of the Conference, *see* http://www.hcch.net/index_en.php?act=states.listing

[15] http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=31

joined, such as Greece, Spain, Portugal, Austria, Finland, and Sweden. The Rome Convention has been widely applied in European countries.

The Convention provisions shall apply to contractual obligations. Under the Convention, a contract will be governed under the law chosen by the parties involved. This choice must be made clear in the terms of the contract or the circumstances of the case. The parties may choose the law applicable to the whole or only a part of the contract.

In the case where no applicable law was chosen, the contract would be governed by the law of the country which has the closest connection with the disputed contract. 'The country which has the closest connection with the disputed contract' is determined by Article 4(2) of the Convention. According to this, the country that has the closest connection with the contract is that where the party fulfiling the main obligation locates his/her major place of business.

C. *International Mercantile Customs and Usages*

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

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

D. *Other Legal Sources*

The 'Model Contracts' and 'General Principles of Contract Law' are other sources of law, which are also becoming increasingly important in governing international commercial contracts in general and sale contracts in particular, having a legal effect similar to international mercantile customs and usages.

Firstly, *regarding the Model Contracts*, it is necessary to distinguish a model contract drafted by a professional association, from one provided to the parties by an independent organization.

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

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

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

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

Nowadays, the application of the general principles of law becomes an increasing trend in international business, because these principles exist independently of the national legal systems, thus may more easily gain the acceptance of parties to a contract. Moreover,

being created in the practices of international business, these principles contain norms relevant to the practices of international business, which are always changing. This trend may be seen in the fact that these principles have been codified and issued as Principles, such as the Principles of International Commercial Contracts (hereinafter the 'PICC'), compiled by the International Institute for Unification of Private Law (hereinafter the 'UNIDROIT');[16] or the Principles of European Contract Law (hereinafter the 'PECL'), drafted and issued by the Commission on European Contract Law (known as 'Lando Commission')[17] (*see,* the Section Three of this Chapter).

Regarding their legal effect, the Principles are for reference only and have no legal binding force over parties to contracts. In other words, these Principles do not be automatically or mandatorily applied. They may apply only in the case where they have been chosen by the parties involved. These Principles have the same legal effect as international mercantile customs and usages.

The following sections will discuss more details about the important sources of law that govern international sale contracts.

Section Two. INTERNATIONAL COMMERCIAL TERMS - INCOTERMS

1. INCOTERMS - Overview

Sale contracts involving transportation customarily contain abbreviated terms describing the time and place where the buyer is to take delivery, the place of payment, the price, the time when the risk of loss shifts from the seller to the buyer, and the costs of freight and insurance. These terms are widely used in international business and each has a different meaning, depending on the governing law.

The most widely used commercial terms are those published by the ICC. Known as 'INCOTERMS', they are applied throughout the world. Their use in international sale is encouraged by trade councils, courts and international lawyers. First published in 1936, the current version is INCOTERMS 2010.

The 2000 revision makes few changes from the previous revision, INCOTERMS 1990. The 1990 revision made several significant

[16] Full text of the PICC may be downloaded from http://www.unidroit.org

[17] This Commission was directed by Prof. Lawyer Ole Lando.

modifications to the earlier terms, reflecting changes both in technology and in shipping practices that occurred during the 1980s. According to the ICC, 'The main reason for the 1990 revision of INCOTERMS was the desire to adapt terms to the increasing use of electronic data interchange (EDI).' The terms, accordingly, allow parties to transmit documents electronically, including negotiable bills of lading, as long as their contract specifically allows them to do so. The second main reason for the revision stemmed 'from transportation techniques, particularly the unitization of cargo in containers, multimodal transport, and roll-on roll-off traffic with road vehicles and railway wagons in "short sea" maritime transport.' Older terms that applied to peculiar modes of land and air transport, such as *Free on Rail (FOR), Free on Truck (FOT)*, and *FOB Airport*, were eliminated and the *Free Carrier* term was expanded.[18]

INCOTERMS 2010 eliminated four terms (DAF, DES, DEQ and DDU) and added two (DAP- *Delivered at Place* and DAT - *Delivered at Terminal*), reducing the total number of terms to eleven. INCOTERMS 2010 officially admits the use of the terms in domestic and international trade. EXW - *Ex Work* clearly indicates for domestic business only.

The new version shall not terminate the validity of the previous versions. Therefore, parties who adopt the INCOTERMS, or any other commercial terms, should make sure they express their desires clearly: they should state clearly in the contract which commercial terms they prefer to use. *For example*, if parties choose FOB for their sale contract, they should indicate FOB INCOTERMS 2000 or FOB US Uniform Commercial Code (UCC); while it contains the same term 'FOB', the meaning differs to some extent. The UCC states in §2-319 FOB and FAS Terms that 'when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article'. However, FOB INCOTERMS 2000 transfers the risk from the seller to the buyer at the loading port.

If parties fail to show their choice of governing law, courts or arbitrators will apply the definitions used in their own jurisdictions.[19] Parties should also refrain from casually adopting any particular set of terms.

[18] Ray August, *International Business Law: Text, Cases, and Readings*, 4th edn., Pearson Prentice Hall, (2004), [CISG reviewed in Chapter 10: Sales], at 535-592.

[19] *Ibid*.

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

2. Terms - Overview

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

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

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

Some terms start with 'C' (i.e., '*Cost*'). 'C' may go with or without 'I' (i.e., '*Insurance*') and 'F' (i.e., '*Freight*') or 'P' (i.e., '*Paid to*'). The 'C' term is preferred by many buyers because it means that they have little to do with the goods until the goods arrive at a port or destination in their country. A 'C' terms contract requires the seller to arrange for the carriage of goods by sea to a port of destination and to turn over to the buyer the documents necessary to obtain the goods from the carrier or to assert a claim against an insurer if the goods are lost or damaged. However, both 'C' and 'F' terms transfer the risk from the seller to the buyer at the departure point. Particularly, the risk passes from the seller to the buyer when the goods are on board under CIF or FOB INCOTERMS 2010. It may be considered an advantage of INCOTERMS 2010 compared with INCOTERMS 2000, as INCOTERMS 2000 creates an imaginary 'line' where the risk transfers, which is the ship's rail.

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

Section Three. RULES ON INTERNATIONAL SALE OF GOODS CONTRACTS

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

The CISG was drafted by the United Nations Commission on International Trade Law (hereinafter the 'UNCITRAL') and adopted in Vienna in 1980. The CISG was based on two previous attempts to achieve an uniform law on international sale, such as the Conventions relating respectively to the Uniform Law on the Formation of Contracts for the International Sale ('ULF'), and to the Uniform Law on the International Sale of Goods ('ULIS'), and both adopted in The Hague in 1964. These two predecessors of the CISG, however, did not gain widespread success. The CISG has now gained worldwide acceptance[20] and is considered to be the most successful convention promoting international commerce. Since its entry into force on 1 January 1988, as of 25 December 2017, UNCITRAL reported that 88 states have adopted the CISG.[21]

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

- Part I (from Article 1 to Article 13) lays down rules on its application and general provisions;
- Part II (from Article 14 to Article 24) governs the formation of the contract;

[20] Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, 2nd edn., (2005), at 1.

[21] UNCITRAL Website.

- Part III (from Article 25 to Article 88) contains the substantive rules for the sale contract, i.e., the obligations and rights, in particular the remedies, of the parties;

- Part IV (from Article 89 to Article 101) contains rules on ratification and entry into force, including the reservations.

The reservations are significant for a number of reasons - when noting whether a State has ratified the CISG, always check for reservations. There are options that may be taken by ratifying States. They fall into three main categories. *Firstly*, the reservations which may *prohibit* the application of the CISG such as the CISG may not extend to all of the territories of a federal State (Article 93); the CISG may not apply between States who reciprocally agree this[22]; the CISG cannot apply through Article 1(1)(b),[23] only through Article 1(1)(a). *Secondly*, the reservations that *limit* the application of the CISG as laid down in Article 92, where either Part II or Part III is excluded.[24] This reflects the fact that the CISG is a 'double-convention', embodying both the ULF (formation) and ULIS (substantive rules). *Thirdly*, there are reservations that *alter* the content of the CISG where Article 11 on verbal contracts may be made inapplicable, requiring written confirmation.[25]

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

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

Article 1 of the CISG laid down 'place of business of parties to contract' as an only criterion for identifying an international sale contract. A contract is considered as an international sale contract if the parties to the contract have their respective places of business in different countries

[22] Reservation taken by the Scandinavian countries.

[23] Reservation taken by the US, China, Slovakia, Singapore, and the Czech Republic.

[24] Reservation taken by Denmark to exclude Part II of the CISG. Thus, Private International Law is to be used to identify the governing law on the formation of the contract.

[25] This reservation is the result of the demands at the diplomatic conferences from the former USSR and Eastern bloc countries, which imposed strict formal requirements in legislation for international sales contracts.

which are contracting states; or the rules of private international law lead to the application of the law of a contracting state. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the 'international nature' of the sale of goods contracts under the CISG.

B. *Sphere of the CISG's Application*

1. The Two Cases of Application

Firstly, it is the case where there is a choice of law referring to apply the CISG. In this case, the CISG will be applied. In a jurisdiction where the autonomy of party is respected, parties to contract may freely identify the CISG to be the governing rules on their contract.[26]

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

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

2. The Three Cases of Non-application

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

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

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

[26] Note that some jurisdictions may not respect this choice where the sale has no transnational element.

C. *Formation of International Sale Contract*

Under the CISG, an international sale contract comes into effect 'when the acceptance of an offer becomes effective in accordance with the provisions of the Convention'.[27] This means the CISG adopts the classical model of the exchange of offer and acceptance and does not require further elements such as form[28], or 'consideration'.

1. Offer

An *offer* is a definite expression of the offeror's will (intention to be bound), addressed to one or more specific persons. A proposal that is not addressed to one or more identified persons would be considered as an offer only if this is clearly indicated by the person making the offer.[29] The CISG does not require the price to be fixed for a contract to be valid. Implied or explicit provisions for determining the price must be contained in an offer for it to be definite.[30] The sending of price lists, catalogues and the placing of advertisements and the like are in principle not offers.[31] The offer is effective as soon as it has reached the offeree.[32] It is terminated when rejected - even if irrevocable.[33]

Under Article 15(2) of the CISG, the offeror may still withdraw his offer if the withdrawal reaches[34] the offeree before or at the same time as the offer. This is true even if the offer is irrevocable. Furthermore, the offeror may still revoke his offer after the offer has reached the offeree, but before the acceptance has been dispatched. The regulation of the *revocation of an offer*[35] came about as a compromise after long discussions between the civil and common law systems. The revocation as it is found in common law systems remains basically intact. Revocation is not possible where an offer is irrevocable (either impliedly or expressly) or if the offeree has acted in reliance upon the offer.

27 *See* Article 23 of the CISG.

28 *See* Article 11 of the CISG, by which a contract does not have to be in writing unless the Article 96 reservation enabling Article 12 be taken out in the CISG state in question.

29 *See* Article 14(1) of the CISG.

30 *See* Article 14(1) of the CISG.

31 *cf.* Hungarian Supreme Court, 25 September 1992 (1993) ZEuP 79.

32 *See* Article 15(1) of the CISG.

33 *See* Article 17 of the CISG.

34 Under Article 24 of the CISG, 'reaches' means an offer, declaration of acceptance or any other indication is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or habitual residence.

35 *See* Article 16 of the CISG.

2. Acceptance

By accepting, the offeree indicates his assent to the offer.[36] As soon as an indication of assent reaches the offeror, the acceptance becomes effective and a contract is formed. Actions of the acceptor, such as the dispatch of goods or payment of the price, may indicate an implied acceptance. This may be when the offer expressly allows for this possibility, when the implied acceptance by parties has become customary or when it is in conformity with commercial usages.[37] The contract then becomes effective at the moment of the implied acceptance. On the other hand, silence or inactivity in itself does not amount to acceptance. An acceptance normally has no effect if it does not reach the offeror within a reasonable time or a fixed time.[38] The acceptance may be withdrawn if the withdrawal reaches the offeror at the same time as or before the acceptance would have had effect.[39]

If an acceptance is late, the offeror may accept it, but must notify the offeree of this as soon as possible. Conversely, if an acceptance is late (typically for problems of delivery, postal strike, etc.), but would have been timely under normal circumstances, the offeror must immediately inform the offeree, if s/he does not accept the acceptance as timely.[40]

An acceptance with modifications to the offer is, in general, a *counter-offer* if the modifications are material.[41] This counter-offer must then, in turn, be accepted by the original offeror.

D. *The Buyer's and Seller's Obligations*

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

36 *See* Article 18(1) of the CISG.

37 *See* Article 18(3) of the CISG.

38 *See* Articles 18 and 20 of the CISG.

39 *See* Article 22 of the CISG.

40 *See* Article 21 of the CISG.

41 For material alteration, *see* more details in Article 19(2) of the CISG.

1. Obligations of the Seller

(a) The seller must deliver goods that conform and are free of third party rights.

Delivery is the physical hand-over of goods to the buyer. If nothing has been negotiated about the place of delivery, the seller must in principle make the goods available at the place of where he has the place of business at the time of concluding the contract. The seller shall deliver on the date agreed in the contract or implied by the contract. If nothing is fixed for the delivery date, then the principle of reasonableness applies.

The delivered goods must be conformable. The conformity of the goods[42] means that the goods must be of the quality, quantity and description required by the contract and are packaged in a manner required by the contract[43] or as sale by sample.[44]

In addition, the seller must deliver the goods free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim.[45] The seller must protect not only against well-founded claims, but also against ill-founded claims. The buyer has to inform[46] the seller within a reasonable period about the existence of any rights or claims, unless the seller is already aware of these. There is a special regulation for goods subject to IP claims.[47]

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

2. Obligations of the Buyer

(a) The buyer must take delivery of the goods.

Taking delivery[48] is indelibly linked to the passing of the risk. The buyer must do all that can reasonably be expected of him/her in order to make delivery possible.[49] Thus, s/he must, if necessary, inform the seller of the exact place of delivery. The buyer must actually take possession of the goods.[50] In principle, the risk passes at the taking delivery of the goods. If the buyer does not take delivery, s/he would breach the contract, which may make him/her liable for any damage to the goods. The passing of risk is governed by Articles 66-70,[51] if contract involves carriage, in Article 67; if goods in transit, Article 68.

(b) The buyer must pay for the goods

Payment is the buyer's main obligation.[52] The obligation to pay covers four elements, such as the determination of the price, the place of payment, the moment of payment, as well as the method of payment. These elements are usually agreed in the contract. However, the contract may remain obscure in respect of some of these elements. In that a case, the supplementary rules of the CISG apply. So, unless the contract states otherwise, the buyer must pay at the seller's place of business or place of handing over[53], without notice[54] when goods or documents come under the buyer's control.[55]

E. *Remedies for Breach of International Sale Contract*

In the process of implementing the international sale contracts, if the breach of contract is committed by a breaching party, the other party can apply the agreed remedies in the contract or as laid down in the CISG. It is important to note that the applying the remedies provided for by the CISG depends on whether there is a breach of contract or not. Unfortunately, the CISG did not define what constitutes a breach of contract. However, one can conclude from the CISG's remedial

42 *See* Article 35 of the CISG.

43 *See* Article 35(1) of the CISG.

44 *See* Article 35(2) of the CISG.

45 *See* Article 41 of the CISG.

46 For buyer's duty of notice, *see* Articles 43 and 44 of the CISG.

47 *See* Article 42 of the CISG.

48 *See* Articles 53 and 60 of the CISG.

49 *See* Article 60(a) of the CISG.

50 *See* Article 60(b) of the CISG.

51 *See* Neil Gary Oberman, 'Transfer of Risk from Seller to Buyer in International Commercial Contracts: A Comparative Analysis of Risk Allocation under the CISG, UCC and INCOTERMS' (LLM thesis in http://www.cisg.law.pace.edu/cisg/thesis/Oberman.html)

52 *See* Articles 54-59 of the CISG.

53 *See* Article 57 of the CISG.

54 *See* Article 59 of the CISG.

55 *See* Article 58 of the CISG.

regime[56] and Article 79(1)[57] that 'breach of contract' includes all forms of defective performance, as well as a complete failure to perform. It also includes both excusable and inexcusable non-performance. The contractual obligation may either be one expressly defined in the CISG (*e.g.*, delivery at the right time,[58] at the right place[59] and of the correct goods[60]) or one created and defined by the parties.

In addition, for the choice of remedy, it is important to know whether is a so-called 'fundamental breach of contract.'[61] A fundamental breach of contract has two elements: (i) there has to be a substantial detriment which deprived the aggrieved party of what s/he is entitled to expect under the contract; (ii) the result of the breach must be foreseeable. It is for the party in breach to prove that neither s/he nor any reasonable person of the same kind and in the same circumstances could have foreseen the result.[62]

1. Remedies of the Buyer

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

- Specific performance;[63]

[56] According to Article 45 of the CISG, which enumerates the remedies available to the buyer,

(1) If the seller fails to perform *any of his obligations under the contract or this Convention*, the buyer may:

(a) Exercise the rights provided in Articles 46 to 52 of the CISG;

(b) claim damages as provided in Articles 74 to 77 of the CISG.

Under Article 61 of the CISG, which enumerates the remedies available to the seller,

(1) If the buyer fails to perform *any of his obligations under the contract or this Convention*, the seller may:

(a) Exercise the rights provided in Articles 62 to 65 of the CISG;

(b) claim damages as provided in Articles 74 to 77 of the CISG.

[57] 'A party is not liable for a failure to perform any of his obligations, if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract.'

[58] *See* Article 33 of the CISG (time of delivery).

[59] *See* Article 31 of the CISG (place of delivery).

[60] *See* Article 35 of the CISG (conformity of goods).

[61] *See* Article 25 of the CISG; and A. Lorenz, *Fundamental Breach under CISG*, http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html.

[62] *See* Article 25 of the CISG.

[63] *See* Articles 46 and 28 of the CISG.

- additional period for performance;[64]
- avoidance (rescission),[65] requiring notice under Article 26;[66]
- reduction of price;[67]
- remedies for partial delivery/conformity of goods;[68]
- damages.[69]

Before invoking general remedies such as those mentioned above, the buyer may also grant the seller extra time to perform his obligations. When it becomes clear that the seller is not going to fulfill his obligations, the buyer may then suspend or rescind the contract; qualifying the breach for avoidance regardless of the initial fundamentality of the breach. The amount of damages is determined by the size of loss, including lost profits.[70]

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

[64] *See* Articles 47 and 48 of the CISG.

[65] *See* Article 49 of the CISG.

[66] *See* Article 49 of the CISG.

[67] *See* Article 50 of the CISG.

[68] *See* Article 51 of the CISG.

[69] *See* Articles 74-77 of the CISG.

[70] The other major issue is the quantification of damages and consequential damages. *See* Articles 74-78 of the CISG. Article 74 of the CISG is good for the quantification of damages based on the lost revenue and the cost of the new software. To identify the legal issues regarding the CISG, *see* http://www.cisg.law.pace.edu/cisg/text/cisgthes.html (UNCITRAL CISG Thesaurus - Outline of Legal Issues). Re damages and quantification of damages *cf*. Joanne Darkey, 'A US Court's Interpretation of Damage Provisions under the UN Convention on Contracts for the International Sales of Goods: A Preliminary Step towards an International Jurisprudence of CISG or a Missed Opportunity?', 15 *Journal of Law and Commerce at* 139-152 (1995), also available at http://www.cisg.law.pace.edu/cisg/biblio/darkey2.html; Arthur Murphey, 'Consequential Damages in Contracts for the International Sales of Goods and the Legacy of Hadley', 23 *George Washington Journal of International Law & Economics* (1989), at 415-474, also available at http://www.cisg. law.pace.edu/cisg/biblio/murhey.html; Eric Schneider, 'Consequential Damages in the International Sale of Goods: Analysis of Two Decisions [*Delchi Carrier S.p.A. v. Rotorex Corp.* (CISG decision: U.S. Dist. Ct. 1994) and Bundesgerichtshof 24 November 1980 (ULIS decision: BGH)]', 16 *Journal of International Business Law* (1996), at 615-688; Jeffrey Sutton, 'Measuring Damages under the United Nations Convention on the International Sale of Goods', 50 *Ohio St. L.J.* (1989), at 737-752, http://www.cisg.law.pace.edu/cisg/biblio/sutton.html.

2. Remedies of the Seller

The remedies available to the seller are the same as those available to the buyer.[71] S/he may also require the performance of an obligation, declare the contract avoided, and claim damages. The seller may fix an additional period of time for the performance of the buyer's obligations. As may the buyer, the seller may suspend the performance of his/her obligation or declared the contract avoided, if it is clear in advance that the buyer will not perform his/her obligations. Furthermore, the seller may make the necessary specifications when the buyer failed to supply missing specifications.

The CISG provides equal remedies for both the buyer and seller. Moreover, the exemptions also have been available for them. This means the buyer or the seller is not liable for failure to perform, if this is due to an impediment beyond his control, rendering the performance impossible. This impediment is what we understand under *force majeure*[72] and failure to perform induced by other party's act omission.[73] Additionally, both the buyer and seller must minimize a loss to their business partner.[74]

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

2. UNIDROIT Principles of International Commercial Contracts 2010 - PICC

The UNIDROIT Principles of International Commercial Contracts (hereinafter the 'PICC') are another major instrument of international business law, which can have relevance for international sale of goods.

Part (A) of this contribution will describe these PICC and the growing impact they have on the law of international contracts in general. Part (B) will examine their possible application to international sale contracts.

[71] *See* Articles 61 to 65 of the CISG.

[72] *See* Article 79 of the CISG.

[73] *See* Article 80 of the CISG.

[74] *See* Article 77 of the CISG.

A. *The PICC - Overview*

UNIDROIT is an intergovernmental institution located in Rome (Italy), active, as its name indicates, in the harmonization of laws. Among other initiatives, UNIDROIT has played a prominent part in the initial efforts to harmonize the laws of sale contracts. In more recent times, the PICC are one of the most outstanding accomplishments of UNIDROIT. The project originated in 1971. The first texts were elaborated by a prestigious triumvirate of comparative lawyers, Professors R. David (civil law), C. Schmithoff (common law), and T. Popescu (socialist law). In 1980, a Working Group took over, very competently and efficiently chaired by Professor J. Bonell of Italy. The composition of the Group has evolved over the years, but the prime concern has always been to try to ensure the representation of the main legal systems worldwide.[75] From the second phase of the project onwards, observers were invited to attend the meetings, in order for the Group directly to benefit from the reactions of institutions such as The Hague Conference, UNCTAD, the International Bar Association, the ICC, and other arbitral institutions.

The PICC consist of a codification of the general law of contracts, where the provisions themselves (the so-called 'black letters rules') are followed by comments and illustrations. The main characteristic is that the texts have not been drafted in the perspective of a future international convention, such as the CISG (*see* above). They have been conceived as a 'soft law' instrument, with no own normative value - similar in that respect, for instance, to the INCOTERMS prepared by the ICC. The PICC are simply published as a book,[76] and their contents are at the disposal of anyone interested in using them.

The nature and possible uses of the PICC are stated in their Preamble:

> These Principles set forth general rules for international commercial contracts.
>
> they shall be applied when the parties have agreed that their contract be governed by them.
>
> they may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
>
> they may be applied when the parties have not chosen any law to govern their contract.

[75] Asia has regularly been represented by specialists from China and Japan.

[76] *UNIDROIT Principles of International Commercial Contracts 2010*, UNIDROIT, Rome.

they may be used to interpret or supplement international uniform law instruments.

they may be used to interpret or supplement domestic law.

they may serve as a model for national and international legislators.

After the publication of the first edition in 1994, the PICC very rapidly became a major source of reference. Without neglecting the wide interest also raised in academic circles, it may be said that most of the aims announced in the Preamble have been reached, admittedly to various degrees. In particular, in 2012, the UNCITRAL unanimously endorsed the 2010 edition of the PICC commending their use 'as appropriate for their intended purposes.'[77]

While it is difficult to gather precise data on the subject, it does happen that parties in an international contract choose the PICC as the rules governing their relationship.[78] However, it is debated whether such 'soft law' rules - as opposed to a national legal system - may be chosen by parties as the rules applicable to their contract.

In any event, the PICC play an important part where the parties have decided to submit their contract to the *lex mercatoria* or to the usages of international commerce: many decisions, mainly from arbitral tribunals but also from national courts, have then made reference to the PICC to substantiate the contents of such general formulas. Experience also reveals the frequency to references to the PICC to support a decision already based on a national or international norm.[79]

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

[77] *Preamble* of the Report of the United Nations Commission on International Trade Law, Forty-fifth Session 25 June - 6 July 2012, General Assembly A/67/17.

[78] The PICC suggest to do so by including the following formula in the contract: 'This contract shall be governed by the PICC (2010) [except as to Articles …]'. Parties wishing to provide in addition for the application of a law of a particular jurisdiction are advised to use the following words: 'This contract shall be governed by the PICC (2010) [except as to Articles …], supplemented when necessary by the law of [jurisdiction X]'.

[79] On the use of the PICC by arbitral and national tribunals, *see* M. J. Bonell, *supra*, at 277-300, as well as the UNILEX data bank (http://www.unilex.info). The Belgian Supreme Court (*Cour de Cassation*) has recently joined the circle of national courts having made reference to the PICC (Cass., 19 June 2009, *D.A.O.R.* [2010], at 149, *see* PHILIPPE, *R.D.C.* [2010], at 879, *see* MALFLIET).

contracts has been drafted taking the PICC as a model.[80]

Recently, some model contracts elaborated by the ICC as well as the International Trade Centre of the WTO have chosen to advise the parties to refer to the PICC to govern matters not already covered by the model contracts.[81]

The first edition of the PICC came out in 1994. The second edition, published in 2004, added new chapters on authority of agents, third party rights, set-off, assignment of rights, transfer of obligations, assignment of contracts and limitation periods. The third edition, issued in 2010, brought innovations mainly on the subjects of validity, restitutions, conditions and plurality of obligors and of obligees.[82]

The PICC 2010 now consist in 211 articles (there were only 120 in the 1994 edition and 185 in the edition of 2004). After the already mentioned Preamble, eleven chapters successively deal with (i) General provisions; (ii) Formation and authority of agents; (iii) Validity; (iv) Interpretation; (v) Content, third party rights and conditions; (vi) Performance; (vii) Non-performance; (viii) Set-off; (ix) Assignment of rights, transfer of obligations, assignment of contracts; (x) Limitation periods; and (xi) Plurality of Obligors and of Obligees.[83]

The respective merits of the common and civil law systems for promoting development and economic efficacy have recently been the subject of lively debates, fuelled by the *Doing Business* reports of the World Bank.[84] In this respect, the PICC are an original 'product', born of

[80] On this influence of the PICC on legislative reform, *see* M.J. Bonell, *supra*, at 268-271. More particularly on the OHADA draft Uniform Act, *see* The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts, *Uniform Law Review* (2004), at 573-584. The PICC are also taken into consideration with respect to other current projects of the harmonization of the laws of contracts in English-speaking countries of Africa.

[81] This is for instance the case with the ICC model contracts of franchising (Article 32) and agency (Article 24), and of the model contract of joint-venture of the Centre (Article 31 of the contract for three parties, Article 23 of the contract for two parties).

[82] The innovations introduced by the 2010 edition will be analysed in a forthcoming issue of the *Uniform Law Review*, published by UNIDROIT.

[83] The order of succession of these different matters is not always satisfactory, because there was an important concern, when adding new chapters to the initial edition, to modify the existing numbering of articles as little as possible.

[84] These annual reports endeavour to rank the different national regulatory systems according to their aptitude to facilitate business; they are generally critical of civil law systems, while pointing out the alleged virtues of the common law. For a critical view on these reports, *see* the extensive analysis made by the Association Henri Capitant: 'Les droits de la tradition civiliste en question. A propos des rapports *Doing Business* de la Banque Mondiale', Paris, S.L.C. (2006).

the confluence of various sources of inspiration - reflecting the universal composition of the Working Group. The CISG, itself the product of debates between representatives of the different legal systems, has also been the model of several provisions of the PICC (*see* below).[85]

One last point should be made in this short presentation of the PICC. The Working Group has constantly been concerned with meeting the needs and expectations of practitioners of international contracts. Special attention was devoted to clauses which are generally ignored by national codifications, but which are extremely frequent in actual contracts.[86] This is for instance apparent in the provisions of Articles 2.1.2 to 2.1.22 of the section related to contract formation,[87] as well as in the provisions on hardship (Articles 6.2.1. to 6.2.3) and *force majeure* (Article 7.1.7). Such marked concern contributes to making the PICC an attractive reference for participants in international business.

B. *The PICC and International Sale Contracts*

Which role could the PICC play in connection with an international sale contract? In particular, how do they relate to more specific instruments such as the INCOTERMS and the CISG, both concerning sale contracts?

Dissimilarly to these last two instruments, the PICC are not especially designed to regulate sale contracts. The PICC are rules applicable to commercial contracts in general; they have been devised to govern any type of contract, not only sale, but also contracts as diverse as, for instance, lease, construction, distribution, transfer of technology

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

[86] On several of such clauses in practice, *see* M. Fontaine and F. De Ly, *Drafting International Contracts. An Analysis of Contract Clauses* (2006).

[87] *See* the provisions on writings in confirmation (Article 2.1.12); conclusion of contract dependent on agreement on specific matters or in a particular form (Article 2.1.13); contracts with terms deliberately left open (Article 2.1.14); duty of confidentiality (Article 2.1.16); merger clauses (Article 2.1.17); and modification in a particular form (Article 2.1.18).

or outsourcing. They state common rules concerning, mainly, the formation, performance and non-performance of contracts in general.

This major difference leads to the answers to the questions just raised. The PICC on one side, the INCOTERMS and the CISG, on the other side, are complementary. Actually, all three instruments are complementary with each other, each at a different level of generality or specificity.

The CISG sets rules applicable to many of the most important aspects of a sale contract: the formation, the obligations of the seller (the delivery of the goods, the conformity, the third party claims) and the corresponding remedies available to the buyer, the obligations of the buyer (the payment, and taking delivery) and the corresponding remedies available to the seller and passing of risk, as well as some provisions common to both parties' obligations.

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

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

3.1.1 to 3.3.2).[88] However, there are many other aspects with which the CISG does not deal, because they are not specific to the sale contract, such as the authority of agents, interpretation of the contract, numerous general rules on content and performance, set-off, assignment of rights, obligations and contracts, limitation periods, and plurality of obligors and of obligees. If parties want the benefit of a complete set of rules to govern their sale contract, they can choose to agree that in addition to the CISG and the possible choice of an INCOTERMS, their agreement will be subject to the PICC.[89]

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

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

Conclusion

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

[88] The same Article 4 states that the CISG is not concerned either with the effect the sales contract may have on the property in the goods sold; in this matter, the PICC will provide no solution.

[89] Subject to the issue raised above.

3. Principles of European Contract Law (PECL)

The Principles of European Contract Law (hereinafter the 'PECL') are the product of work carried out by the Commission on European Contract Law, a body of lawyers drawn from all of the member states of the European Community, under the chairmanship of Professor Ole Lando. They are a response to a need for a Community-wide infrastructure of contract law to consolidate the rapidly expanding volume of Community law regulating specific types of contract.[90]

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

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

A. *Application of the PECL*

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

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

- The parties have agreed to incorporate them into their contract or that their contract is to be governed by them;

[90] For more details on the Commission on European Contract Law, *see* http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/members.htm. The full text of the PECL can be found at http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/

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

B. *Freedom of Contract*

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

Direct application of freedom of contract principle is laid down in Article 1:102 of the PECL. The parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by the PECL. The parties, however, may exclude the application of any of the PECL or derogate from or vary their effects, except as otherwise provided by the PECL.[91]

Regarding the good faith requirement, the PECL provides that before reserving the liability of the party who negotiates in bad faith, the provision starts by affirming the freedom of the parties to negotiate, which is nothing other than an expression of freedom of contract at a pre-contractual stage.[92]

Article 1:103 of the PECL details the limiting of freedom of contract by mandatory rules. This provision allows parties, when the applicable law determined by the choice of law rules of the forum before which the dispute is brought, so allows, to 'choose to have their contract governed by the PECL, with the effect that national mandatory rules are not applicable',[93] with the exception of those rules which apply regardless of the governing law.[94]

[91] For more information of this issue, *see* Article 6 of the CISG.

[92] *See* Article 2:301 of the PECL:
A party is free to negotiate and is not liable for failure to reach an agreement.
However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party. (...)

[93] *See* Article 1:103(1) of the PECL.

[94] *See* Article 1:103(2) of the PECL.

The freedom of the parties to submit their contract to the PECL can thus allow them to elude the application of certain national mandatory rules, which the commentary has christened 'ordinary' mandatory laws in contrast to the so-called 'directly applicable laws' which are applicable irrespective of which law governs the contract.[95] According to the commentary, these directly applicable rules are rules that 'are expressive of a fundamental public policy of the enacting country and to which effect should be given when the contract has a close connection to this country'.[96] Therefore, the freedom of contract of the parties to submit their contract to the PECL does not, in any case, allow them to elude the application of national, supranational or international mandatory rules which always apply to the contract regardless of the governing law. The freedom of the parties to contract is therefore systematically limited by fundamental mandatory rules.

The freedom to determine the content of the contract implies, *e.g.*, the freedom to determine the obligations' place of execution,[97] the contract's date of execution[98] or the currency of payment[99].

The PECL retain a wide conception of the fundamental principles and avoid heterogeneous national concepts of 'immorality', 'illegality', 'public policy' and 'morals'.[100] The commentary on Article 15:102 states that, although the PECL constitute a self-contained system of rules applicable to the contracts governed by them, it is still not possible to ignore altogether the provisions of national law or other rules of positive law applying to such contracts, in particular those rules or prohibitions expressly or impliedly making contracts null, void, voidable, annullable or unenforceable in certain circumstances. It is therefore necessary to return to the distinction between mandatory rules laid down in Article 1:103 of the PECL.[101]

[95] *Principles of European Contract Law, Parts I and II*: Prepared by The Commission on European Contact Law and Parts I and II edited by Ole Lando and Hugh Beale, (2000), at 102. *Principles of European Contract Law, Part III* edited by Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann.

[96] *Supra*, at 101.

[97] *See* Article 7:101(1) of the PECL.

[98] *See* Article 7:102 of the PECL.

[99] *See* Article 7:108 of the PECL.

[100] *Principles of European Contract Law, Part III* edited by Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann, at 211.

[101] *See* Article 1:103:
(1) Where the otherwise applicable law so allows, the parties may choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable.

C. *Formation of the Contract*

It should note that the conditions for the conclusion of a contract also were stated under the PECL. The PECL establishes, without giving it a name, the principle of concensualism as it states first of all that the contract is concluded by the agreement of the parties, i.e., intend to be legally bound and reach a sufficient agreement 'without any further requirement'.[102] Additionally, it is expressly foreseen that 'a contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form'.[103]

As mentioned above, under the PECL, a contract is concluded on the basis of the agreement of the parties,[104] the formation of contract is constituted mainly through exchange of offer and acceptance. An offer is revocable until accepted, unless it is to be deemed firm.[105] The acceptance that does not conform to the offer is deemed to be a 'counter-offer', unless the modifications were not material.[106] Negotiations have to be entered into and continued in good faith.[107]

The PECL specify also that their rules on the formation of contract, although expressly meant to regulate the eventuality of exchange of offer and acceptance, shall be deemed applicable, even if the contract is entered into in a different way, thus indirectly recognizing that contracts may be concluded also in other ways.

D. *Remedies for Non-performance*

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

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

(2) effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract.

102 *See* Article 2:101(1) of the PECL.

103 *Ibid*. Compare similarities with Article 11:104 of the PECL which states that 'an assignment need not be in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses'.

104 *See* Article 2:101(1) of the PECL.

105 *See* Article 2:202 of the PECL.

106 *See* Article 2:208 of the PECL.

107 *See* Article 2:301 of the PECL.

The remedy of specific performance is restricted by some provisions.[108] Under the PECL, the specific performance is not admitted where the performance would be unlawful or impossible, it would be unreasonably burdensome, or performance could be reasonably obtained from other sources. Furthermore, the PECL extend these restrictions also to the remedying a defective performance.[109]

The PECL provide also for the right to reduce the price.[110] The right to termination is subject to the breach of contract being fundamental, or to the non-defaulting party having given notice to the non-performing party with an additional period to perform.[111]

In addition to all these remedies, reimbursement of damages is also available.[112] The PECL assume that damages are payable on the basis of strict liability, and do not therefore require proof of the negligence of the non-performing party; also the PECL, however, make an exception for the eventuality that the performance is prevented by an event beyond the control of the non-performing party.[113]

In respect of the calculation of the reimbursable damages, the PECL specify that the sum should be such as to place the non-defaulting party in the position as if the contract has been properly performed, and it shall contain both incurred expenses and loss of profit.[114]

In respect of the remoteness of the loss, the PECL applies the 'foreseeability of the losses'[115] standard as a likely result of the breach. However, it should note that in connection with the remoteness of the losses, the PECL introduces the criterion of 'gross negligence' or 'intentional misconduct'. If the defaulting party's conduct has been grossly negligent or intentional, the losses to be compensated will not be limited to the foreseeable losses.

In respect of excuse due to an impediment beyond the control of the non-performing party, the remedies of reimbursement of damages

108 *See* Article 9:102 of the PECL.

109 *See* Article 9:102(1) of the PECL.

110 *See* Article 9:401 of the PECL.

111 *See* Article 9:301 of the PECL.

112 *See* Articles 8:101 and 8:102 of the PECL.

113 See Article 8:108 of the PECL.

114 *See* Article 9:502 of the PECL.

115 *See* Article 9:503 of the PECL.

and of specific performance are not admitted.[116] This excuse lasts as long as the effects of the impediment persist.[117] The effects of hardship are to entitle the affected party to renegotiations or to request that the court terminates the contract.[118]

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

4. Vietnamese Rules Governing International Sale Contracts

A. *Sources of Law*

Before 2005, Vietnamese rules governing international sale of goods contracts were scattered in various legal documents such as the Civil Code 1995, Commercial Law 1997, Ordinance on Economic Contracts 1989, and several delegated legislations. Such rules were not only scattered; they also overlapped each other to some extent. The year 2005 was considered remarkable to the Vietnamese law-making procedure due to the promulgation of many new pieces of legislation to bring the Vietnamese legal system to meet the WTO rules, among which the new Civil Code and Commercial Law were good examples. Nowadays, fundamental rules governing international sale of goods contracts in Viet Nam can be found in Civil Code 2015 (hereinafter the 'Civil Code') and the Commercial Law also of 2005 (hereinafter the 'Commercial Law').

Article 1 of the Civil Code stipulated:

> 'The Civil Code provides the legal status, legal standards for the conduct of natural and juridical persons; the rights and obligations of natural and juridical person (hereinafter referred to as persons) regarding personal and property rights and obligations in relations established on the basis of equality, freedom of will, independence of property and self-responsibility (hereinafter referred to as civil relations).'

Therefore, international sale contracts shall be governed by the Civil Code. While the Civil Code provides general rules like the formation of the contract, general standards of performance, etc., the Commercial Law governs specific rules on the contract like the form of the contract, remedies for breach of contracts, etc. To avoid a repeat of the pre-2005 overlapping, Article 4 of the Commercial Law clearly stated the priority order of the application of the sources of law for international sale of goods in the case where the law applicable to the contract is Vietnamese law as below:

1. Commercial activities must comply with the Commercial Law and relevant laws.
2. Particular commercial activities provided for in other laws shall comply with the provisions of such laws.
3. Commercial activities which are not provided for in the Commercial Law and other laws shall comply with the provisions of the Civil Code.

It can be seen that international sale contract shall be governed firstly by the specialized law, followed by the commercial law and civil law. What if there is no regulation or inadequate regulations?

Article 12 of the Commercial Law stipulates:

> Except otherwise agreed, the parties shall be regarded as automatically applying customs in commercial activities pre-established between them which they have already known or ought to know, provided that such customs are not contrary to the provisions of law.

Article 13 of the Commercial Law provides:

> Where it is neither provided for by law nor agreed by the parties, and there exist no customs pre-established between them, commercial practices shall be applied provided that such practices are not contrary to the principles provided for in this Law and the Civil Code.

Both Articles 12 and 13 of the Commercial Law state that parties are bound by any practices established between themselves and usages regularly observed by parties to contracts. Article 13 also shows the priority order of application in which practices prevail.

[116] *See* Article 8:101(2) of the PECL.

[117] *See* Article 8:108(2) of the PECL.

[118] *See* Article 6:111 of the PECL.

B. *Definition on International Sale Contract*

The Commercial Law does not directly define the activity of international sale. Instead, it lists all activities considered to be international sale in Article 27, including export, import, temporary import for re-export, temporary export for re-import, and international sale of goods without import-export procedures at border-gates ('chuyen khau' in Vietnamses).

The 'export' of goods means bringing goods out of the territory of Viet Nam or into special zones locating in the Vietnamese territory regarded as separate customs zones according to the law (Article 28(1) of the Commercial Law).

The 'import' of goods means bringing goods into the territory of Viet Nam from foreign countries or special zones locating in the Vietnamese territory regarded as separate customs zones according to the law (Article 28(1) of the Commercial Law).

The 'temporary import of goods for re-export' means bringing goods into Viet Nam from foreign countries or special zones locating in the Vietnamese territory regarded as separate customs zones according to the law, with the completion of the procedures for importing such goods into Viet Nam, then procedures for exporting the same goods out of Viet Nam (Article 29(1) of the Commercial Law).

The 'temporary export of goods for re-import' means bringing goods overseas or into special zones locating in the Vietnamese territory regarded as separate customs zones according to the law, with the completion of procedures for exporting such goods out of Viet Nam, then procedures for importing the same goods back into Viet Nam (Article 29(2) of the Commercial Law).

The 'international sale of goods without import-export procedures at border-gates' means the purchase of goods from a country or territory for sale to another country or territory outside the Vietnamese territory without carrying out the procedures for importing such goods into Viet Nam and the procedures for exporting such goods out of Viet Nam (Article 30(1) of the Commercial Law).

From those definitions, it is shown that goods in international sale (i) must be movable; and (ii) can be delivered across borders. Sale of immovable assets to foreigners are excluded from international sale activities.

C. *Form of the Contract*

The international sale contract must be in writing or other form of equal legal validity. Article 15 of the Commercial Law states that data messages which satisfy all technical conditions and standards provided for by law shall be recognized as being as legally valid as are written documents.

D. *Formation of the Contract*

The formation of the contract cannot be found in the Commercial Law thus general principles in the Civil Code shall be applied. In these, a contract is formed and the parties are bound by its provisions when an offer to buy or sell goods is accepted. The rules of offer and acceptance are similar to those stipulated in the CISG. This part shall focus on the discrepancies only.

A seller sends an offer to a buyer. The buyer responds with an acceptance that modifies some of the terms in the offer. Under the CISG, if the inconsistencies are 'material', the would-be acceptance would be a 'counter-offer' as stated in Article 19(3) of the CISG. However, Vietnamese rules require an acceptance amounting to an agreement must be unconditional and final. In other words, the acceptance must be the 'mirror' of the offer. Article 395 of the Civil Code provides that additional or different terms to offer shall amount to a 'counter-offer'.

Normally, the silence does not amount to the acceptance. However, Article 404(2) of the Civil Code allows a silence to constitute an acceptance if it has been agreed upon by the parties in advance that a silence means the reply of an acceptance.

For common law countries, when the acceptance depends on which rule applies, whether postal rule or actual communication rule. Vietnamese law reject postal rule. Article 400(1) of the Civil Code clearly describes the time of the acceptance is the time when the offeror receives the acceptance.

E. *Terms of the Contract*

Before 2005, Vietnamese rules required certain terms that must be applied in any contract. However, since 2005, there are no required terms in contracts generally nor in international sale contracts particularly. The parties may agree on the (i) goods; (ii) quantity and quality; (iii) price

and method of payment; (iv) duration and place of performance; (v) parties' obligations; (vi) liabilities; (vii) penalty, and other details. Also, Vietnamese rules provide modes to settle some typical cases where there are no specific terms.

In the case where the contract does not specify the price, which rarely happens in reality, Article 52 of the Commercial Law describes the method of identifying the price for the contract as follows: the price of such type of goods under similar conditions, on mode of delivery, time of sale, market, payment method and other conditions which affect the prices.

In the case where there is no agreement on specific agreement on the specific place of payment, Article 54 of the Commercial Law requires the buyer to pay to the seller at one of the following places: (i) the seller's place of business which is identified at the time of entering into the contract; or (ii) the place where the goods or documents are delivered if the payment is made the same time as the delivery of goods or documents.

In the case where there is no agreement on specific time for delivery of goods, the seller may deliver goods at any time within such time limit and must notify the buyer of the delivery in advance. If the time limit for delivery of goods is not specified, the seller must deliver goods within a reasonable time limit after the contract is entered into. However, Vietnamese rules do not provide criteria to identify 'reasonable time'.

F. *Passing of Risk*

The loss of goods may occur at any time and in most cases, the loss will be covered by insurance. It is important to determine whether the seller or the buyer is responsible for obtaining the insurance? Unlike other domestic laws, Vietnamese rules allows parties to allocate risk among themselves and to specify when the risk will pass between them. In the case where there is no such specification, the Commercial Law shifts the risk from the seller to the buyer when the buyer receives the goods at the specified place of delivery. If no specified place of delivery is provided, the risk shall pass to the buyer when he receives the documents of title or confirms his possession of the goods. If the buyer is not the person who receives the goods from the seller, the risk shall pass to the seller when the goods are delivered to the first carrier. For other cases, passing of risk stipulated in Vietnamese rules is similar to the CISG.

G. *General Standard of Performance*

Similarly to the CISG, Vietnamese rules impose general standards of performance on both the buyer and seller. In general, both parties are entitled to get from their contract what they expect. A party that fails to perform accordingly is in breach of contract, among which fundamental breach can bring to serious remedies like avoidance or termination of the contract. Vietnamese rules define fundamental breach slightly different from the way the CISG does. Fundamental breach is defined in Article 4(13) of the Commercial Law as a breach committed by one of the parties which causes damage to the other party to an extent that the other party cannot achieve the purpose of the entry into the contract. The purpose of the entry into the contract sometimes does not specify what the injured party is entitled to expect under the contract as required in Article 25 of the CISG.

H. *Remedies for Breach of Contract*

When one party breaches a contract, the other party may claim for remedies. Remedies listed in Article 292 of the Commercial Law are specific performance, penalty, damages, suspension of the performance, termination, avoidance, and others agreed by the parties.

Vietnamese rules authorize an injured party to ask for specific performance if the other party fails to carry out his obligations. *For example*, where the breaching party fails to deliver goods in full, it shall have to deliver goods in full; where the breaching party delivers goods of an inferior quality, he shall have to rectify defects of the goods or to deliver other goods as substitutes. The breaching party must not use money or goods of other types as substitutes unless so consented to by the other party.

According to Vietnamese rules, a penalty consists of liquidated damages to punish the party in breach. Such a penalty clause will not be enforced in common law countries if the purpose is to punish rather than to compensate the injured party. In order to ensure the fairness of the contract, Vietnamese rules requires both parties to insert the penalty clause into the contract with an agreed rate not exceeding eight

per cent of the value of the breached contractual obligation portion as stated in Article 301 of the Commercial Law.

As for damages, Vietnamese rules does not require that damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract as in Article 74 of the CISG. Vietnamese rules allow the injured party to claim for all damages covering the value of the material and direct loss suffered and the direct profit that the injured party would have earned if such breach had not been committed. It means the requirement of foreseeability does not apply. The party claiming damages is under an obligation to take reasonable measures to mitigate the loss. If the claiming party fails to take such action, the other may seek a proportionate reduction in the damages. If the buyer is late in payment, the other party may claim interest on such delayed payment. The interest is the average interest rate applicable to overdue debts in the market at the time of payment for the delayed period, unless otherwise agreed or provided for by law.

Vietnamese rules allow the injured party to claim for suspension of performance, termination and avoidance when the condition for the suspension of performance or termination or avoidance of the contract as agreed by the parties occurs or when one party commits a fundamental breach. Therefore, such remedies shall not apply to anticipatory breach as stipulated by the CISG. If it becomes apparent that one party will not perform a substantial part of his obligations, the other party cannot claim for remedies but is required to wait for breach in reality. One example concerns the seller who may see the buyer unable to pay yet cannot claim for remedies before the due date. For any remedies, the injured party is required to notify the other party of his option of the remedy.

When one party claims for avoidance of the contract, he may avoid a part of or the entire contract. The avoidance of a part of contract shall not affect the validity of the rest of the contract.

An injured party may claim over specific performance together with penalty and damages, but not pursue other remedies. Requiring damages shall not deprive the injured party of the right to claim for the other remedies.

I. *Excuses for Non-performance*

Four excuses are provided in Article 294 of the Commercial Law for a party's failure to perform the contract. They are (i) cases of liability exemption agreed upon by the parties; (ii) *force majeure*; (iii) 'dirty hand'; and (iv) a result of the execution of a decision of authorities which the parties cannot know at the time the contract is entered into. The breaching party seeking to use such excuses has a duty promptly to notify the other party of the impediment and its effect on his/her ability to perform. S/he also has a duty to notify the other party of the end of the impediment as well. The excuse may be used only *force majeure*.

Force majeure is defined in Article 156 (1) of the Civil Code as the impediment which is not a factor the breaching party could reasonably have taken into account at the time of contracting and he remains unable to overcome the impediment or its consequences. In the case of *force majeure*, the parties may lengthen the time of the performance of the contract. If the parties do not agree or cannot agree on such duration, it shall be deemed to be as long as the underlying impediment continues in existence. However, it shall not be longer than five months for which the agreed time limit for their delivery or provision does not exceed 12 months from the date the contract is entered into or eight months for which the agreed time limit for their delivery or provision exceeds 12 months from the date the contract is entered into.

5. Choice of Laws in International Sale Contracts

An international sale contract is carefully drafted by parties who are knowledgeable and experienced in the area of sale. However, the contract itself cannot foresee all circumstances that may occur after it is concluded. Therefore, it is necessary to have a choice of law clauses to provide the parties with a legal basis on which to identify their obligations and liabilities.

By the use of a choice of law clauses, the parties agree in advance as to what law should apply. *For example*, the parties may include in the contract the following content: 'The contract between the parties is made, governed by, and shall be construed in accordance with the laws of Canada applicable therein, which shall be deemed to be the proper law hereof.' Alternatively, it can be 'Applicable law: The validity and performance of this purchase shall be governed by the laws of the state

shown on buyer's address on this order'. So long as the parties made the agreement freely, even if they have no factual connection with the country whose legal system they have adopted, their choice will be enforced. Such applicable law can be domestic laws, international treaties, and international mercantile customs and usages.

A. *Domestic Law*

Domestic law becomes applicable law for an international sale contract when:

- It is agreed in the contract at the time the contract is concluded;
- it is agreed by the parties after the contract is made. For many reasons, the parties fail to choose applicable law and they may agree afterward or at the time the dispute occurs;
- it is referred by the applicable international treaty. *For example*, the Convention on the Law Applicable to International Sale of Goods, The Hague 1955 refers to the applicable law of the vendor in Article 3 as follows:

> In default of a law declared applicable by the parties under the conditions provided in the preceding article, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale shall be governed by the domestic law of the country in which the establishment is situated.

- it is decided by the court or arbitral tribunal who has the jurisdiction to settle the dispute. The court or arbitral tribunal may base its decision on different doctrines to choose a domestic law for the contract.

According to the 'vested right' doctrine, a court is to apply the law of the State where the rights of the parties to a suit is vested (*i.e.*, where they legally became effective). It may be the law of the country where the contract was made that governs questions of validity, and the law of the country where the contract was to be performed that governs questions of performance.

The 'vested rights' doctrine is the traditional device used by courts to determine the choice of law; however, it is not the only mechanism. In recent years, many civil law countries have modified their choice of law rules in response to objections that the 'vested rights' doctrine is too rigid and fails to reflect the true interests of the states whose law may or may not be applied. The great majority of states have adopted the 'most significant relationship' doctrine. Others have turned to the 'governmental interests' doctrine.[119]

The 'most significant relationship' doctrine has a court apply the law of the State that has the most contacts with the parties and their transaction. In essence, the courts will consider the following general factors in all cases: (i) which State's law best promotes the needs of the international system? (ii) which State's law will be furthered the most by applying it to the case at hand? and (iii) which State's law will best promote the underlying policies of the legal subject matter area involved? In addition, a court will consider 'specific factors' depending on the kind of case that is before it. And the specific factors of the cases are: (i) the place of contracting; (ii) the place of negotiation; (iii) the place of performance; (iv) the location of the subject matter; and (v) the nationality, domicile, residence, or place of incorporation of the parties[120].

Courts that apply the 'governmental interest' doctrine will, *firstly*, make no choice of law unless asked to do so by the parties. *Secondly*, if they are not asked, they will apply the law of their own State. If asked, they will then look to see which State has a legitimate interest in determining the outcome of the dispute. If only the forum State has an interest (a false conflicts case), they will, of course, apply the forum State's law. If both the forum State and another State or States have some legitimate interest (a true conflicts case), then the forum State's laws should be applied, because the court obviously understands those interests better. If two States other than the forum State have legitimate interests (also a true conflicts case), then the court should dismiss the case, if the State in which the court is located follows the doctrine of 'forum non conveniens' (*see* Section 2 - Chapter 7 of the Textbook). Otherwise, the court has the choice of applying whichever law it feels the most appropriate, or most like that of the forum State.[121]

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119 Ray August, *supra*.

120 *Ibid*.

121 *Ibid*.

There have been some development in the recognition and protection of freedom of parties to the contract in terms of choice of applicable law in Vietnamese rules. Article 769 of the Civil Code 2005 states that 'if the contract is concluded and performed in Viet Nam, it must be governed by Vietnamese law'. Therefore, when Vietnamese courts settle a dispute over an international sale contract which is concluded and performed in Viet Nam, it shall apply Vietnamese law even when the choice of law clause included in the contract points out another source of law. Similarly, Article 770 of the Civil Code also denies the choice of law applicable to the form of contracts. However, Civil Code 2015 gives parties the right to choose the law applicable to their contract at Article 683(1). The 'most significant relationship' doctrine has been accepted through this article.

If the chosen domestic law provides the results which conflict with the public orders or general principles of the country where one of the parties has nationality, such applicable law shall be void.[122] General principles in Vietnamese rules can be found from Article 10 to Article 15 of the Commercial Law,[123] and Article 3 of the Civil Code[124].

B. *International Treaties*

Treaties are legally binding written agreements between two or more nations. Article 2(1) of the Law on International Treaties 2016 states that:

> International treaty is a written agreement which is concluded or accessed by the state or by the government with one or more other nations, international organizations or other subjects of the international law, regardless of the names which can be agreement, convention, protocol, memorandum of understanding or others.

An international treaty applies to international sale contracts when either (i) both states must be contracting parties to the treaty; or (ii) the rules of private international law must lead to the application of the law of a contracting state. For example, the CISG may apply even if the buyer's and seller's places of business are not in a contracting state.

[122] Article 670(1a) of the Civil Code and Article 5(2) of the Commercial Law.

[123] They are equality, freedom to enter into contract, application of past dealings, application of customs, protection of legitimate interest of consumers and the validity of electronic data.

[124] They are equality, fairness, respect of the traditions and ethics, good wills, protection of public interests and civil liability.

For example, assume that the seller has a place of business in the state A (a non-contracting state), and the buyer has a place of business in the state B (also a non-contracting state). They enter into a contract in state C (a contracting state) and the seller breaches performance in state C. The buyer brings an action in state B, whose choice-of-law rules point to the laws of state C as applying to the contract. Because state C is a contracting party and the transaction is international, the CISG would apply.[125]

Where a treaty to which a nation is a contracting party stipulates the application of foreign laws or international commercial practices, or contain provisions different from those of the national law, the provisions of such treaty shall apply. Such principle is accepted in most countries, including Vietnam.[126]

C. *International Mercantile Customs and Usages*

To show that a customary practice has become customary law, two elements must be established - one behavioural and one psychological.

Firstly, the behavioural element - called '*usus*' in Latin - requires 'consistent and recurring action' (or lack of action if the custom is one of non-involvement) by States (and other actors). Evidence of such action can be found in comments on draft treaties, national court decisions, and even legislation of a subordinate government, etc. 'Consistent and recurring action' does not mean lengthy (as in 'since time immemorial', which is sometimes given as the rule in municipal practice), nor it must be followed by all states. On the other hand, it must be accepted by a reasonably large number of major states for a period long enough to be recognized by the courts as establishing constant and uniform conduct.

Secondly, the psychological element in showing that a customary practice has become law requires that states observing the customs must regard it as binding. That is, they must recognize the customs as being a practice that they must obligatorily follow as compared with one that they follow out of courtesy (*i.e.*, comity) to other States. This is often referred to by the Latin phrase '*opinio juris sive necessitates*'.[127]

[125] Ray August, *supra*, at 535-592.

[126] *See* Article 5(1) of the Commercial Law.

[127] Ray August, *supra*.

International mercantile customs and usages shall apply to the contract in the case where it is agreed by the parties or it is referred by the applicable law. In the case where the applicable law cannot settle the dispute, the international commercial customs and usages may be invoked.

Section Four. METHODS OF FINANCING OF INTERNATIONAL SALE OF GOODS

1. Introduction

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

Usually, the seller, after the goods have been shipped, draws up a bill of exchange for the value of the shipment, attaches the bill of lading and any other specified documents required, and presents the bill of exchange to a bank, usually in his/her country of residence, for negotiation or payment. The buyer shall pay when s/he receives the required documents at his/her bank in his/her country.

This Section will deal with two types of financing arrangements under international trade. *Firstly*, it mentions documentary bills and documentary credits, which have the key functions of providing payment security for goods and services against specified documents tendered. *Secondly*, standby credits, performance bonds and guarantees with the key function of providing security against default in performance of the principal in the underlying contract.

2. Documentary Bills

In international sale of goods, the term 'documentary bills' denotes a bill of exchange accompanied by shipping documents and is intended to be accepted or paid in exchange for those documents. Compare this with a 'clean' bill, that is, a bill of exchange.[128] An approximate definition is that a documentary bill is a bill of exchange to which the bill of lading (or other documents of title) is attached.[129]

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

A. *Bill of Exchange*

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

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

A bill of exchange (also known as a 'draft'), along with others (for example, cheques) belongs to the class of document known as 'negotiable instruments'. A negotiable instrument, which evidences the obligation to pay money by one party to another, has two outstanding characteristics. *Firstly*, it is transferable by delivery, and with the transfer,

[128] R. Goode, *Goode on Commercial Law*, *supra*, at 1054.

[129] L. S. Sealy and R. J. A. Hooley, *supra*, at 847.

rights embodied in it are transferred, such that the transferee can enforce them in his/her own name; and it is not necessary to notify the obligor or assignee. *Secondly*, where the transferee takes it in good faith and for value, s/he takes it free of any defects of title of the transferor. The bill of exchange is an autonomous contract and is not affected by breach in the underlying contract that resulted in the creation of a bill of exchange. Because of these characteristics, bills of exchange are treated as cash.[130]

Where the bill of exchange is negotiated with recourse, the endorser may be liable to the subsequent holder if the bill is dishonoured by the drawee, upon notice of such failure to honour it by the subsequent holder. Where the bill of exchange is negotiated without recourse, the endorser negates this liability and therefore, the subsequent holder bears the loss. Another matter is that a bill of exchange may be a sight bill or a time bill. A sight bill must be paid on presentation. A time bill must be paid upon presentment for acceptance, when the bill matures a fixed time (*e.g.*, 90 days) after sight. A time bill may be sold for cash, although of course their value (sight rate) will be lower than the face value of the bill (because of a commission or interest).[131]

B. *Function of Shipping Documents*

After shipping the goods being sold, the seller obtains shipping documents, usually including a bill of lading or other documents of title. A document of title transfers constructive possession of the goods. For example, the shipped bill of lading is recognized, by the custom of *merchants*, as document of title. Only the holder of a document of title may demand the goods from the ship at the destination. The bill of lading may therefore be negotiated, to enable the holder either to resell the goods or pledge them with a bank to raise money on the security.[132] In brief, the shipping documents entitle the buyer to receive the goods at the port of destination.

C. *Operation of Documentary Bills*

The parties to international sale contract may agree to effect payment through documentary bills. The seller will send a documentary bill to the buyer to ensure that the buyer does not take up the bill of lading, which gives him/her a right of disposal of the goods, without first accepting or paying the bill of exchange as previously agreed between the parties. If the buyer fails to accept or to pay the bill of exchange (depending on whether it is a time or a sight bill), s/he is bound to return the bill of exchange to the seller, and if s/he wrongfully retains the bill of lading, the ownership of the goods does not pass to him/her.[133]

The advantage for the seller is that, on the acceptance of the bill of exchange by the buyer, money may be obtained by the seller, before the maturity date of the bill of exchange, by selling it at a discount to a bank. As for the buyer, s/he obtains credit until the bill of exchange's maturity date. However, a major disadvantage for the seller, with the documentary bill, is that the buyer may not honour the bill of exchange. In this case, the party to whom the seller discounted the bill of exchange would have recourse to him/her.[134]

In the event that the bill of exchange is not honoured by the buyer, one more problem that may occur is that the buyer may then proceed to sell the goods as s/he holds the bill of lading, a document of title. It is an illegal or fraudulent act by the buyer, as the ownership of the goods has not yet passed to him/her, because s/he has not accepted or paid against the bill of exchange. To prevent the risk of loss of title through the buyer's fraud in disposing of the goods without honouring the bill of exchange, the seller will arrange for collection through a bank. The seller's own bank (the remittance bank) may despatch the bill of exchange and shipping documents to its correspondent (the collecting bank) in the buyer's country with the instruction not to part with the documents, except against payment or acceptance of the bill of exchange. The collecting bank will then present the documents to the buyer, procuring his/her payment or acceptance of the bill of exchange.[135]

The relations between the seller and the remittance bank, between remitting and collecting banks; are usually governed by the ICC's Uniform Rules for Collection (the latest version is URC 522 published in 1995),[136] commonly known as 'Uniform Rules for Collection' or 'URC'. In fact, in this circumstance, it is combination of two methods

130 Indira Carr, *supra*, at 466.

131 P. Todd, *Cases and Materials on International Trade Law*, Sweet & Maxwell, (2002), at 393-394.

132 P. Todd, *supra*, at 254.

133 L. S. Sealy and R. J. A. Hooley, *supra,* at 847.

134 Indira Carr, *supra*, at 470.

135 *See* next para. 2.4 for further details.

136 R. Goode, *supra*, at 1054.

in the financing of international trade, which is documentary bills and collection; in other words, the method of collection with supported documents (documentary collection).

D. *Documentary Collection*[137]

These rules set out the procedures to be followed by all parties concerned, including the liabilities and responsibilities of banks and customers involved with collection transactions. They endeavour to eliminate difficulties (created by differences in banking phraseology and procedures) in various countries by setting out standard practices that banks may apply.

Sellers may, by specific written instructions to their bank, for individual bills and subject to the agreement of the bank, vary any standard procedure to suit their own requirements. The URC rules recognize local conditions by stating that the rules are binding on all parties '...[u]nless contrary to the provisions of a national, state or local law and/or regulation which cannot be departed from'.

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

1. Parties in Documentary Collections

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

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

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

2. Method of Collecting Bills

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

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

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

3. Presentation on Arrival of Goods (PAG)

A seller may find that the buyer is not, until the relevant goods arrive, prepared to pay, or to accept, a documentary bill drawn on him/her. In some countries, it is common practice for the payment or acceptance of bills to be deferred until the arrival of the goods. The term used in the heading, 'PAG', is applied to this practice. It is also described as 'payment on arrival of carrying vessel'.

[137] Technical Officers, 'Global International Trade and Business Finance', National Australia Bank Limited, *Finance of International Trade,* (2000).

Banks despatch export documentary bills by airmail or courier, as previously described, yet pass on the seller's instructions to the correspondent bank in the importing country that presentation of the bill to the drawee is to be delayed until the arrival of the relevant goods, or that there is the option of requesting such delayed presentation if the drawee so wishes.

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

If the buyer fails to honour the bill of exchange by non-acceptance or non-payment, the bank may sue the seller over the bill. This highlights the real disadvantage, from the seller's point of view, of payment under a documentary bill collected by or discounted to a bank. The buyer may accept the bill of exchange so that the bill of lading will be released to him/her. However, the seller has no assurance that the buyer will pay when the bill matures.[138] This problem is well resolved by documentary credits, as will be mentioned below. That is why the documentary credits or letters of credit are preferred to the method of documentary bills.

3. Documentary Credits

Documentary credits (also known as 'commercial credits' or 'letters of credit') are preferred alternatives to a documentary bill. Documentary credits are widely used across the world. Their popularity in international commerce has led judges to describe them as 'the life blood of international commerce' and it is said that merchants across the world embraced and continue to embrace them whole-heartedly; much of the law governing letters of credit is grounded in the mercantile customs and practices.[139] For example, the UCP, e-UCP and ISBP.

Despite the wide use of documentary credits, the attempt to harmonize the law governing the documentary credits through the negotiation and conclusion of international treaties has been largely unsuccessful. A near global unification, however, has been achieved through the great efforts of the ICC, which creates and is responsible for the UCP. An eminent academic on commercial law in the UK, Professor R. M. Goode, described it as the 'most successful harmonizing measure in the history of international commerce'. The unification is, as Professor E. P. Ellinger, a leading expert on letters of credit, observes, a consequence of necessity and use of banks as agents in international trade.[140]

The UCP is seen as a code to standardize (i) conditions under which bankers are prepared to issue documentary credits at the request of the trader willing to arrange the payment for their traded goods *via* the means of documentary credits; and (ii) the interpretation of documentary credit practice.[141] It may also be seen as a set of rules governing the use of documentary credits. The majority of banks and traders in most countries of the world have welcomed and adopted the UCP for supporting payments for goods.

The UCP was first published by the ICC in 1933 and has been revised six times since then. The latest version is UCP 600, which came into effect on 1 July 2007. UCP 600 replaces the 1993 version (UCP 500).[142] Unless stated otherwise, all references in this section are to UCP 600. In addition to UCP, a supplement to UCP 600, the 'e-UCP', was also enacted to deal with the electronic presentation of documents.

A. *Application of the UCP*

Article 1 of the UCP provides:

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

138 *See* L. S. Sealy and R. J. A. Hooley, *supra,* at 848.

139 *See* Indira Carr, *supra*, at 471.

140 *See* Indira Carr, *supra*, at 471-472.

141 National Australia Bank Limited, *supra*, at 5.

142 It does not mean that UCP 500 will no longer be applied. The parties may choose to apply UCP 500, or even more previous versions of UCP, by the incorporation of an appropriate provison into their contract with or without modifications, if they prefer. In essence, the UCP is only a model law, which acts as a guide and is used by parties at their discretion.

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

1. UCP Rules Apply to Documentary Credit

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

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

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

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

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

B. *Definition of the Documentary Credit*

Research scholars all over the world have outlined some definitions of a documentary credit. *For example*, one of the most brief and correct definitions is that a documentary credit is, in essence, a banker's assurance of payment against presentment of specified documents.[143] A documentary credit may also be described as an advice issued by a bank authorizing the payment of money to a named party, the beneficiary, against delivery by the beneficiary of specified documents (usually accompanied by a bill of exchange for the amount to be paid) evidencing the shipment of described goods. The advice sets out the strict terms and conditions that must be fulfilled.[144]

Under the UCP, its Article 2 reads: 'Credit means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.'

Therefore, documentary credits means credits (within the meaning in this Article 2) that arrange payment by the buyer ('the applicant') to the seller ('the beneficiary') against the presentation of specified documents (that is why this type of credit is known as 'documentary').

In order to ascertain the definition of a documentary credit under Article 2 above, relevant terms in this Article as defined in the UCP should be taken into consideration, as follows:

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

[143] It is pointed out by R. M. Goode, a leading and eminent expert in commercial law in the UK as well as in the world. *See* R. Goode, *supra*, at 1059.

[144] National Australia Bank Limited, *supra*, at 5.

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

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

C. *Types of Documentary Credits*

1. Irrevocable and Revocable Credits

(a) Irrevocable credit

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

Once an irrevocable credit has been advised, the beneficiary is assured that such credits contain an express undertaking by the issuing bank, or one implied by the use of the word 'irrevocable', that all drawings will be duly honoured provided that there has been full compliance with all of the terms of the credit. That is why these credits have a high standing in the commercial world when issued by reputable banks, and are the type usually required in commercial transactions.[145]

(b) Revocable credit

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

[145] National Australia Bank Limited, *supra*, at 51.

2. Unconfirmed and Confirmed Credits

The meaning of the 'confirmation' of an irrevocable credit is set out '*inter alia*' in Article 2 of the UCP as follows: 'Confirmation means a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation.'

Therefore, in unconfirmed credit, only the issuing bank provides an undertaking to pay the beneficiary; although the credit will be advised to the seller by the advising bank, the advising bank has no undertaking to pay. However, in confirmed credit, there is an additional undertaking in the credit given by a bank other than the issuing bank (usually by the advising bank), and the beneficiary has assurance that s/he will have one more definite undertaking to pay in addition to that of the issuing bank. Moreover, it is convenient to the beneficiary that the confirming bank is normally located in his own country, which offers greater comfort and reassurance.

The 'confirmed' undertaking may be detailed in the credit advice by the confirming bank; otherwise, the use of the words 'This credit is confirmed by us' or similar is sufficient to imply the undertaking specified by the confirming bank.

(a) Confirmed plus irrevocable credits

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

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

When the issuing bank is a well-known, first-class bank of high standing, located in a country with a stable political and economic climate, confirmation has little practical value. However, if the issuing bank is little known and has low resources, or if the country of issue has political or economic problems, the beneficiary may - understandably - seek

to have the credit confirmed by a bank in his/her own country, the reputation and standing of which s/he is better able to assess.[146]

(c) Operation of a credit confirmed

The instruction to an advising bank to confirm a credit must be given by the issuing bank, which will be responsible for the confirmation fee unless it instructs that the fee is to be charged to the beneficiary. If a beneficiary, on receipt of the credit bearing no provision for confirmation, wishes to have it confirmed, the advising bank should be requested to refer back to the issuing bank for their permission to do so. Although advising banks requested by issuing banks to add their confirmation to a credit seldom refuse, they may do so in circumstances where satisfactory arrangements cannot be made with the issuing bank to cover the liability which the confirming bank will incur by confirming the credit.[147]

(d) Silent confirmation

Silent confirmations fall outside the current provisions of the UCP. A silent confirmation is an undertaking given by a bank (at the request of the beneficiary, without the request or authorization of the issuing bank) to add its undertaking to a letter of credit to pay according to the terms of the credit, providing all documents are presented in order. Accordingly, these transactions are available only for specific customers that meet the bank's stringent criteria. Silent confirmations are assessed at the sole discretion of the bank requested to add its silent confirmation.[148]

3. Sight Payment, Acceptance and Deferred Payment Credits

Classified by the time at which the seller is entitled to payment, documentary credits may be divided into the following categories:[149]

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

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

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

Article 2 of the UCP reads:

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

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

146 National Australia Bank Limited, *supra*, at 53.

147 *Ibid.*

148 The following criteria may be a critical factor in assessing a silent confirmation request from the beneficiary: (i) experienced traders; (ii) credit assessment of the Issuing Bank; (iii) customer relationship with the Bank; (iv) control of goods through Bills of Lading; (v) possible contract repudiation due to the type of commodity being exported; and (vi) export insurance cover is a pre-requisite for some countries. *See* National Australia Bank Limited, *supra*, at 3-54.

149 For further information, *see* L. S. Sealy and R. J. A. Hooley, *supra*, at 853-854.

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

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

'Green clause' credits came to be used in the coffee trade in Zaire and operate similarly to 'red clause' credits. The only difference is that in this type of credit, the goods are stored in the name of the bank.[150]

6. Revolving Credits

Instead of a credit being for a fixed amount or for a fixed time, it may revolve around value or time. A credit revolving around value enables the beneficiary to present the documents as often as s/he wishes during the credit period so long as the overall limit specified in the credit is not exceeded. A credit revolving around time allows the beneficiary to draw up to, a certain amount of money a month for the period of the credit and may or may not permit the beneficiary to carry forward under-drawings from one month to the next.[151]

7. Transferable and Non-Transferable Credits

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

However, the term 'transfer' is somewhat misleading. 'Transferable' does not mean 'negotiable'. A documentary credit is not a negotiable instrument that may be transferred from one person to another through endorsement and delivery. In practice, what happens when the first beneficiary (the seller) wishes to transfer the credit to the second beneficiary (usually the seller's own supplier) is that s/he returns the credit to the transferring bank, which at the first beneficiary's request, issues a new credit to the second beneficiary for the whole or part of the amount of the original credit. Where the first beneficiary transfers only a part of the credit, the balance remains payable to him/her. Unless otherwise stated in the credit, a transferable credit may be transferred only once (UCP 600, Article 38(d)). This means that the second beneficiary is not able to transfer part of the credit in favour of his/her supplier, while it does not prevent the first beneficiary from transferring part of the credit to several different people, so long as the aggregate of the sums transferred does not exceed the amount of the credit; also, partial shipments and partial drawings are not prohibited under the credit (UCP 600, Articles 38(d) and (g)).[152]

8. Demand Guarantees and Standby Credits

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

D. *Operation of Documentary Credits*

Assuming that the underlying transaction is an international sale contract, a documentary credit transaction usually operates as follows:[153]

- The seller and the buyer agree in the sale contract that payment shall be made under a documentary credit;
- the buyer (acting as the 'applicant' for the credit) requests a bank in his/her own country (the 'issuing bank') to open a documentary credit in favour of the seller (the 'beneficiary') on the terms specified by the buyer in his/her instruction (usually made through a request to open a documentary credit);
- the issuing bank opens an irrevocable[154] credit and by its terms, undertakes (i) to pay the contract price; or (ii) to incur

150 Indira Carr, *supra*, at 493-494.

151 R. M. Goode, *supra*, at 1075-1076.

152 L. S. Sealy and R. J. A. Hooley, *supra*, at 855-856.

153 L. S. Sealy and R. J. A. Hooley, *supra*, at 849-850.

154 Revocable credit is not provided for by the UCP 600 (*see* Article 2 on the definition of the credit) and in practice this type of credit is rarely used.

a deferred payment undertaking and pay at maturity; or (iii) to accept a bill of exchange drawn by the beneficiary and pay at maturity[155]; provided that specified documents are duly tendered[156] and any other terms and conditions of the credit are complied with;

- the issuing bank may open the credit by sending it directly to the seller; alternatively, as happens in most cases, the issuing bank may arrange for a bank in the seller's country (the 'advising' or 'correspondent' bank) to advise the seller that the credit has been opened;

- the issuing bank may also ask the advising bank to add its 'confirmation' to the credit. If the bank agrees to do so, the advising bank (now called the 'confirming' bank) gives the seller a separate payment undertaking in terms similar to those given by the issuing bank, and the seller benefits from having the payment obligation localized in his/her own country;

- the seller ships the goods and tenders the required documents (often through his/her own bank, which acts as his/her agent) to the advising bank (acting as the nominated bank[157]) or confirming bank. If the documents conform to the terms of the credit, the advising bank (as a nominated bank[158]) or confirming bank will (i) pay the contract price; or (ii) incur a deferred payment undertaking and pay at maturity; or (iii) accept a bill of exchange and pay at maturity; or (iv) negotiate a bill of exchange drawn for the price, and seek reimbursement from the issuing bank;

[155] Depending on the type of credit: whether it is sight payment, acceptance or deferred payment credits.

[156] That is to say, the transport documents, such as the bill of lading, the policy of insurance and the invoice and other documents specified in the credit, such as certificates of origin, certificates of quality, and packing lists.

[157] 'Nominated bank' mean the bank authorized in the credit to honour or negotiate or in the case of a freely available credit, any bank (UCP 600, Articles 2 and 6(a)).

[158] Unless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary (UCP 600, Article 12(a)). Receipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to honour or negotiate, nor does it constitute honour or negotiation (UCP 600, Article 12(c)).

- before releasing the documents to the buyer, the issuing bank will in turn seek payment from him/her. If the buyer is not in a position to pay without first reselling the goods, the issuing bank may provide the documents to him/her under a 'trust receipt'[159], thereby giving the buyer access to the goods on arrival without destroying the bank's security interests in the goods and in the proceeds of sale.

E. *The Contracts Arising out of A Documentary Credit Transaction*

A documentary credit transaction is held together by a series of interconnected contractual relationships. *Firstly*, there is the underlying sale contract between the seller and buyer. *Secondly*, when the issuing bank agrees to act upon the instructions of the buyer, a contract comes into existence between them. *Thirdly*, when a correspondent bank agrees to act upon the instructions of the issuing bank, and advises or confirms the credit, there is contractual relationship between the issuing bank and the correspondent bank. *Finally*, the payment undertakings given to the seller by the issuing and confirming banks in a documentary credit transaction are contractual in nature.[160]

F. *Undertakings by Issuing Bank and Confirming Bank*

Usually, when a credit is confirmed, the beneficiary will be paid by the confirming bank. If the credit is unconfirmed, the beneficiary will be paid by the issuing bank. If a nominated bank[161] is involved, s/he will be paid by such bank. If the nominated bank does not pay, the beneficiary will come back to the confirming bank or issuing bank. Therefore, legally speaking, the undertakings by the issuing bank and the confirming bank to the related parties, e.g., the undertakings to pay are very important for the beneficiary of the credit (*e.g.*, the seller).

With respect to the undertaking of the issuing bank, Article 7 of the UCP provides as follows:

[159] In this case, the buyer takes the documents, including the bill of lading, which gives him/her the right to take the goods from the shipper. However, the legal ownership of the goods still remains with the bank and offers it the necessary security interests.

[160] *See* L. S. Sealy and R. J. A. Hooley, *supra*, at 850. For further great in-depth analysis of such series of contractual relationships under English law, *see* R. Goode, supra, at 1085-1096.

[161] 'Nominated bank' means the bank through which the credit is available or any bank in the case of a credit available with any bank (Article 2 of the UCP).

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

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

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

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

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

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

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

c. an issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary.

With respect to the undertaking of the confirming bank, Article 8 of the UCP provides as follows:

A. Provided that the stipulated documents are presented to the confirming bank or to any other nominated bank and that they constitute a complying presentation, the confirming bank must:

i. honour, if the credit is available by:

   a. sight payment, deferred payment or acceptance with the confirming bank;

   b. sight payment with another nominated bank and that nominated bank does not pay;

   c. deferred payment with another nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;

   d. acceptance with another nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;

   e. negotiation with another nominated bank and that nominated bank does not negotiate.

ii. negotiate, without recourse, if the credit is available by negotiation with the confirming bank.

B. a confirming bank is irrevocably bound to honour or negotiate as of the time it adds its confirmation to the credit.

C. a confirming bank undertakes to reimburse another nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the confirming bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not another nominated bank prepaid or purchased before maturity. A confirming bank's undertaking to reimburse another nominated bank is independent of the confirming bank's undertaking to the beneficiary.

D. if a bank is authorized or requested by the issuing bank to confirm a credit but is not prepared to do so, it must inform the issuing bank without delay and may advise the credit without confirmation.

G. *Fundamental Aspects*

1. Principle of 'Autonomy of the Credit'

It is said that a documentary credit is separate from and independent of the underlying contract between the seller and buyer and the relationship between the issuing bank and the buyer. In general, therefore, the seller's breach of the underlying contract is no defence

for the issuing bank (or the confirming bank). It is irrelevant to the performance of the credit that the buyer alleges, *for example*, that the shipped goods are not of satisfactory quality, not fit for their purpose, or that there has been a shortfall in delivery. By the same token, the issuing bank may not refuse to honour its undertaking merely because of the buyer's failure to put it in funds.[162]

The principle of 'autonomy of the credit' is enshrined in Article 4 of the UCP that:

a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfill any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary. A beneficiary may in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.

b. an issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, *pro forma* invoice and the like.

Reasoning of the principle of 'autonomy of the credit': In the case where the buyer has accepted a bill of exchange, for example, but has discovered that the seller has broken some of his/her obligations under the contract of sale, the most notable of which is that the goods are not of the quality or quantity that the buyer expected. Normally, what the buyer tries to do is to stop the payment that is to be made by the bank. However, it is well established that it is hard to do so except in some exceptional cases.[163]

The reasoning behind it is explained by an English judge as follows:

> Buyers often seek an injunction to stop the bank from paying where goods do not match the contract description, but courts are unwilling to grant such injunction. It is normally interpreted that the banker's obligation to pay under the credit was separate from the contract of sale, and the court would intervene only if a sufficiently grave cause was shown. To allow buyer to intervene in the payment arrangements between the issuing bank and the seller (the beneficiary) where goods do not match the contract description would seriously affect international trade, since the seller enter into the contract of sale with a documentary credit arrangement in the belief that he will be paid under an irrevocable credit and may rely on the provision of the credit to purchase goods from the manufacturers or manufacture the goods himself. If court was to intervene, certainty of payment normally associated with commercial credits is seriously affected.[164]

2. Standard for Examination of Documents

Article 14 of the UCP provides that:

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

b. a nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.

In practice, as allowed by this Article of the UCP, the nominated bank, the confirming bank if any, and the issuing bank are usually concerned only with ensuring that the documents presented appear on their face to constitute a complying presentation, not to check with the veracity of the statements contained in the documents, and still less to examine the goods, the subject of the contract of sale.

In addition, Article 5 of the UCP also emphasizes that: 'Banks deal with documents and not with goods, services or performance to which the documents may relate'. Therefore, if the documents appear in be in order, then, in general, the bank is both entitled and obliged

[162] L. S. Sealy and R. J. A. Hooley, *supra*, at 865.

[163] In the case of fraud or illegality under English law, for example. However, it is a complicated issue and may be different under various legal systems. Therefore, these are not mentioned herein.

[164] Reasoning by Judge Megarry J in *Discount Records Ltd v Barclays Bank Ltd* [1975] 1 Lloyd's Rep 444.

to pay. Conversely, if the documents deviate from the language of the documentary credit, the bank is entitled to withhold the payment even if the deviation has no materiality in fact.[165]

H. *The Governing Law of Documentary Credits*

As outlined above, there are several different contractual relationships under a documentary credit arrangement. Leaving aside the underlying sale contract, there are contracts between: (i) the buyer and the issuing bank; (ii) the issuing and the confirming bank; (iii) the confirming bank and the seller; and (iv) the issuing bank and the seller.

If a dispute arises out of or relating to such contractual relationship, an important legal question that may arise concerns which state's law governs the documentary credits. Because such a relationship is complicated and involves more than one country, the answer may not be easy to determine. However, in principle, the Rome Convention on the Law Applicable to Contractual Obligations ('the Rome Convention') may well assist in resolving the issue.

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

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely related. Nevertheless, a several part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. subject to the provisions of Paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered in the course of that party's trade or profession, that country shall be the country in which the principle place of business is situated or, where under the terms of the contract, the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

[165] R. M. Goode, *supra*, at 1082.

4. Standby Credits, Performance Bonds and Guarantees

Standby credits, performance bonds and guarantees have a different function to that of documentary credits. Whereas the function of documentary credits is to provide payment for goods and services against documents, the function of the above instruments is to provide security against default in the performance of the underlying contract. Although standby credits, performance bonds and guarantees may be used to secure the performance of the buyer and (more usually) the seller under an international sale contract, they are more often found in international construction contracts where the overseas employer requires financial security from a reputable third party (usually a bank) against the contractor defaulting in his performance of the contract.[166]

A. *Standby Credit*

A standby letter of credit is similar to an ordinary documentary credit in that it is issued by a bank and embodies an undertaking to make payment to a third party (the beneficiary) or to accept bills of exchange drawn on his/her, provided that the beneficiary tenders conforming documents. However, whereas a documentary credit is a primary payment mechanism for discharge of payment obligation contained in the underlying contract (i.e., the issuing or confirming bank is the first port of call for payment), the standby credit is given by way of security with the intention that it should only be drawn on if the party by whom the work should be done, or the goods or services provided, (the principle) defaults in the performance of his/her contractual obligation to the beneficiary.[167]

The liability of a bank under a standby credit is intended to be secondary to that of the principle (although, technically, the form of the credit makes the bank's liability primary) and the credit performs the same security function as would be provided by a bank guarantee. However, unlike a guarantee, a standby credit may be called upon by

[166] L. S. Sealy and R. J. A. Hooley, *supra*, at 913.

[167] L. S. Sealy and R. J. A. Hooley, *supra*, at 914.

tendering any specified documents without the beneficiary having to prove actual default by the principal, e.g. the specified documents may simply be a demand from the beneficiary or a statement from him/her that the principal is in default.

Standby credits are covered by the UCP (subject to its incorporation by the parties) and therefore, the principle of autonomy of the credit applies to the standby credit in general. However, the UCP is generally regarded as being ill-suited to the security nature of standby credits, so the ICC, in collaboration with the Institute of International Banking Law and Practice, has produced separate Rules on International Standby Credit Practices (ICC Publication No 590) ('ISP 98') which came into effect on 1 January 1999. Standby credits may be issued subject to the UCP or the above Rules, depending on the will of the parties.[168]

The ISP 98 reflects 'accepted practices, custom and usage'[169] relating to standby letters of credit. The ISP 98 deals with various obligations, such as the undertaking to honour by the issuer the presentation of documents as required, examination of the documents for compliance and various standby document types, and the transfer and assignment of drawing rights. The ISP 98 has a number of similarities with the UCP yet it caters specifically for standby letters of credit, for instance, it allows for more than one transfer (Rule 6.02), and partial drawing (Rule 3.08).

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

168 *Ibid*.

169 The Preface of the ISP 98.

B. *Performance Bonds and Guarantees*

The terms 'performance bond' and 'performance guarantee' are sometimes called 'on demand' performance bond or demand guarantee) (hereinafter the 'demand guarantee'). The bank issuing a demand guarantee agrees to make payment on production of a written demand by the beneficiary, or his/her declaration that the principal has defaulted. The beneficiary needs only demand payment; s/he does not have to prove that the principal has defaulted in performance of the underlying contract (although sometimes the demand may have to be supported by specific documents such as a certificate from an independent third party indicating that the principal has defaulted or that payment is otherwise due). The demand guarantee may be issued by a bank in the beneficiary's country against the counter-guarantee of the principal's bank (a four-party demand guarantee). In either case, the principal's bank will require a counter-indemnity from its customer.[170]

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

Summary of the Chapter Five

The Chapter Five introduces the legal framework, which governs the rights and obligations of the subjects/actors entering into international sale of goods - the most important international business transactions. Five sections of this Chapter aim at introducing the comprehensibility and complexity of an international sale transaction and the law

170 L. S. Sealy and R. J. A. Hooley, *supra*, at 914-915.

governing this. Besides examining the obligations of the buyer and seller under standard international commercial terms ('INCOTERMS') used in international sale contracts, the Chapter focuses on the UN Convention on the International Sale of Goods 1980 (popularly known as the 'Vienna Convention') due to its worldwide impact in determining the obligations of the seller and the buyer and remedies available to them in the case of breach the contractual terms by either of them. Recent international initiatives of the law governing international contracts are mentioned in this Chapter, such as UNIDROIT Principles of International Commercial Contracts ('PICC') and Principles of European Contract Law ('PECL').

Since payment for the goods is a major feature of the sale contracts, this Chapter considers the various payment mechanisms, such as bill of exchange, documentary bill, letter of credit (or documentary credit), standby credit, etc. Which method of payment is used depends on various factors such as the bargaining capacities of the parties to the international sale of contract, the economic environment in the importing and exporting countries, the political stability of the countries affecting the international sale transaction, and the degree of trust and confidence of each party in the other.

QUESTIONS/EXERCISES

1. Why does INCOTERMS 2010 eliminate DES, DEQ and DDU?
2. What is the similarity between CIF and FOB?
3. What is the difference between CIF and DAT?
4. What is the advantage of the CISG? Real or perceived?
5. Comparing a remedy under the CISG with a similar remedy under the Commercial Law of Viet Nam.
6. Comparing '*force majeure*' under the CISG with that following Vietnamese law.
7. Explain the principle of freedom of contract under the PECL. What are advantages of this principle?
8. Comparing the formation of contracts under the PECL with that under the CISG.
9. Comparing a remedy under the PECL with a similar remedy under the Commercial Law of Viet Nam.
10. There is a statement 'In fact, the application of the PECL is so limited. Thus, the PECL seems to be not real'. Discuss.
11. What are the differences between documentary bills and documentary credits? What are the advantages and disadvantages of each?
12. What is the principle of autonomy of the credits? What is the reasoning behind it?
13. What are the differences between documentary credits and standby letters of credit?
14. How many types of documentary credits are there? Which is the best for the seller?
15. What is the governing law of documentary credits?
16. Nieuwenhuis Vo.f, a Dutch company from Alkmaar, supplies 1,500 kilos of Leerdammer cheese to Brown Ltd., a company established in the UK. The English buyer pays only half of the price, claiming that he received only half of the amount of kilos he ordered. Since this is utterly untrue, the Dutch seller wants to claim the remaining half of the price from the English buyer. Question: Could be the CISG applied in this case?
17. Anders, a company established in Germany, offers Egberts, a company established in the Netherlands, a consignment of coffee. Anders informs Egberts in writing that the time limit for Egberts to accept the offer is three months. One month after his offer to Egberts, Anders sees an opportunity to sell these goods to Christensen, a company from Denmark, at a much higher price. Anders revokes the offer made to Egberts. Nevertheless, Egberts accepts the offer after Anders has revoked it. Question: Whether an agreement has been reached in this case?
18. Abels, a company established in the Netherlands, sells to Bartels, a company established in Germany, a number of radios at a price of 150,000 Euros. The moment they are delivered to Bartels it becomes clear that these radios suffer from an electronic defect. Question: Has the seller fulfilled his legal obligations?

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

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

REQUIRED/SUGGESTED/FURTHER READINGS:

1. ICC, *INCOTERMS 2010*.

2. The Vienna Convention on Contracts for the International Sale of Goods 1980.

3. *UNIDROIT Principles of International Commercial Contracts 2010*, UNIDROIT, Rome.

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5. Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, (2005).

6. Lorenz, *Fundamental Breach under CISG*, http://www.cisg.law.pace. edu/cisg/biblio/lorenz.html

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9. Franco Ferrari (edn), *The CISG and its Impact on National Legal Systems,* Sellier, European Law Publishers, (2008).

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11. Peter Huber, Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners*, Sellier, European Law Publishers, (2007).

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18. L. S. Sealy and R. J. A. Hooley, *Commercial Law, Text, Cases and Materials,* Oxford University Press, 4th edn., (2009).

19. P. Todd, *Cases and Materials on International Trade Law*, London: Sweet and Maxwell, (2002).

20. Indira Carr, *International Trade Law*, Cavendish Publishing Limited, 3rd edn., (2005).

21. Technical Officers, Global International Trade & Business Finance, National Australia Bank Limited, *Finance of International Trade,* (2000).

22. D. X. Trinh and D. T. Nhan, *Financing of International Trade Textbook,* Hanoi, Science and Technology Publishing House, (2011).

USEFUL WEBSITES

Pace University, http://www.cisg.law.pace.edu

UNIDROIT, http://www.unidroit.org

ICC, http://www.iccwbo.org/

http://pecl.php.net/

CHAPTER SIX.
RULES GOVERNING SOME OTHER INTERNATIONAL BUSINESS TRANSACTIONS - OVERVIEW

RULES GOVERNING SOME OTHER INTERNATIONAL BUSINESS TRANSACTIONS - OVERVIEW

This Chapter provides an overview of rules governing some other international business transactions than international sale of goods, such as international franchising, international logistics and e-commerce. Upon completion, students are expected to have a basic understanding of the concepts of franchising, logistics and e-commerce; the important roles of franchising, logistics and e-commerce in international business; the international rules and Vietnamese legal framework governing these three international business transactions. Students are also expected to be able to make further research into related rules, and work out possible legal sources applicable to any particular transaction in respective areas.

Section One. RULES GOVERNING INTERNATIONAL FRANCHISING - OVERVIEW

1. The Franchising Concept

Franchising is a method of business operation that has revolutionized the distribution of goods and services in virtually all industry sectors, and has transformed the business landscape of most countries. The original meaning of 'franchising' refers to granting a freedom; it is derived from the French verb 'affranchir', *i.e.* 'to free'.[1] Today, however, the term 'franchise' usually refers to a commercial relationship for distributing products or services.[2] In the widest meaning, franchising may be explained as

> 'Transactions in which one person grants rights to another to exploit an intellectual property right involving, perhaps, trade-names, patents, trademarks, equipment distribution, a fictitious character, or a famous name, but not amounting to the entire package, or business blueprint, which is the essential feature of the business format franchise.'[3]

Franchising is frequently divided into three main types: '*the product franchise*', '*the processing or manufacturing franchise*', and '*the business format franchise*'. In '*the product franchise*', the franchisee is a distributor, either a wholesaler or a retailer, for a specific product within a territory and in conjunction with the franchisor brand. In a '*processing or manufacturing franchise*', the franchisor grants an essential ingredient or know-how to the franchisee, which can be applied in conjunction with the franchisor brand in a territory. These types of franchising are called collectively '*product and trade-name franchises*'. In '*the business format franchise*' mode, the franchisor permits the franchisee to use a unique method of doing business in a territory in conjunction with the franchisor brand.

Franchise relationships comprise both single-unit franchise and multi-unit franchise arrangements. The single-unit franchise is an agreement under which a franchisor licenses the franchisee to open one franchise unit. The multi-unit franchise is an agreement where a franchisor licenses the franchisee to open more than one unit. The multi-unit franchise includes two types: '*the area development franchise*' and '*the master franchise*'. '*The area development franchise*' is an agreement under which a franchisor grants to a franchisee (the 'area developer') the rights - and the obligations - to open and operate more than one unit within a specified area. '*The master franchise*' is an agreement under which the franchisor grants to the franchisee the rights to exploit a territory through granting franchises to sub-franchisees, as well as in most cases operating its own outlets.

2. The Development of Franchising

It has been suggested that the first examples of franchising were the licensing and financing agreements between beer brewers and tavern owners in Germany and England before the eighteenth century. Other scholars assert that franchising was first used when Queen Isabella of Spain granted the license/franchise to Christopher Columbus for finding a new way to the East.[4] It is nevertheless generally accepted that the earliest franchise appeared in the US when the Singer Sewing Machine Company began setting up a dealer network in around 1850. However, it was not until the beginning of the twentieth century that franchising became popular. The success of the industrial revolution in the US at the turn of the century led to great progress in technology, improved transportation and communication, and resulted in the mass

[1] Dov Izraeli, *Franchising and the Total Distribution System* (1972), at 3.

[2] Andrew Terry, 'Business Format Franchising: The Cloning of Australian Business', in *Business Format Franchising in Australia* (1991), at 2.

[3] Martin Mendelsohn, *The Guide to Franchising* (1992), at 37.

[4] Donald W. Hackett, *Franchising: The State of the Art* (1977), at 5.

production society. In this situation, manufacturers discovered that the distribution of their products to local markets was a key factor in their success.[5] The soft drink and automobile producers were pioneers of the use of franchising as an effective method of distribution, which expanded rapidly in the period between 1920 and 1949. Since the late 1940s, after World War II ended, franchising has experienced a phenomenal development in many countries. Despite a recent slowing in the development of franchising because of the impact of the global economic crisis, franchising is still a popular economic trend and may lead to economic recovery.[6]

An embryonic franchise sector has existed in Viet Nam since the mid-1990s. As for most other countries, franchising first appeared in Viet Nam through the international expansion of foreign franchisors. The foreign fast-food systems *Jollibee* (from the Philippines, in 1996), *Lotteria* (from Japan, in 1997) and *KFC* (from the US, in 1997) were early entrants. The entry of the foreign franchisor pioneers introduced the practical image of franchising to Viet Nam and attracted the interest of local businesses. Viet Nam's domestic businesses quickly absorbed the franchising model introduced by these pioneers. Although domestic companies were attracted to franchising introduced by the foreign franchise pioneers, the development of franchising was constrained during the period 1996 to 2005, because of a lack of a clear legal framework for the sector. Franchising has shifted to a period of steady development since Viet Nam introduced a specific franchise law in 2005.

3. International Franchising

International franchising is 'a foreign market entry mode that involves a relationship between the entrant (the franchisor) and a host country entity, in which the former transfers, under contract, a business package (or format), which it has developed and owns, to the latter'.[7] Franchising has rapidly been developing throughout the world in recent years under the influence of expanding US franchise systems facing increasing concentration in home market. The international expansion of franchising began in the late 1960s and early 1970s by US pioneer franchisors such as McDonald's, KFC and Pizza Hut. Their international expansion introduced the franchising concept to other countries and stimulated the development of local franchising. The process of foreign penetration of US franchisors first occurred in developed countries, such as the UK, Australia, and Canada, then spread to DCs. The local franchisors in the host countries not only absorbed and applied the techniques; they were eventually franchising overseas.

Six methods of international expansion are available as entry mode for foreign franchisors: direct franchising, master franchising, area development agreement, branch, subsidiary, and joint-venture. Direct franchising means that franchisors themselves directly enter into franchise agreements with each individual franchisee in the host country, without any intervention of a third party. In the case of entering foreign countries through a subsidiary, the franchisor establishes a subsidiary in the host country. This subsidiary is a legal entity with an independent legal status in comparison with the franchisor. The subsidiary may open its owned outlets or enter into franchise agreements with a franchisee in the host country. In the case of establishing a branch in the host country, the branch is not an independent legal entity, thus the franchisor still has to assume legal responsibilities for the branch's business in the host country. In the entry mode through establishing a joint-venture, a franchisor enters into a joint-venture agreement with a partner who usually holds the nationality of the host country, in which a joint-venture company is usually established; sometimes, though, the establishment is only a contractual relationship. The franchisor then enters into either an area development agreement or a master franchise agreement with the joint-venture, which leads to the establishment of joint venture-owned outlets or franchised outlets.

4. Regulations on International Franchising

International franchising, as an international business activity, would be subject to domestic law as well as to international agreements and international mercantile customs. To date, there are no particular international agreements or customs dedicated to international franchising. However, it is subject to regulation through the international agreements and customs generally applied to international transactions, such as the CISG, PICC, legal mutual assistance agreements between countries and INCOTERMS, etc.

[5] Donald W. Hackett, *supra*, at 12.

[6] Alisa Harrison, 'Franchise Businesses Can Help Lead the Economic Recovery with Access to Capital' (10 June 2009), http://www.franchise.org/Franchise-News-Detail.aspx?id=45912>

[7] F. N. Burton and A. R. Cross, 'Franchising and Foreign Market Entry', in Stanley J. Paliwoda and John K. Ryans (eds), *International Marketing Reader* (1995).

The ICC and UNIDROIT have attempted to encourage uniformity of franchising regulation. In 2000, the ICC produced a Model International Franchise Contract, revised in 2010, while the UNIDROIT introduced a Model Franchise Disclosure Law in 2002. In 1998, the UNIDROIT also published a Guide to International Master Franchise Arrangements. However, there is no common way to regulate franchising worldwide. The majority of countries in the world rely simply on underlying commercial law to govern franchising or even adopt voluntarily self-regulatory codes of practice and consumer. The last two decades have nevertheless experienced an accelerating trend towards specific franchise regulations. To date, around 33 countries, including Viet Nam, have enacted specific franchise regulations. However, only a few countries - such as China, Indonesia, Malaysia and Viet Nam - impose some special provisions on foreign franchisors; these are generally approval and registration issues. Franchising, although generally not being directly governed by a specific franchise law even in the regulated regimes, is still influenced by the totality of underlying commercial law.

In the countries adopting specific franchise regulations, there are generally four regulatory strategies used to govern franchising: disclosure, alternative dispute resolution, registration, and standards of conduct. These have led to the creation of nine regulatory modes for franchising, as illustrated in the table here below.

The Regulatory Models	Jurisdictions
Disclosure	Belgium, Brazil, France, Japan, Sweden and Taiwan
Disclosure and Conduct	Albania, Canada (Alberta, New Brunswick, Ontario, Prince Edward Island, Quebec), Georgia, Italy and Romania
Disclosure and Registration	Indonesia, Mexico and Spain
Disclosure, Registration and Conduct	China, Macau, Malaysia, Moldova and Viet Nam
Disclosure, Conduct and Dispute Resolution	Korea and Australia
Registration	Croatia and Barbados
Conduct	Estonia, Lithuania, Russia, Ukraine and Venezuela
Registration and Conduct	Belarus, Kazakhstan, Kyrgyzstan, Saudi Arabia
USA	Disclosure: federal Conduct: federal (auto/petrol) and most States (general, sector or issue specific) Registration: State (14 States)

A. *Registration and Reporting*

A registration regime was introduced into the US very early in the development of franchising under the California law and it has been embraced by 13 other States. However, it has received little support from other countries. Only 14 US States and 14 other jurisdictions require registration obligation, the degree of which varies from a full audit to a mere recording. 14 US States introduced the most onerous registration and audit mechanisms that, though, have different levels of control between states as well as between franchisors. These States and five other registration countries, including China, Indonesia, Malaysia, Spain and Viet Nam, also impose an annual reporting obligation.

B. *Disclosure*

Prior disclosure is considered to be a key feature of franchising regulation. It is widely accepted as a tool to deal with the information imbalance inherent in the typical franchising relationship. It facilitates the approach of full and reliable information of the franchise, both useful for and necessary to prospective franchisees in making an informed decision to buy into the franchise. Although franchisors would generally not welcome other aspects of any regulation of franchising, 'there is a consensus among franchisors that comprehensive disclosure of information to prospective franchise buyers improves the franchisee recruitment process and is generally good for franchising'.[8] In one of the earliest government reports in Australia, prior disclosure was not regarded as a restriction on business; rather, it was a 'common sense and firm basis for doing business within the peculiarly close relationship of a franchise and in accordance with normal business practice'.[9]

[8] Lewis G. Rudnick, 'Trends: Where Do Franchisors and Franchisees Stand on Regulation?', in *Franchising World* (1999), at 24.

[9] Parliament of Australia Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* (1979), [11.32].

Prior disclosure obligations are a unifying feature of franchise regulation internationally, except under the laws of Kazakhstan, Lithuania and Russia.[10] The publication of the UNIDROIT's Model Franchise Disclosure Law, which suggests a minimum content of the disclosure document, is expected to be influential both in accelerating the acceptance of disclosure laws and in shaping their content.[11]

Although prior disclosure is widely adopted in the franchising regulation of almost all countries, few countries require a template for disclosure in the form of a prescribed disclosure document. In the countries requiring a prescribed disclosure document there is generally a requirement of an annual update. The template for disclosure and also the annually updated filing requirement are believed to facilitate the compilation of sector statistics.

C. *The Franchise Agreement*

The franchise agreement is the ultimate reference point for classifying the relationship between the franchisor and the franchisee. However, not all countries definitely require the agreement to be in written form. Moreover, only a minority of countries introduce a prescribed content of a franchise agreement. Of the countries that do not require the prescribed content of the agreement, the majority request that the prior disclosuree has to include at least some of the key contractual provisions. Only Australian law requires the sensible provision that, before entering into a franchise agreement, the perspective franchisee must certify that advice has been received from an independent legal or business advisor or independent accountant, or that the obtaining of such advice has been recommended but has not been sought. Australian and Malaysian laws also give the franchisee a 'cooling off' period in which the franchisee may withdraw from the agreement and be reimbursed fees paid, less an amount to cover reasonable expenses incurred by the franchisor provided that this is stipulated in the agreement.

D. *Relationship/Conduct Issues*

Of the countries adopting franchise regulation, most address particular issues in the franchisor/franchisee relationship. Almost all regulated countries (except for Japan) impose restrictions on unilateral termination by the franchisor with the most common formula including the prescribed termination events and/or notice of default and an opportunity to remedy. Instead of specifying a fixed term for the relationship, most regulation regimes simply require a term long enough for the franchisee to recover the initial investment. No mandatory right to renew the agreement is imposed by the majority of regulated jurisdictions; however, an advance notice of non-renewal is more commonly required. Most prior disclosure regimes request a notice of the franchisee's entitlement to assign the agreement, but few of them mandate a right of assignment. Many other relationship issues are also redressed idiosyncratically, such as encroachment, unilateral variation, general releases from liability, rights to associate, confidentiality, or non-competition, although there is no 'consistent international approach to relationship regulation.'[12]

General standards of conduct are imposed by some countries, including the Canadian Provinces, China, Italy, Korea and Malaysia, where there are requirements of 'fair dealing in performance and enforcement' (Canada); 'compliance with principle of fair dealing and honesty' (China); 'good faith' (Italy and Korea), and 'the best franchise business practice of the time and place' (Malaysia). In other countries, these issues may be prescribed in the underlying law of general application. Australian law is a typical example as the prohibitions of 'misleading conduct' and 'unconscionable conduct' under the Competition and Consumer Act 2010 has been influential in raising standards of conduct within the franchising sector. Some countries such as Korea and Japan provide the prohibitions on various vertical restraints that usually fall under competition laws in other jurisdictions. It is also important to note that in certain countries, particularly in developing economies, the statements of the prescribed rights and obligations of franchisors and franchisees are also provided, which factor is considered significant with respect to 'educational' impact.

E. *Dispute Resolution*

Many countries require dispute resolution processes to be introduced into the franchise agreement or prior disclosure. However, only some jurisdictions including Australia, Alberta (Canada) and Korea impose

[10] Andrew Terry, 'A Census of International Franchise Regulation', Paper presented at the 21st Annual International Society of Franchising Conference, Las Vegas, Nevada, the US, (2007).

[11] Lena Peters, 'UNIDROIT Prepares a Model Franchise Disclosure Law', in *Business Law International* (2000), at 279.

[12] Andrew Terry, *supra*.

mediation as a prerequisite to litigation. Australia has been successful in using mediation as an integral component of its regulatory scheme. Over 75 per cent of disputes referred to the Government-sponsored office of the Franchising Mediation Advisor (established according to the 'Franchising Code of Conduct in Australia') for mediation are solved within one day only and at minimal cost compared to traditional dispute resolution.

5. Regulation of International Franchising in Viet Nam

On 12 July 1999, Ministry of Science, Technology and Environment (now the Ministry of Science and Technology) of Viet Nam issued Circular 1254/1999/TT-BKHCNMT (hereinafter 'Circular 1254') implementing Decree No. 45/1998/ND-CP of the Government on the technology transfer; here, the word '*franchise*' ('*cap phep dac quyen kinh doanh*' in Vietnamese*)* was first time used officially. In this Circular, although no definition of '*franchise*' was given, the content of Item 4.1.1.a of Circular 1254 suggests that franchising may be defined as a contract which contains provisions in relation to the granting of a licence to use a trademark accompanied by production or business know-how. This conception was only a simple combination of trademark licence and a transaction of production or business know-how, which is quite different from the franchising concept in Western countries, and reflects in Circular 1254 a lack of understanding of franchising. There was a confusion between the 'franchising' and the 'technology transfer'. Being stipulated within a legal document that governed technology transfer, under this Circular, franchising was classified as a form of technology transfer yet not as a form of method of business organization.

Approximately a decade after the year franchising first appeared in Viet Nam, and for six years of being governed by the regulations on technology transfer, Viet Nam introduced the dedicated franchise regulations. This was part of its extensive legal modernization process preparatory to the WTO's accession in January 2007. The franchise legal framework comprises the Commercial Law 2005 (hereinafter the 'Commercial Law') providing a framework regulating franchise relationship; Decree No. 35 Making Detailed Provisions for the Implementation of the Commercial Law with Respect to Franchising Activities 2006 (hereinafter the 'Decree 35'); Decree No. 120 Amending and Supplementing Administrative Procedures Stipulated in a Number of Decrees of the Government Detailing the Implementation of the Commercial Law 2011 (hereafter the 'Decree 120'; this Decree amends several articles of Decree 35); Circular 09 of Ministry of Industry and Trade Providing Guidelines on Procedures for Registration of Franchising Activities 2006 (hereinafter 'Circular 09') addressing registration and prior disclosure which are key features of the regulatory regime; and Decision 106 of Ministry of Finance Providing Guidelines on the Levels and Regime for the Collection and Payment, Management and Use of Charges for Commercial Franchising Registration 2008.

The franchise legal framework applies to all franchising activities - by both Vietnamese and foreign business entities - within Viet Nam (Articles 1 and 2 of Decree 35) and adopts an increasingly familiar regulatory model with prior disclosure obligations supplemented by moderate registration and relationship requirements.

A. *Definition*

The Commercial Law contains a broad definition of franchising in Article 284:

> Franchising means a commercial activity whereby a franchisor authorizes and requires a franchisee to conduct on its own behalf the purchase and sale of goods or provision of services in accordance with the following conditions:
>
> 1. The purchase and sale of goods or provision of services be conducted according to the method of business organization specified by the franchisor and be associated with the trademark, trade name, business know-how, business mission statements, business logo and advertising of the franchisor.
>
> 2. The franchisor has the right to control and offer assistance to the franchisee in the conduct of the business.

Decree 35 further defines franchising to include '*master franchising*' (the rights granted by a franchisor to a secondary franchisor to sub-franchise to secondary franchisees) and '*franchise development contracts*' (the rights granted a franchisee to set up more than one establishment to conduct the franchise business within a specific geographical area) (Article 3). The Decree prohibits secondary franchisees from further sub-franchising (Article 3).

B. *Qualifications of Franchisor and Franchisee*

Under Decree 35, a '*franchisor*' must satisfy the following conditions:

> The business system to be franchised has been operating for at least one year;
>
> the business entity has registered the franchising activity with the competent authority; and
>
> the goods and services of the franchise are not on the list of goods and services in which its business is prohibited.

The only prerequisite for a '*franchisee*' is that it must have the business registration appropriate to the subject of the franchise (Article 6 of Decree 35).

One-year operating requirement: Decree 35 requires franchisors, both foreign and Vietnamese, to have operated for at least one year before, respectively, franchising into Viet Nam or franchising to another Vietnamese (Article 5.1). In the case of a Vietnamese master franchisee from foreign franchisor sub-franchising in Viet Nam, the Vietnamese master must have operated the franchise business for at least one year before sub-franchising (Article 5.1).

Goods or services permitted to be franchised: Any goods or services may be franchised provided that: (i) they are not under the list of goods and services prohibited from business; and (ii) if they are restricted from business or they are conditional business activities, franchising may be carried out only if the franchisee is granted a certificate to do business in respect of such goods or services (Article 7 of Decree 35). Foreign franchisors face an additional restriction. A foreign-invested enterprise specializing in the purchase and sale of goods or in activities related thereto may conduct franchising only in those lines of goods for which the distribution is permitted pursuant to Viet Nam's international commitments (Article 2.2 of Decree 35).[13]

C. *Disclosure*

The franchisor must provide a copy of the franchise contract and the '*Franchise Description Document*' at least 15 working days prior to the date of entry into the franchise contract, 'if the parties do not have some other agreement' (Article 8.1 of Decree 35). Decree 35 provides for the then Ministry of Trade (now the Ministry of Industry and Trade) to provide regulations on the compulsory content of the Franchise Description Document; and these have been issued in Appendix III - Franchise Description Document attached in Circular 09 mentioned above. The Franchise Description Document must include a 'warning' to the prospective franchisee to exercise with 'due diligence' and advises the franchisee to seek independent advice, talk to franchisees, in the system and attend training courses. It requires a range of specific information to be given under the following general headings:

- General information about the franchisor and the franchise;
- trademarks/IPRs;
- initial costs of the franchisee;
- other financial obligations;
- initial investment by the franchisee;
- obligations of the franchisee to buy or lease equipment for compatibility with the business system as designated by the franchisor;
- obligations of the franchisor;
- description of the market of the goods/services to be franchised;
- the franchising contract;
- information about the franchise system;
- financial statements of franchisor; and
- rewards or acknowledgements to be received, and organizations to participate.

In addition to the pre-franchise disclosure, Decree 35 also requires the franchisor 'immediately [to] notify all franchisees of any important change to the franchise system which affects the franchise business of a franchisee' (Article 8.2).

[13] Vietnam's 'international commitments' have now been codified in domestic law by the then Ministry of Trade's Decision No 10/2007/QD-BTM dated 21 May 2007.

In the case of sub-franchising, the 'secondary franchisor' (the sub-franchisor) must provide to the 'secondary' franchisee not only the Franchise Description Document, but also details of the master franchisor, the contents of the master franchising agreement; and the method of settlement of the sub-franchising agreement in the case where the master franchising agreement is terminated (Article 8.3).

Decree 35 requires franchisee disclosure as follows: the proposed franchisee must provide the franchisor with all information reasonably requested by the franchisor in order to make a decision on granting a franchise (Article 9).

D. *The Franchise Agreement*

The Commercial Law simply provides that a franchise agreement 'must be made in writing[14] or in another form with equivalent legal validity' (Article 285). Decree 35 follows the principle of the 2005 Civil Code (which came into effect on 1 January 2006) (hereinafter the 'Civil Code') on the rights of parties to freely agree on contractual provisions in order to establish rights and obligations provided that such commitments and agreements are not prohibited by law or are contrary to public order. The Decree simply provides in Article 11 that the franchise contract *may* contain the following main items if the parties choose to apply Vietnamese law:

- Contents of franchising;
- rights and obligations of the franchisor;
- rights and obligations of the franchisee;
- price and periodic franchising fee, and payment method;
- term of the contract;
- extension and termination of the contract; and
- dispute resolution.

The terms of the contract are as agreed by the parties (Article 13 of Decree 35) and the contract takes effect from the date of its signing, except where the parties agree otherwise (Article 14 of Decree 35).

[14] Except the case of a franchise granted from Viet Nam to overseas, in which the parties can agree on the language, and such franchise contract must be made in Vietnamese (Article 12 of Decree 35).

If the franchisor licences IPRs along with the franchise of trading rights, the licensing of the IPRs may be made in a separate agreement or be contained in the franchising agreement. The licensing of IPRs in the franchising agreement must comply with Vietnamese laws on IP (Article 10 of Decree 35).

E. *Relationship/Conduct Issues*

The Commercial Law contains five articles dealing, generally, with the rights and obligations of franchisors (Articles 286 and 287) and franchisees (Articles 288, 289 and 290). The franchisor has the *right* to receive royalties, organize advertising network and conduct inspections to ensure the uniformity and quality control, and the *obligation* to provide a prior disclosure document, initial training, ongoing technical assistance and the IPRs stipulated; to design at the franchisee's cost the franchise outlet, and to treat franchisees equally. The franchisee has the *right* to require the franchisor to provide technical assistance, to treat all franchisees equally, and to sub-franchise to a third party (referred to as the *sub-franchisee*) with the consent of the franchisor, and the *obligation* to pay amounts due under the contract; to invest in physical facilities, finance and human resources; to submit to the franchisor's control, supervision and guidelines; to retain the confidentiality of business know-how during and after the contract term; to cease to use any trademark, trade name, business slogan, business logo and other IPRs (if any) or the system of the franchisor on expiry or termination of the contract; to operate the business in accordance with the system; and to not to sub-franchise without the franchisor's consent.

Transfer: Decree 35 gives a franchisee the right to assign the franchise (Article 15) to a proposed assignee holding the appropriate business registration with the approval of the franchisor, which may be refused on one only of the following grounds:

The proposed assignee is unable to satisfy the financial obligations which it would have to discharge under the franchise contract;

the proposed assignee has not satisfied the selection criteria of the franchisor;

the assignment will have a significantly adverse effect on the existing franchise system;

the proposed assignee does not agree in writing to comply with the obligations of the franchisee under the franchise contract; and

the assignee has not fulfilled its obligations under the franchising agreement (unless the assignee provides a written obligation to discharge such obligations).

The franchisee wishing to assign the franchise must provide the franchisor with a written request to assign and, within 15 days, the franchisor by written response must approve or not approve on one of the grounds noted above. If a written response is not received by the franchisee within 15 days, the proposed assignment is deemed to have been approved. On assignment all rights and obligations relating to the franchise of the assignor shall transfer to the assignee, unless other agreements have been reached.

Termination: The franchisee has the right unilaterally to terminate the franchise agreement (Article 16 of Decree 35) if the franchisor breaches the obligations under the Article 287 of the Commercial Law:

To provide the franchisee with the disclosure document on the franchise system;

to provide the franchisee with initial training and ongoing technical assistance to enable the operation of the franchise system;

to design and lay out the goods or services sales outlet at the cost of the franchisee;

to ensure the validity of the intellectual property rights in licensed under the franchise contract; and

to accord equal treatment to franchisees in the franchise system.

The franchisor has the right unilaterally to terminate the franchise contract (Article 16 of Decree 35) in the following cases:

The franchisee ceases to have a business certificate or equivalent documents required by law for the franchisee to carry out the franchising business;

the franchisee becomes bankrupt or is dissolved in accordance with Vietnamese law;

the franchisee commits a 'serious breach of law' which may significantly damage the reputation at the franchise system; and

the franchisee fails to remedy a non-fundamental breach of the franchise contract within a reasonable time after the franchisee has received written notice from the franchisor to remedy such breach.

F. Registration and Reporting

The Commercial Law requires that prior to commencing franchising, 'a *prospective franchisor* must register with Ministry of Trade' (now Ministry of Industry and Trade) and provides that the government shall provide detailed regulations 'on the conditions for operating in the franchise form and on the order and procedures for registration of franchises' (Article 291). Registration is also addressed in Decree 35 which requires *franchising activities* (in effect the franchise system) - not the prospective franchisor - to be registered (Article 17). The registration detail is provided in Circular 09. The franchisor has to register only once, rather than separately for each franchising arrangement.

Under Decree 35, the Ministry of Trade (now the Ministry of Industry and Trade) is responsible for registering franchising activities done from abroad to Viet Nam and from Viet Nam to abroad. In other cases, the Department of Trade of the province where the franchisor has its business registration will register domestic franchising activities (Article 18). However, Decree 120 (which became effective on 1 February 2012) has removed registration obligations of franchisors who franchise domestically or from Viet Nam to overseas (Article 3.2). This means that only foreign franchisors who franchise into Viet Nam now have to register their system with Viet Nam's Ministry of Industry and Trade.

An application for registration must be made on the prescribed form and be accompanied by the Franchise Description Document and documents in respect of legal status of the franchisor and certificates of the IP registered in Viet Nam or abroad, in the case where the franchisor wishes to license, as inevitably it will, such IP. If any of the application documents are made in a foreign language, they must be translated into Vietnamese and consularised in accordance with the law of Viet Nam (Article 3.4 of Decree 120). If the applicant is a sub-franchisor, it must present a document issued by the master franchisor permitting it to sub-franchise the business (Article 19 of Decree 35; and Circular 09).

Registration of franchising activities of the franchisor may be revoked if the franchisor ceases its business or changes its business activities, or if the business registration certificate or the investment license of the franchisor is withdrawn (Article 22 of Decree 35).

There is also a requirement of annual report from franchisors to the registration authority. Franchisors must notify the registration authority about the changes of the 'general information' about the franchisors and their trademarks on goods, services and IPRs within 30 (thirty) days from the date of such change (Circular 09). They must also annually report 'information relating to the franchisor', the initial costs of the franchisee, other financial obligations, the initial investment by the franchisee, the obligations of the franchisee to buy or lease equipment for compatibility with the business system as designated by the franchisor, the obligations of the franchisor, a description of the market of the goods and services to be franchised, the franchising contract, information about the franchise system, the financial statements of franchisor, and rewards, acknowledgements to be received and organizations needed to join to the registration authority at the latest by 15 January (Circular 09). Although Decree 120 has already removed registration obligation of franchisors who franchise domestically or from Viet Nam to abroad, it still requires those franchisors to comply with the reporting regime as prescribed under Decree 35.

G. Foreign Franchisors

Viet Nam applies a quasi-unified regulatory regime for both foreign and domestic franchisors, which is consistent with international practice; however, there were restrictions on foreign-invested enterprises engaged in franchising. These have been removed in accordance with Viet Nam's WTO accession commitments in relation to services. All restrictions on the forms of foreign-invested enterprises were due to end on 1 January 2009. Until 1 January 2008, foreign-invested enterprises participating in franchising were required to be in the form of a joint-venture with a maximum of 49 per cent foreign ownership. The foreign capital restriction was lifted on 1 January 2008, but the joint-venture requirement remained. From 1 January 2009, foreign-invested enterprise franchisors established in Viet Nam could be 100 percent foreign owned.

Although Viet Nam's franchise regulations do not prescribe directly the choice of laws for franchise agreements, the words 'if the parties select application of the law of Viet Nam' prefaces the provision of Decree 35 addressing the contents of franchise agreements (Article 11 of Decree 35). These words imply the ability of the parties to choose foreign law as the applicable law the law for franchise agreements between foreign and domestic entities. It means that although foreign franchisors have to follow Viet Nam's franchise regulations in several issues including registration regime, qualifications and disclosure, they can choose the applicable law which will govern other aspects of their franchise agreements. Franchising is a civil relationship, thus the choice of law in the case of franchise agreements in Viet Nam follows the rule of the Civil Code which is considered to be the 'mother law' governing civil relations in general.

Section Two. RULES GOVERNING INTERNATIONAL LOGISTICS - OVERVIEW

1. Introduction

One of the challenges faced by logistics practitioners when managing the flow of goods, services and related information between nations, *i.e.*, international logistics, comes from the different systems of jurisprudence.[15] More specifically, when a logistics activity crosses a country border, it is no longer subject to the departing country's laws only. Instead, laws of other nations (*for instance*, countries of destination or in transit) or international rules apply. Due to the breadth of systems of logistics and logistics-related international laws and rules, this Section presents some popular governing rules that a logistics practitioner operating in Viet Nam should understand.

In addition, while the breadth of laws and regulations on logistics and logistics-related services corresponds to the scope of logistics, the definition of the concept remains problematic. A review of the literature that attempts to define logistics therefore proves to be necessary.

The Section is divided into four subsections: (i) introduction; (ii) different approaches to defining logistics and logistics activities; (iii) a brief review of some relevant rules governing international logistics; and (iv) **s**ome concluding remarks.

[15] D. F. Wood, *International Logistics* (1995).

2. Logistics Concept

A review of the literature on logistics and logistics-related fields suggests that logistics definitions differ greatly and the boundary of the concept appears in dispute. *For example*, according to Johnson and Wood (1996),[16] logistics is the function responsible for the physical product flow into, through and out of an organization. However, its scope is expanded by Wood (1995)[17] to include additional flows of services and people. For Lummus *et al*. (2001),[18] logistics spans the flow from immediate suppliers to immediate customers. According to Waters (2003),[19] this process may include second, third or even ultimate tiers of suppliers and customers. There even exists a controversial distinction between two terms: 'logistics', and 'supply chain management'. Waters (2003)[20] and Ballou (2004)[21] confirm that 'logistics' and 'supply chain management' refer to exactly the same function. On the other hand, the Council of Supply Chain Management Professionals (2011)[22] and Mentzer (2004)[23] clearly distinguish these two concepts, where 'logistics' is presented as part of 'supply chain management'.

Since the lack of a consensus among logistics definitions clouds the understanding of the concept and consequently the topic of this discussion, a taxonomy of 'logistics' and 'supply chain management' would provide a useful starting point.

A. *Logistics Definitions*

Logistics, under the first perspective, is defined as a within-firm function that manages the movement and storage of particular objects between immediate suppliers and immediate customers. Objects under the auspices of logistics differ from author to author, either physical products

16 J. C. Johnson and D.F. Wood, *Contemporary Logistics* (1996).

17 D. F. Wood, *supra*.

18 Lummus *et al.*, 'The Relationship of Logistics to Supply Chain Management: Developing a Common Industry Definition', 101 *Industrial Management + Data Systems*, at 426.

19 C. D. J. Waters, *Logistics: An Introduction to Supply Chain Management* (2003).

20 *Ibid.*

21 R. H. Ballou, *Business Logistics/Supply Chain Management: Planning, Organizing, and Controlling the Supply Chain* (2004).

22 *See CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

23 J. T. Mentzer, *Fundamentals of Supply Chain Management: Twelve Drivers of Competitive Advantage* (2004).

only[24] [25] [26] [27] or combinations of physical products and information.[28] Other objects could comprise physical products and services,[29] [30] goods, services and people[31] or goods, services and related information.[32] [33] Put simply, the boundary of logistics spans the first tiers of suppliers and customers of a firm and covers the flow of goods, services, related information and, sometimes, people.

A broader perspective that challenges this view argues that logistics processes span the whole marketing channel or supply chain, rather than being limited to immediate suppliers and customers. To view logistics performance in the supply chain context is the most fundamental shift in logistics thinking.[34] The application of logistics in this sense is also called supply chain management by Waters (2003)[35] and Ballou (2004).[36]

The term 'supply chain management' has, however, been used by the Council of Supply Chain Management Professionals (2011)[37] and Mentzer (2004)[38] to imply a somewhat different concept. In this instance, it is defined as a function that coordinates flows of goods, services, information, and finances as well as other flow-related business processes such as purchasing, production, marketing, after-sales services, personnel, and information systems throughout the supply chain. Against this background, 'supply chain management' becomes

24 Bureau of Transport Economics of Australia, *Logistics in Australia: A Preliminary Analysis* (2001).

25 J. F. Cox and J. H. Blackstone, *APICS: Dictionary* (1998).

26 J. C. Johnson and D.F. Wood, *Contemporary Logistics* (1996).

27 R. Demkes *et al., TRILOG-Europe Summary Report* (1999).

28 M. Christopher, *Logistics and Supply Chain Management: Strategies for Reducing Costs and Improving Services* (1992).

29 Allen, 'The Logistics Revolution and Transportation', 553 *The Annals of the American Academy of Political and Social Science* (1997), at 106-116.

30 Lummus *et al., supra*, at 426.

31 D. F. Wood, *supra*.

32 J. T. Mentzer, *supra*.

33 *See CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

34 D. J. Bowersox *et al., 21st Century Logistics: Making Supply Chain Integration A Reality* (1999).

35 C. D. J. Waters, *supra*.

36 R. H. Ballou, *Business Logistics/Supply Chain Management: Planning, Organizing, and Controlling the Supply Chain* (2004).

37 *See CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

38 J. T. Mentzer, *supra*.

much broader than the 'logistics' concepts discussed above, in both scope and span. 'Supply chain management' embraces factors that are not included in 'logistics', for example, flow-related business processes, and information unrelated to the movement and storage of goods and services. It is a process that spans the whole supply chain.[39] Arguably, this is why the Council of Supply Chain Management Professionals (2011)[40] considers logistics to be a component of supply chain management.

Despite the clear distinction between 'logistics' and 'supply chain management' by the Council of Supply Chain Management Professionals (2011)[41] and Mentzer (2004)[42], the fact that 'logistics' interacts closely with flows embodied within 'supply chain management' (such as production, marketing and accounting) might still lead to confusion. For example, it is not always easy to separate information related to the movement or storage of goods and services from other non-related information. Similarly, distinguishing the responsibilities of logistics and production for materials and work-in-progress during the production process is no simple task. Arlbjorn and Halldorsson (2002)[43] therefore offer another approach to defining logistics by invoking the 'hard core' and 'protection belt' concepts of Lakatos (1970).[44] 'Hard core' illustrates what a matter is all about and unchangeable while 'protection belt' includes anything that helps understand the hard core.[45] As for logistics, its hard core is

> directed toward the flow of materials, information and services; along the vertical and horizontal value chain (or supply chain) that seeks to coordinate the flows and is based on system thinking (a holistic view), where the unit of analysis essentially is the flow.[46]

The protection belt of logistics can be extended, seemingly without limit, to include anything that is associated with logistics. *For example*, it can include problems of motivation (concepts from organizational theory), if they are applied in logistics. Such a cross-disciplinary nature implies a very broad protection belt for the logistics concept.[47]

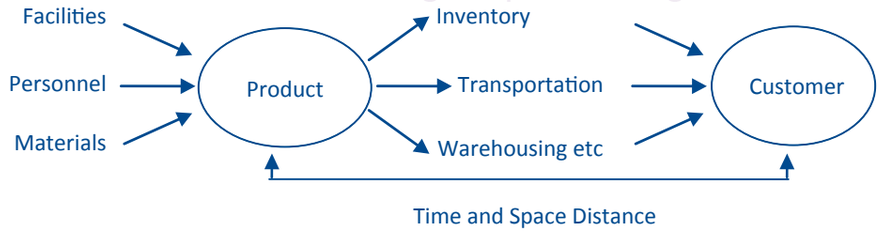
Notwithstanding the difficulties associated with defining the concept in a manner that gains consensus, for the purpose of this discussion, the definition of logistics offered by the Council of Supply Chain Management Professionals (2011)[48] is applied:

> Logistics Management is that part of Supply Chain Management that plans, implements, and controls the efficient, effective forward and reverse flow and storage of goods, services and related information between the point of origin and the point of consumption in order to meet customers' requirements.[49]

B. *Logistics Activities*

By definition, logistics are a process that integrates multiple activities to achieve efficient and effective flows of goods, services and related information. It is therefore also possible to identify major logistics activities by examining logistics flows.

Goods create physical flows within and among organizations. There exists spatial and temporal distance between the production and the consumption of a product.[50] Goods may be stored, inventoried and transported from place of supply to place of demand. As a result, managing the flows that circumscribe a product involves activities such as order processing, transportation, inventory, warehousing, materials handling and packaging.[51] A diagrammatic representation of these concepts is offered in Figure 6.2.1:



39 *Ibid.*

40 *See CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

41 *Ibid.*

42 J. T. Mentzer, *supra*.

43 Arlbjorn and Halldorsson, 'Logistics Knowledge Creation: Reflections on Content, Context and Processes', 32 *International Journal of Physical Distribution & Logistics Management* (2002), at 22.

44 Lakatos, 'Falsification and the Methodology of Scientific Research Programmes', in I. Lakatos and A. Musgrave (eds.), *Criticism and the Growth of Knowledge* (1970), at 91-196.

45 *Ibid.*

46 Arlbjorn and Halldorsson, *supra*, at 22.

47 *Ibid.*

48 *ee CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

49 *Ibid.*

50 K. Marx, *Capital: Volume II: A Critique of Political Economy* (1978).

51 D.G. Bloomberg *at al.*, *Logistics* (2002).

Figure 6.2.1. Logistics Activities for A Physical Product

Unlike 'products' '*per se*', a service constitutes an intangible benefit. More specifically, in this instance, production and consumption of services happen simultaneously. As soon as production starts, the process of consumption begins. A service is totally consumed whenever production finishes.[52] For services, there is no time and space distance between production and consumption. As a result no inventory of services is required, as would be the case in manufacturing industries. A contrasting conceptualization of service provision is offered in Figure 6.2.2.:

Figure 6.2.2.: Logistics Activities for A Service

Clearly and in the context of Figure 6.2.1. and Figure 6.2.2., management of 'flow and storage of services' comprises activities quite different from managing physical flows that pertain to goods. No transportation, inventory, warehousing, materials handling or packaging are required when it comes to service logistics. However, to deliver service benefit to customers, a service provider has to manage their capacity to provide services[53] and coordinate service delivery.[54]

Capacity management involves various tasks. These include demand forecasting and defining the necessary capacity to meet that demand. Supply management encompasses 'making sure that there is enough capacity at the peak and to squeeze more capacity out of the process.'[55] By way of contrast, demand management involves 'shifting the timing of demand so that the peak is "shaved" and the off-peak times, with their excess capacities, are fed more.'[56] Notwithstanding the benefits of being able to employ capacity to manage demand, too much capacity gives rise to excessive costs while too little results in lost sales.[57] However, decisions on long-term measures in capacity management, such as the establishment of a new branch operation, are not the sole responsibilities of logistics professionals. They are usually matters of concern for top management[58] although the decision-making process may require certain or substantial inputs from logistics managers.[59]

In addition to capacity management, the coordination of service delivery forms one of the core activities for logistics management in service industries. The service delivery encompasses dynamic scheduling, dispatching and feedback. The overarching aim is to ensure that each unit within the organization synchronizes its activities to ensure effective delivery.[60]

Facilitating and coordinating logistics activities associated with movement of a product and a service is logistics information. Logistics information identifies specific locations of demand and supply within a logistical system. Accurate, timely and affordable logistics information is required for the effective performance of every logistics function.[61] Management of logistics information, in effect, is an integral component of goods and services flow management. The most widely-discussed task of logistics information management thus far is how to apply information technology (*e.g.*, Internet technologies and software) effectively for the better flow of information throughout the supply chain.[62]

As identified, a logistics process is made up of various activities. Consequently, its operation is subject to laws and regulations in a correspondingly large number of areas, for instance, transportation, warehousing, packaging, loading/discharging, service agency (*e.g.*, freight forwarding), insurance, commerce and trade, competition, investment and enterprise. To complicate the situation, each area has multiple levels of laws and regulations: national, bilateral, regional/sub-regional and global.

52 K. Marx, *supra*.

53 D. G. Bloomberg *at al., Logistics* (2002).

54 Davis and Mandrodt, 'Teaching Service Response Logistics', 13 *Journal of Business Logistics* (1992), at 199-229.

55 R. W. Schmenner, *Service Operations Management* (1995), at 133.

56 R. W. Schmenner, *supra* at 134.

57 A. D. Little and The Pennsylvania State University, *Logistics in the Service Industries* (1991).

58 R. W. Schmenner, *supra*.

59 R. H. Ballou, *supra*.

60 Davis and Mandrodt, *supra*, at 199-229.

61 D. J. Bowersox *et al., Supply Chain Logistics Management* (2010).

62 Power, 'Supply Chain Management Integration and Implementation: A Literature Review', 10 *Supply Chain Management: An International Journal,* at 252-263.

At the international level, laws and regulations are numerous. *For instance*, in the maritime law category alone, they cover a wide range of areas including arbitration and legal procedure, arrests, carriage of goods and passengers, collision, general average, law of the sea, liens and mortgages, limitation of liability, pollution and environment, safety at sea, salvage, seafarers, and customs. Each area in turn has multiple relevant international conventions. Some international conventions under 'Arbitration and legal procedure', *for example*, are Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958, The Hague Convention 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and The Hague Convention 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters.[63] Due to the breadth of international legal systems on logistics and logistics-related services, the next item focuses only on (A) some popular global conventions on the carriage of goods; and (B) several agreements of the Association of ASEAN in the transport field that logistics practitioners in Viet Nam should be aware of.

3. Global Conventions on Carriage of Goods and ASEAN Agreements on Transport

A. *Global Conventions on Carriage of Goods*

1. Rail Transport

(a) Uniform Rules Concerning the Contract for International Carriage of Goods by Rail ('CIM'): These standard rules were first signed in Bern in 1890. In May 1980, they became Appendix B to Convention Concerning International Carriage of Rail ('COTIF 1980'). In June 1999, 'COTIF 1980' was modified by the Vilnius Protocol ('Protocol 1999') and became 'COTIF 1999'. In the 1999 version, 'CIM' standard rules are still included as Appendix B, applicable from 1 July 2006.

CIM Rules in the COTIF 1999 apply to a contract of carriage by rail if the place of taking in charge of goods and the designated place of delivery are situated in two different countries, of which at least one is a party to CIM Convention and the parties to the contract agree that the contract is subject to the CIM Rules.[64]

[63] *See International Conventions*, http://www.admiraltylawguide.com/interconv.html#CG.

[64] Hoang Van Chau *et al.*, *A Handbook on International Conventions on Marine and Transportation* (1999).

(b) Agreement 1951 on International Goods Transport by Rail ('SMGS Agreement'): This agreement has been amended and updated several times: in 1953, 1997 and 2007. It applies to the transport of goods by rail among member nations.[65]

(c) CIT/OSJD Project. Currently, actions have been taken towards implementing the CIT/OSJD project, which aims at the harmonization of CIM and SMGS. The project is proposed in three phases: (i) common CIM/SMGS consignment note; (ii) standardized claims handling mechanism; and (iii) CIM/SMGS harmonization. The first phase is in progress while the latter two have not yet begun.[66]

2. Road Transport

Convention on the Contract for the International Carriage of Goods by Road 1956 ('CMR'): This Convention applies to every road journey that starts or finishes in countries which have ratified this Convention.[67]

3. Sea Transport

(a) International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924 (The Hague Rules or the Brussels Convention): The Hague Rules resulted from the first attempt by the international community to find a workable and uniform means of dealing with the problem of shipowners' regularly excluding themselves from all liability for loss or damage of cargo. Under The Hague Rules, the shipper is responsible for lost or damaged goods if they cannot prove that the vessel was unseaworthy, improperly manned or unable to safely transport and preserve the cargo. In other words, the carrier may avoid liability for risks resulting from human errors provided they exercise due diligence and their vessel is properly manned and seaworthy.[68]

(b) Protocol 1968 to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924 ('Hague/Visby Rules'): The Hague/Visby Rules apply to any bill of lading or similar document of title relating to the carriage of goods between ports in different states, if the bill of lading is issued in a contracting state; or the carriage is from a port in a contracting state; or the contract expressly

[65] *See Organization for Cooperation between Railways,* http://www.osjd.org.

[66] *Ibid.*

[67] Hoang Van Chau *et al.*, *supra*.

[68] *See The Hague Rules of 1924*, http://www.bws.dk/conditions/sea-transport/hague-rules.aspx.

provides that the Rules shall govern. Major amendments include: (i) compensation calculation in cases where goods are transported in container, pallet, or trailer; and (ii) changes in liability limit (10,000 francs/package or unit, or 30 francs/kg of gross weight of goods lost or damaged, whichever is higher).[69]

(c) Protocol 1979 Amending the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924, as Amended by the Protocols 1968: This Protocol defines the limit of liability of carriers calculated in 'Special Drawing Rights' ('SDR') as defined by the International Monetary Fund (IMF).[70]

(d) United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules): Given the need to redress the imbalance between shipowners and shipper interests and to reflect new situations (e.g., different categories of cargo carried, new technology and loading methods, and other practical problems incurred by shippers such as losses incurred through delays in delivery), the Hamburg Rules was negotiated in 1978. The Convention adopted a new approach to cargo liability. Under the Hamburg Rules the carrier is held responsible for the loss of or damage to goods while in their charge, unless they are able to prove that all reasonable measures to avoid damage or loss were taken. Carrier liability limits were also increased.[71]

(e) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (Rotterdam Rules): The Rotterdam Rules extend and modernize the existing international rules relating to the carriage of goods by sea. Their objectives are to: (i) replace The Hague Rules, The Hague/Visby Rules and the Hamburg Rules; (ii) achieve uniformity of law in the field of maritime carriage; and (iii) provide for modern industry needs in terms of door-to-door carriage. The Rotterdam Rules are the first rules governing the carriage of goods by sea and connecting or previous transport by land.[72]

69 Hoang Van Chau *et al.*, *supra*.

70 *Ibid.*

71 *See Hamburg Rules of 1978*, http://www.bws.dk/conditions/sea-transport/hague-rules.aspx.

72 *See Rotterdam Rules*, http://www.rotterdamrules2009.com.

4. Air Transport

(a) Convention for the Unification of certain Rules relating to International Carriage by Air 1929 (Warsaw Convention/Warsaw Rules): The Warsaw Convention governs the international carriage of goods by aircraft for hire or reward when the place of departure and place of destination are both situated in the territory of states which are parties to the Convention. In particular, the Warsaw Convention: (i) mandates carriers to issue passenger tickets; (ii) requires carriers to issue baggage checks for checked luggage; and (iii) limits a carrier's liability to 17 SDR per kilogram for checked luggage and cargo.[73]

(b) The Protocol to Amend the Warsaw Convention 1955 ('The Hague Protocol'): The Hague Protocol makes amendments to carriers' basis of liability.[74]

(c) The Guadalajara Protocol to Amend the Warsaw Convention 1961 (the 'Protocol 1961'): This Protocol supplements carriers' liability in cases where the international carriage by air performed by a person other than the contracting carrier.[75]

(d) The Montreal Protocol to the Warsaw Convention 1966 (the 'Montreal Protocol 1966'): The Convention which the provisions of this Protocol modify is the Warsaw Convention as amended at The Hague in 1955.[76]

(e) The Protocols to amend the Warsaw Convention as amended by the Protocol done at The Hague in 1955 signed at Guatemala City in 1971 (Guatemala City Protocol 1971). This Protocol provides more detailed calculations of compensation.[77]

(f) Additional Protocols Nos. 1 to 3 and Montreal Protocol No 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol signed at Montreal in 1975: These Protocols modify liability limits of air carriers.[78]

73 Hoang Van Chau *et al.*, *supra*.

74 Hoang Van Chau *et al.*, *supra*.-.

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

78 *Ibid.*

(g) Convention for the Unification of Certain Rules for International Carriage of Air 1999 (The 'Montreal Convention'): This Convention is aimed to modernize and consolidate the Warsaw Convention and related instruments. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.[79]

5. Multi-modal Transport

(a) United Nations Convention on the International Multi-modal Transport of Goods 1980: The Convention applies to all contracts of multi-modal transport between places in two states, if the place of taking in charge or delivery of the goods as provided for in the transport contract is located in a contracting state. Multi-modal Transport Operators (MTO) is liable for loss resulting from loss of, or damage to, the goods as well as from delay in delivery, unless he proves that he, his servants, agents or sub-contractors took all measures that could reasonably be required to avoid the occurrence and its consequences.[80]

(b) UNCTAD/ICC Rules for Multi-modal Transport Documents 1992: The Rules do not have the force of the law, but are of purely contractual nature; they apply only if they are incorporated into a contract of carriage, irrespective of whether it is a uni-modal or multi-modal transport contract involving one or several modes of transport or whether a document has been issued or not. MTO is liable for loss resulting from loss of, or damage to, the goods as well as from delay in delivery, unless the MTO proves that no fault or neglect of his own, his servants, agents or sub-contractors has caused or contributed to the loss, damage or delay in delivery.[81]

6. Rules on Contracts, including some important instruments, such as the CISG, INCOTERMS, and PICC (*see* Chapter 5 of the Textbook).

7. International Conventions on Customs Matters

(a) International Convention on the Simplification and Harmonization of Customs Procedures 1973 (Kyoto Convention):

[79] *Ibid.*

[80] Hoang Van Chau *et al.*, *supra* .

[81] *Ibid.*

This Convention proposed provisions to ultimately achieve a high degree of simplification and harmonization of the parties' customs procedures with a view effectively to contributing to the development of international trade and of other international exchanges, and to undertake to conform to the standards and recommended practices as stipulated in the annexes of the Convention.[82]

(b) The Customs Convention on the International Transport of Goods under Cover of TIR Carnets 1975 ('TIR Convention'):

TIR is one of the most successful international transport conventions and is so far the only universal customs transit system in existence. As of February 2012, it has 68 contracting parties, including the European Community. More than 40,000 operators are authorized to use the TIR system and around three million TIR transports are carried out per year.[83]

B. *ASEAN Agreements*

ASEAN aims to establish the ASEAN Economic Community (AEC) by 2015. In accordance with this plan, AEC will be characterized by the following: (i) a single market and production base (*i.e.*, a region with free movement of goods, services, investment, skilled labour, and freer flow of capital); (ii) a highly competitive economic region; (iii) a region of equitable economic development; and (iv) a region fully integrated into the global economy.[84]

Various measures have been proposed and implemented for achievement of free movements of goods and services. Examples include elimination of tariffs and non-tariff barriers, trade facilitation, customs integration, simplifying, harmonizing and standardizing trade and customs, processes, procedures and the application of information technology ('IT') in all areas related to trade facilitation, liberalization of certain services such as air transport, e-ASEAN, healthcare and tourism and recognition of professional qualifications.[85]

[82] H. D. Nguyen *et al., Transportation and Freight Forwarding in International Trade* (2005).

[83] *See Introducing TIR*, http://www.unece.org/tir.

[84] *See ASEAN Economic Community Blueprint*, http://www.aseansec.org.

[85] *Ibid.*

Transport cooperation is argued to be one of key measures to achieve both free flows of goods and services and regional competitiveness. Operationally, multiple agreements among ASEAN members and between ASEAN and some other countries have been signed, some of which are listed below:[86]

- Air Transport Agreement between ASEAN and China, Bandar Seri Begawan, 12 November 2010;
- Brunei Action Plan (ASEAN Strategic Transport Plan) 2011-2015;
- ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Services, Bandar Seri Begawan, 12 November 2010;
- Protocol 1 on Unlimited 3rd and 4th Freedom Traffic Rights between any Points in Contracting Parties, Bandar Seri Begawan, 12 November 2010;
- Protocol 2 on Unlimited 5th Freedom Traffic Rights between any ASEAN Cities, Bandar Seri Begawan, 12 November 2010;
- Memorandum of Understanding between the Governments of the Member States of the Association of Southeast Asian Nations and the Government of the People's Republic of China on Maritime Consultation Mechanism, Bandar Seri Begawan, 12 November 2010;
- ASEAN Framework Agreement on the Facilitation of Inter-state Transport, Manila, 10 December 2009;
- ASEAN Multilateral Agreement on Air Services, Manila, 20 May 2009;
- ASEAN Memorandum of Understanding on Cooperation Relating to Aircraft Accident and Incident Investigation, Cebu, Philippines, 29 May 2008;
- Agreement on Maritime Transport between the Governments of the Member Countries of the Association of Southeast Asian Nations and the Government of the People's Republic of China, Singapore, 2 November 2007;

[86] *See Agreements on Transportation and Communication*, http://www.aseansec.org/19867.htm.

- ASEAN Sectoral Integration Protocol for the Logistics Services Sector, Makati City, Philippines, 24 August 2007;
- Protocol No 1 - Designation of Transit Transport Routes and Facilities and its Annex of List of Transit Transport Routes, Bangkok, 8 February 2007;
- ASEAN-Japan Ministerial Declaration on Transport Security, Bangkok, 9 February 2007;
- ASEAN Framework Agreement on Multimodal Transport 2005);
- ASEAN Transport Action Plan 2005-2010;
- Manila Declaration 2002;
- Ministerial Understanding on the Development of the ASEAN Highway Network Project 1999);
- ASEAN Framework Agreement on the Facilitation of Goods in Transit, Hanoi, 16 December 1998;
- Agreement on the Recognition of Commercial Vehicle Inspection Certificates for Goods Vehicles and Public Service Vehicles Issued by ASEAN Member Countries 1998);
- Agreement for the Facilitation of Search of Ships in Distress and Rescue of Survivors of Ship Accidents 1975);
- Agreement for the Facilitation of Search for Aircrafts in Distress and Rescue of Survivors of Aircraft Accidents 1972).

4. Conclusion

Logistics is a broad concept, requiring a correspondingly long list of relevant governing laws and regulations, whether at national, sub-regional/regional or global levels. This Section provides the first step into the world of logistics and logistics-related international legal systems for those practitioners operating in Viet Nam by briefly reviewing some popular international conventions and several ASEAN agreements related to the flows of goods. Importantly, logistics practitioners should continuously build up and update their knowledge in the field for successful performance.

Section Three. RULES ON E-COMMERCE FOR INTERNATIONAL BUSINESS TRANSACTIONS - OVERVIEW

Introduction

With the explosion of information technology and the Internet,[87] international businesses have an effective tool to support and develop their commercial activities - e-commerce. E-commerce, expected to have a wide economic impact and readily embraced is known by other names, such as online trade; cyber trade; paperless commerce, and electronic business. The growth of e-commerce and its influence on trade practice has been phenomenal.[88] It has reduced costs and saved time in both international and domestic business, which have placed demands on businesses, then attractive to individuals, enterprises and governments. E-commerce has no national boundaries; its intangible radical character always raises important issues. Among these are the economic, moral and social impacts of the technology, new opportunities for fraud or other criminal activity.[89] E-commerce lacks the legal framework to establish the rights and obligations of the various actors[90] involved in the use of that technology.[91] A business transacting via e-commerce needs to be aware of all of the issues above in order to limit its risks. This Section attempts to shed further light on aspects of the legal harmonization of specific issues relating to e-commerce in general, and to electronic contracts and electronic signatures in particular, at various international organizations, including the UNCITRAL, EU and ICC. Other issues, for instance, the dispute resolution, applicable law, privacy and data protection, IPRs, or the law dealing with cyber-crime, are outside the scope of this Section.

87 The growth in the number of Internet users from 2000-2011 is 480.4 per cent; it currently has over two million users, http://www.internetworldstats.com/stats.htm.

88 *See* Schmitthopff, 'Chapter 33: Electronic Commerce and Electronic Data Interchange', *Export Trade: the Law and Practice of International Trade*, Thompson, at 858.

89 Sharon Curry, *An Inside Look at E-commerce Fraud - Prevention and Solutions* (2000).

90 Actors in e-commerce could be seller, buyer, service provider, often considered as customer; business and government. Although there are many models of e-commerce, such as B2C, B2B, B2G, C2B, C2C, C2G, G2B, G2C, or G2G, the real meaning of e-commerce refers only to model B2B. *See* Michael Chissick and Alistair Kelman, *Electronic Commerce: Law and Practice,* Sweet and Maxwell, London, 3rd edn., (2002), at 143.

91 Indira Carr, *supra*, at 103.

1. E-Commerce - Legal Issue and Harmonization

A. *E-Commerce - Electronic Data Interchange (EDI)*

With the growth of e-commerce generally, EDI is becoming more popular in aspect of 'business-to-business' ('B2B') use. Although often confused, e-commerce and EDI are not the same thing. E-commerce is a generic term that embraces EDI as well as other electronic communication technologies, such as election mail and the Internet.[92] EDI is defined as 'the inter-company computer-to-computer communication of standard transactions in a standard format that permits the receiver to perform the intended transaction'.[93] The unique aspect of EDI is that, in a pure EDI environment, there is no human intervention and computers communicate with each other directly, supplying and processing data. The functionality of EDI is extremely diverse; exchanges of information between computers may mean changes in production levels within a company, and the speedier processing of orders and preparation of consignments for shipment. The major hurdle that e-commerce, and EDI in particular, have had to overcome is the ability for two or more parties, each with different computers and using different software, to be able to 'talk' to each other. Therefore, in order to prevent a situation where parties have to negotiate the terms, content and structure of the messages before they are able to communicate, let alone trade, internationally acceptable standards have been developed. Industries such as the motor industry in Europe set about creating its own standard in ODETTE,[94] or the chemical industry in CEFIC.[95] The UN/EDIFACT[96] rules, later, were developed by UNECE[97] and ISO[98] and have become the world standard for EDI message structures. EDIFACT operates on the principle that parties need established message formats if they are to be able to communicate, but within these formats there is a degree of flexibility that enables users to define their own requirements. To facilitate the use

92 At the UN, six main instruments of electronic commerce can be distinguished: the telephone, the fax, television, electronic payment and money transfer systems, Electronic Data Interchange and the Internet.

93 *See* Sokol, *Electronic Data Interchange: The Competitive Edge*, McGraw-Hill, (1989).

94 Organization for Data Exchange by Teletransmission in Europe, http://www.odette.org

95 Conseil Européen des Fédérations l'Industrie Chimique, http://www.cefic.be

96 United Nations, Electronic Data Interchange for Administration, Commerce and Transport.

97 United Nations Economic Commission for Europe. *See* also Troye, *The Development of Legal Issues of EDI under the European Union TEDIS Programmer*, (1994).

98 International Standards Organization.

of EDI in international trade, in September 1987, the ICC formulated a code of conduct known as UNCID, also approved by UNECE; its purpose was to help EDI users to enter fair communication contracts (interchange agreements).[99] Many of the provisions in the UNCITRAL Model Law on Electronic Commerce are traceable to the ideas enshrined in the UNCID. After issued, the UNCID, which applied only to close networks,[100] the ICC continued to work on setting out international guidelines for e-commerce on the open networks;[101] these focused on such issues as authentication devices, certification policies, public key certificates and record keeping.

B. *UNCITRAL Model Law on E-commerce 1996*

Consideration of the legal issues in relation to the international business and e-commerce would not be complete without reference to the work of UNCITRAL. The Model was drawn up by UNCITRAL in 1996 in recognition of the inadequate national legislation then in existence around the world, a significant amount of which is linked to the use of modern communication techniques. Along with it, a guide to the enactment was also published in the same year. The objectives of the Model Law, which include enabling or facilitating the use of e-commerce and providing equal treatment to users of paper-based documentation and to users of computer based information, are essential for fostering economy and efficiency in international business.[102] This Law applies to any kind of information in the form of a data message[103] used in the context of commercial activities.[104] States can limit the scope of data messages related to the international business.[105] The Guide, however, recommends that the Model Law should be applied as widely as possible[106] since its objective is to promote legal certainty, for instance,

[99] *See* for more Andreas Mitrakas, *Open EDI and Law in Europe: A Regulatory Framework*, Kluwer Law International, Netherlands, (1997), at 170. UNCID was specifically designed for closed networks and was insufficient for establishing trust and reliability in open networks, as later published in the *General Usage for International Digitally Ensured Commerce* in 1997 and a subsequent document GUIDEC II in 2001.

[100] *See* GUIDEC *General Usage for International Digitally Ensured Commerce* to understand more.

[101] *Ibid*.

[102] *See* for more the aims of Model through UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, (1996), at 16.

[103] Data messages are defined in Article 2(a) of the Model Law.

[104] Article 1 of the Model Law.

[105] *Ibid*.

[106] Guide to Enactment, para. 29, at 25.

the variety of procedures available under the Model Law (particularly Articles 6 to 8) to limit the use of data messages if necessary.

Based on the Model Law, many members of the UN drafted their own versions within the meaning of 'framework' law for e-commerce.[107]

The structure of Model Law was divided into two parts, one dealing with e-commerce in general and the other with e-commerce in specific areas. It comprised 17 articles, including:

- Part I with three chapters: Chapter I mentions the general rules, including four articles on sphere application, explaining the relations among the words, interpretation and the exclusive cases following the deal between parties. Chapter II is on the application of legal requirements to data messages, with six Articles (Articles 5-10) admitting the legal recognition of data messages; writing; signature; originals to data messages; admissibility, evidential weight and retention of data messages. Chapter III (Articles 11-15) is on the communication of data messages, such as the validity of messages.

- Part II consists of one chapter (Articles 16-17) relating to specific activities concerned with contracts of the carriage of goods and transportation documents.

Some important contents of Model Law should be noted:

- Confirming the validity of data messages, it therefore eliminates and settles the barriers from different regulations in the respective national law systems, about requiring information to be presented or retained in its original form: to be writing.

- Confirming the data messages have satisfied with the requirements found in non-electronic (paper document) means.

- Regarding e-signatures (Article 7), the Law confirmed that it has the same value as a physical signature in the case

[107] *For instance*, Australia (1999), China (2004), France (2000), Singapore (1998), certain territories of the UK, and 48 States of the US. Southeast Asia was initially slow in adopting the Model, but the take-up in countries such as Thailand and Korea encouraged other countries to adopt legislation consistent with the Model. Viet Nam also issued the Law on Electronic Transactions 2005, based almost exactly on the Model Law.

where it meets the requirements set out in Article 7.1(a) and 7.1(b).[108] Furthermore, the e-signature can be used not only for identification purposes but also for the encryption of a document.[109] Furthermore, to enhance the validity of data messages, Articles 8 and 9 support (not deny) the original; admissibility and evidential weight of data messages.

- The recognition of formation and validity of e-contract is addressed by Article 11:

In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

Although it is not enough to cover all aspects of a contract, Article11 provides the legal basis of international business transactions: these could be established by e-transaction without fears that the legeffect or validity of such a transaction would be denied purely on the basis of the nature of the communication medium used (Article12).

- The regulation of time and place of dispatch/receipt of messages could terminate the conflict of the 'postal acceptance' rule in common law with others. The dispatch of a data message occurs when it enters an information system outside the control of the originator and the time of receipt of a data message is determined when the data message enters an information system of the addressee, unless otherwise agreed between the originator and the addressee.[110]

- In Part II, the Model Law provides a legal framework for carriage of goods by using electronic transport documentation such as air waybills, bills of lading, multi-modal transport documents and charter, it, therefore, applies not only to maritime sector but also to other forms of transport.[111]

All the content above confirmed the validity of data messages, e-contracts, and e-signatures. It is the legal basic of the recognization and use of the e-commerce. Although the Model Law has no the same normative value as a treaty, and perhaps it does not lead to the unification of law, but it is a worth document that UNCITRAL and states may continue to research then issue further statutes on e-commerce.

C. *The EU Directive on E-commerce*

The EU is one of regions where the e-commerce has been strongly developed. In order to create a legal environment for the e-commerce, an European Initiative in Electronic Commerce was published in 1997 by the European Commission. Based on this document, many regulations were issued, one of which is Directive No 2000/31/EC on 'Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market'. The purpose of the Directive was to lay down a general framework to cover certain legal aspects of e-commerce to ensure the free movement of 'information society services'[112] among member states, and the protection of the online consumer. The structure of Directive includes four chapters and four sections with 24 articles. The main points of the Directive are following:

- Article 1 addressed the scope of the Directive which is not to extend into the field of taxation and cartel law;[113] and to support the free movement for the purposes of information society services for which Article 4 eliminates the prior authorization by member states. Certain information of the recipients of the service and competent authorities needs to be provided, including their name, registered address and other details.[114]

[108] Article 7.1:
(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message;
(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all of the circumstances, including any relevant agreement.

[109] *See* Guide, Chapter 4, at 126-128.

[110] *See* for more Article 15 of the Model Law.

[111] Including road, air, rail and multi-modal transports.

[112] Information society services includes any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service. *See* as listed in Annex V to Directive No 98/34/EC. To make clearer about information society services, Article 1(5) of the E-commerce Directive shows some kind of information on society services outside its scope.

[113] EU Directive, *supra* Article 1(5).

[114] EU Directive, *supra* Article 5.

- The contract matter is addressed in Section 3, through Article 9. It shows as a regulation that requires all member states have to admit the validity of e-contract and must neither create obstacles nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means. Certain types of contract are excluded[115] although their exclusion is not relevant to the scope of this publication, and the placing of the order[116] is also mentioned. With this article, the parties who enjoy the e-contract in the EU could enjoy the validity of such a contract not only in each member state but also in all EU areas. This statement is similar to the UNCITRAL Model Law on E-commerce with regard to e-contracts.

- The liability of third party service providers is expressed in Section 4, in which parties involved are able to understand the right and obligations of the Internet service providers.

- The issue of enforcement is also addressed in the Directive; through Article 20, member states are free to determine the sanctions applicable to infringements of national provisions adopted on the basis of the E-commerce Directive.

The UNCITRAL Model Law and the EU Directive on e-commerce governe only some issues relating to the facilitation of the e-transactions. E-signature, one of other complicated issues in e-commerce, which boosts the authenticity and authentication of a message, was also drafted by the UNCITRAL and the EU. The following part will discuss some of these rules.

2. E-Signature

A. *UNCITRAL - The Model Law on Electronic Signatures*

Five years after UNCITRAL issued the Model Law on E-commerce on 5 July 2001,[117] it adopted another Model Law dealing specifically with issues related to e-signatures - The Model Law on Electronic Signatures. The objective of the Law is to extend the principles outlined in Article 7 of the Model Law on Electronic Commerce in encouraging methods for replacing hand written signatures with electronic equivalents.[118] The scope of the Model Law includes commercial activities[119] and it is not intended to overrule consumer protection laws.[120] The Law comprises 12 articles with some of the main contents as follows:

- Admitting the validity of e-signature;

- giving the reliability requirements for a legally effective e-signature.[121] A signature is regard as reliable if the signature creation data must be linked to a signatory and no other person; the signature creation data at the time of signing must be under the control of the signatory and of no other person; any alteration to the e-signature after the time of signing is detectable.

- regulating the responsibilities of all parties, including the signatory; the third party and the party who relies on the e-signatures.[122]

- recognizing the certificates and e-signatures in aspects of international business, Article 12 provides that in determining to what extent an electronic certificate or signature is legally effective, no regard shall be paid to the geographical location where they were generated or the business user's domicile; further, that the signature shall have equivalent validity whether or not it was issued in a contracting member state.

With the above content, the Law provides some rules to eliminate the discriminations towards and barriers in using the e-signature. It confirms the confidence in using e-signature for any international business transaction. In particularly, the Law had contributed to harmonize the rules on the e-signature and it would be a more effective tool for the law-makers.

115 EU Directive, *supra* Article 9(2).

116 EU Directive, *supra* Article 11.

117 Adoption by General Assembly, *see* Document A/Res/56/80, dated 24 January 2002.

118 'E-signature' covers a broader meaning than 'digital signature'. An e-signature could be a digital signature or a digitized image of a hand-written signature based on biometrics such as a fingerprint or an iris scan.

119 Commercial activities in this context are meant to be given a wide interpretation. *See* for more the UNCITRAL Model Law on Electronic Signatures, Article 1.

120 UNCITRAL Model Law, *supra*

121 UNCITRAL Model Law, *supra*, Article 6.

122 UNCITRAL Model Law, *supra*, Article 2 for definitions; Articles 8 and 9 for the specified responsibilities for each subject.

B. *The EU Directive on Electronic Signatures*

Being aware of the complication and importance of e-signature in international business transactions, on 19 January 2000, the EC issued the Directive No. 1999/93/EC on a Community Framework for Electronic Signatures. Some of its content are similar to the UNCITRAL Model Law on Electronic Signatures. However, the scope of the Directive is only to promote the internal market, including consumer needs. In Article 5, the Directive impressed that: 'All member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the ground that it is in electronic form.' It shows that the e-signature is treated as equivalent to hand-written signatures. To make it clear about e-signatures, the Directive provided a definition about 'an advanced electronic signature'[123] that includes the requirements that need to met by the e-signature for it to be reliable.

Similarly to the EC Directive on e-commerce, the Directive on e-signature ensures free movement of services. Member States cannot make the provision of certification services subject to prior authorization,[124] but the Directive allows them to

> introduce or maintain voluntary accreditation schemes aimed at enhanced levels of certification - service provision[125] under which the conditions for such schemes must be "objective, transparent, proportionate and non-discriminatory".

Based on the distinction between the notions of a 'certificate' and a 'qualified certificate',[126] the Directive stipulates in Annex II the responsibilities and requirements of certification service providers who issue 'qualified certificates'. These have to demonstrate the reliability of the certificate[127] and the management of the systems, competence of personnel, and services provided. They are also liable for damage caused to any entity or person[128] who reasonably relies on the certification they issued.[129] Besides, the Directive also laid down certain rules on international aspects, with conditions to accept the 'qualified certificate' issued by a certification-service-provider established in a third party.[130]

Data protection is a newly appearing issue mentioned in the Directive. Article 8 requires member states to ensure that certification-service-providers comply with the Directive No. 95/96[131] on the protection of individuals with regard to the processing of personal data and on the free movement of such data, such that the certification service providers can collect data only directly from the data subject or after the explicit consent of the data subject.

3. United Nations Convention on the Use of Electronic Communications in International Contracts 2005

Two model laws were issued on e-commerce and e-signature by UNCITRAL. In 2005, the UN General Assembly adopted the Convention on the Use of Electronic Communications in International Contracts. This is the first Convention to establish a framework for signing and practising the international e-contract. The primary of the Convention was to validate the use of electronic communications in international business.[132] It has a close relationship with the CISG and the Model Law on Electronic Commerce 1996.[133] The Convention comprises a total of 25 Articles contained in four chapters. It applies only in relation to contracts between parties whose places of business are in different states, and neither to the nationality of the parties nor to the civil or commercial

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123 EU Directive on Electronic Signature, defined in Article 2 as:

… [A]n electronic signature which meets the following requirements:

It is uniquely linked to the signatory;

it is capable of identifying the signatory;

it is created using means that the signatory can maintain under his sole control; and

it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

124 EU Directive, *supra*, Article 3(1).

125 EU Directive, *supra*, Article 3(2).

126 *See* the definition in Article 2 and requirements for qualified certificates in Annex I.

127 Starting from the identification of the certificate holder through to the security and trustworthiness of the systems and products used.

128 Including legal or natural persons.

129 EU Directive, *supra*, Article 6(1).

130 *Ibid*., Article 7.

131 Directive No. 95/46/EC of European Parliament and of the Council of 24 October 1995.

132 Amelia H. Boss, Wolfgang Kilian, *United Nations Convention on the Use of Electronic Communication in International Contracts - An In-depth Guide and Sourcebook*, Kluwer Law, the Netherlands, (2008), at 4.

133 Because the Convention mentions only in respect of using electronic means in international business, other respects are governed by substantive law such as the CSIG or domestic law.

character of the parties or of the contract[134] with the exclusion areas in Article 2.[135] The Convention is a positive step in resolving and clarifying outstanding issues, such as the time and place of dispatch and receipt of electronic communications, as well as the implications of automated systems for contract formation. Some issues of the Convention should be known as follows:

- The definition of e-contract is understood with a wider meaning. It is not only as a sales contract, but also the commitment of parties to such as arbitration agreements.
- In order to determine the location of parties, that is important issue which makes clear where the contract is established. Article 6 states that where no place of business is indicated or there is more than one place of business, then the place of business shall be that which 'has the closest relationship to the contract, having regard to the circumstances' at the time the contract was made.
- The validity of electronic communication is expressed in the Convention by Article 8 which provides that a communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.
- Article 9 of the Convention ensures that none of a communication or a contract to be made or evidenced in any particular form and nowhere the Convention requires that a communication or a contract should be in writing, or provides consequences for the absence of a written document, that requirement is met by an electronic communication.
- Time and place of dispatch and receipt are governed by Article 10 as: when the information leaves (dispatch) and arrives in the recipient's system and is capable of being retrieved (receipt).
- The Convention applies only to 'business-to-business' electronic transactions and e-contracts ('B2B'). Such contracts as signed by 'customer-to-customer' ('C2C'); 'customer-to-business' (C2B); and 'business-to-customer' ('B2C') are excluded from this Convention.

The Convention was intended to facilitate harmonization of the domestic laws already in force in many countries on the use of electronic communications in international contracts.

4. Vietnamese Law on E-Commerce

In November 1997, the Internet appeared in Vietnam and has developed at a high speed. Until 2004, however, some transactions were established only through business-to-customer ('B2C') working, most of them resolving the administrative procedures and information exchange.[136] In order to develop e-commerce, Viet Nam signed the e-ASEAN Framework Agreement,[137] with commitments to the development of an ASEAN information infrastructure and the facilitation of e-commerce. Viet Nam also has created the legal framework including many decrees, circulars, decisions, resolutions, directives and instructions aiming at the guidance and support of the e-commerce development. The cornerstone of the legal framework for e-commerce is the Law on Electronic Transactions 2005 comprising 54 articles divided in eight chapters. The Law widely applies to all types of e-transactions in the administrative, civil and commercial fields.[138] The definitions of e-contract;[139] e-contract transaction,[140] and the rules on e-transactions[141] were clarified in this Law. The Law also emphasized that the validity of an e-transaction could not be denied solely on the ground that it is contained in data messages.[142] Moreover, the e-signature, the rules on using an e-signature and a certificated e-signature service are included in the Law. It could be said that the Law was based on the combination of the model laws and the Convention mentioned above. Although the Law could not cover all aspects of e-commerce, it is the basic ground for elaborating decrees and other guidance instruments[143] governing e-commerce in Viet Nam.

[134] Article 1 of the Convention on the Use of Electronic Communications in International Contracts.

[135] Such as contracts formulated for family and personal purposes; transactions in respect of regulated or foreign exchanges; inter-bank transfers; transfer of security rights; bill of exchange; bill of lading, warehouse receipts or any other transferable document in relation to the delivery of or payment for goods.

[136] Prof. Dr. Nguyen Thi Mo, *Handbook 'Law on Electronic Contracts'*, Labour-Social Publisher, (2005), at 133.

[137] In the Fourth ASEAN Summit in Singapore, 22 - 25 November 2000.

[138] Article 1 of the Law on Electronic Transactions 2005;

[139] Article 33 of the Law on Electronic Transactions 2005;

[140] Article 37 of the Law on Electronic Transactions 2005;

[141] Article 36 of the Law on Electronic Transactions 2005;

[142] Article 34 of the Law on Electronic Transactions 2005;

[143] Viet Nam issued Circular No. 09/2008/TT-BCT on 21 July 2008 about contract transactions on E-commerce website; Decree No. 106/2011/ND-CP about amending and supplementing some provisions of Decree No. 26/2007/NĐ-CP detailed regulations to implement the Law on electronic transactions and signature certificate service and other legal specializations.

5. Conclusion

This Section has introduced a legal overview of e-commerce as ruled by the UNCITRAL Model Law and the EU Directive as well as the ICC Guide. These documents have made the effort to harmonize the rules on e-commerce for international business transactions in general, and the use of e-signature and e-contract in particular. The priority of the harmonization was to validate the use of electronic communications in international business and to eliminate the discriminations against or barriers to develop e-commerce. In the future, with the rapid evolution of digital communications technologies and expansion of computer networks, e-commerce will be used increasingly frequently in international business transactions, therefore, these rules will be the valuable reference for the law-makers all around the world.

Summary of Chapter Six

This Chapter has provided an overview of legal sources applicable to three important transactions in international business, such as international franchising, logistics and e-commerce. The background information on these three concepts is presented prior to the focal discussions of the Chapter. One point of note is that the lists of legal sources reviewed in the Chapter are not exhaustive. They should only be considered reference frameworks, based on which rules potentially governing any particular transaction could be worked out and retrieved accordingly.

QUESTIONS/EXERCISES

1. What is the difference between '*business format franchising*' and '*product and trade name franchising*'?
2. Which are the main entry modes of the foreign franchisors?
3. Which legal sources can affect international franchising?
4. According to Vietnamese franchise rules, what is the major legal requirement that foreign franchisors must satisfy if they would like to expand to Vietnam?
5. Clarify the carrier's liability in international conventions on transport (rail, road, sea, air, and multi-modal transports) based on the three following criteria; liability basis; liability period; and liability limit.
6. What is e-commerce? What is the difference between EDI and e-commerce?
7. Compare the respective scope of the UNCITRAL Model Law with that of the EU Directive on E-commerce.
8. What are the responsibilities and requirements of certification service providers through the EU Directive on e-signature?
9. A Vietnamese company based in Hanoi imports air conditioners (for industrial purposes) from Singapore on FOB Singapore port (INCOTERMS 2010). The goods will be transported by sea. Please clarify the model the possible physical flow of goods, logistics activities and relevant international governing regulations.
10. Mr. Phillips is businessman who has a company in Germany, on a flight from Beijing to London, He ordered 1,000 watches from alibaba.com. Where and when are the place and time of this contract?
11. Mr. Nam is Vietnamese. He has a company based in Paris, and enters into e-contract with a company in New York. Which rules on e-commerce could be applied?

REQUIRED/SUGGESTED/FURTHER READINGS

1. F. N. Burton and A. R. Cross, 'Franchising and Foreign Market Entry', in Stanley J. Paliwoda and John K. Ryans (eds.), *International Marketing Reader* (1995).
2. R. H. Ballou, *Business Logistics/Supply Chain Management: Planning, Organizing, and Controlling the Supply Chain* (2004).
3. J. T. Mentzer, *Fundamentals of Supply Chain Management: Twelve Drivers of Competitive Advantage* (2004).
4. D. J. Bowersox *et al., Supply Chain Logistics Management* (2010).
5. Schmitthopff, 'Chapter 33: Electronic Commerce and Electronic Data Interchange', *Export Trade: the Law and Practice of International Trade*, Thompson.

USEFUL WEBSITES

ASEAN, http://www.aseansec.org

http://www.bws.dk

http://www.cscmp.org/aboutcscmp/definitions.asp.

http://www.admiraltylawguide.com/interconv.html#CG

EU, http://europa.eu

CHAPTER SEVEN. INTERNATIONAL COMMERCIAL DISPUTE SETTLEMENT

INTERNATIONAL COMMERCIAL DISPUTE SETTLEMENT

Section One. INTRODUCTION

It is inevitable, in such a dynamic global economy exemplified by the booming of international commercial transactions, that the number of the international commercial disputes has significantly increased. Characterized by legal complexity and the time-consuming process and expensive costs of their resolution, international commercial disputes have caused tremendous difficulties to parties once they are submitted to international dispute settlement mechanisms. In order to ameliorate the harshness of disputes, parties to international commercial agreements should consider at the outset how any disputes arising under them may be resolved amicably.

Firstly, they may choose, in advance or at some stage of the dispute, a mode of dispute resolution after considering the advantages and disadvantages of each mode, their suitability for the particular business relationship, and the legal, economic and commercial backgrounds of the dispute. There are several well-established dispute resolution mechanisms for international commercial disputes that parties can rely on. Most popular, among others, are negotiation, mediation/conciliation, arbitration and litigation. Traditionally, the parties submitted their dispute to the courts of a chosen forum operating around well-settled legal rules and principles, yet nowadays the alternative dispute resolution (hereinafter the 'ADR') processes have been popularly resorted. In this light, the parties may agree contractually to pursue non-binding modes of dispute resolution such as negotiation, mediation/conciliation. Subsequently, they may further agree that if such non-binding modes fail, they will resort to a binding form of ADR such as arbitration. It is also noted that arbitration has been 'the dominant method of resolving private party disputes in international commerce',[1] given that international commercial arbitration provides a number of benefits that are not available through litigations.[2] Furthermore, parties may make use of other non-binding modes including negotiation, mediation and conciliation in aiding the arbitration or litigation proceedings with a view to reach an outcome that better serve the interest of the disputant parties. Arbitration thus gives the parties substantial autonomy and control over the process that will be used to resolve their disputes.[3]

To scratch a picture of available international dispute settlement processes and possible choice of the disputant parties, Section Two of this Chapter will, in turn, deal with negotiation, mediation or conciliation, arbitration and litigation. At the end of this Section, some suggestions will be provided to parties on the choice of those modes to settle their commercial disputes.

Choosing the dispute settlement modes, however, does not mean the dispute would be resolved in the way that the parties wish. The process and the outcome of the dispute resolution also depend significantly on the jurisdiction in charge and the governing (both procedural and substantive) law. In litigation, it is almost true that the governing law is the law of the court jurisdiction, though in some cases foreign laws would be applied if found necessary. That means the parties' choice of jurisdiction would also mean that they implicitly choose the applicable law for resolving their disputes.

Indeed, the chosen governing law, in this circumstance, is actually the national law, which would follow its principles of conflicts of laws in deciding the case in question. That means the litigation process is neither easily predicted nor unambiguous. In arbitration, the situation is slightly different. The principle of party autonomy is much more favoured. The parties have greater freedom to build their desired process of dispute resolution. They may choose an 'institutional' arbitration with established arbitral rules, or an '*ad hoc*' arbitration with flexible rules. They may also choose the venue at which the arbitration takes place. It should be noted that the venue may play a significant role in the enforcement of the arbitral award. Besides, in most '*ad hoc*' arbitrations, the parties may tailor their own regulations to resolve the disputes. It should be noted that, however, as flexible is the governing law, as unpredictable is its result. In many cases, the choice of the applicable law is tacit, impractical or in conflict with other related law, resulting in tremendous difficulties for arbitrators in settling the dispute. In other cases, any agreement on the choice of law between the parties

[1] Richard Garnett *et al., A Practical Guide to International Commercial Arbitration* (2000), at 1.

[2] Party can choose the composition of the arbitral tribunal, language of proceeding, and rule governing the arbitration; *See* Pierter Sanders, *Quo Vadis Arbitration?: Sixty Years of Arbitration Practice* (1999), at 7-9. And, the simplicity, lower costs, confidentiality, speed of resolution as reasons for favouring arbitration over litigation, *see* Stephen M. Ferguson, 'Interim Measures of Protection in International Arbitration: Problems, Proposed Solutions and Anticipated Results', in *International Trade Law Journal* (2003), at 55.

[3] Margaret L. Mosses, The Principles and Practice of International Commercial Arbitration, Cambridge University Press, 2008, p. 1.

may be lacking, which suggests that the situation may be even more complex.

Section Three of this Chapter will discuss the parties' choice of laws and jurisdictions. While trying to canvass the main complications around the topic, this Section also introduces several international conventions guiding the parties. The international regulations on the choice of law and jurisdiction have been most strongly influenced by the common law system as well as the civil law system. This Section, therefore, exemplifies several regulations of the English law and European law to cover the topic. Prior to entering into commercial contracts parties are encouraged to decide at the outset the applicable law and jurisdiction for their prospective disputes. That would be a crucial point at which to determine which law is applicable for the contract.

At the final stage of a dispute resolution process, a court's judgment or an arbitral award are usually provided. The crucial importance for the prevailing parties is to seek their recognition and enforcement. It would not be a major problem if the enforcement of the judgment or arbitral award to be sought within the jurisdiction where the court or the arbitral tribunal resides. The situation is further complicated if the prevailing party wishes to obtain the arbitral award or the court's judgment under a foreign jurisdiction. In the case of an arbitral award, international law has gone so far as to facilitate its recognition and enforcement in nearly 160 State jurisdictions. The New York Convention 1958 ruled on the recognition and enforcement of an arbitral award (hereinafter the 'New York Convention'). It is necessary to discuss the main rules of the New York Convention in order to understand the reason why arbitration has dominated litigation in the field of commercial dispute resolution in the last decades.

Under the New York Convention, the grounds for non-enforcement of a foreign arbitral award have been narrowly defined. However, it is not uncommon for a foreign arbitral award to be rejected on limited grounds, such as that of 'damaging the public policy' of the enforcing State. The merit of the award will not be reviewed, although its enforcement may need further action. The most controversial aspect of enforcing the arbitral awards is the choice of the place to enforce the award and the national law of the chosen jurisdiction for enforcement. Other issues arise in the circumstance that the prevailing party wishes to seek the enforcement of an arbitral award in a country not a party to the New York Convention. The aim of enforcement would depend solely on the national law of the country in question in recognizing and enforcing the foreign award.

Section Four will present the enforcement of arbitral awards under the New York Convention and contemplate enforcement in the absence of the New York Convention.

In the case of seeking enforcement of a court's judgment within a foreign jurisdiction, the enforceability faces further complexities and impediments given the predominant situation that foreign judgment has no local legal effect. Several regional regulations have been established to deal with the enforceability of foreign judgments, yet this is not applied globally. A foreign court judgment does usually follow a cumbersome process, possibly immersed in legal pitfalls. Recently, any international effort to deal with this matter has failed, along with the failure of The Hague Convention on the recognition and enforcement of foreign judgment. There is still a long way to go until foreign judgments would be treated as arbitral awards in the regard of recognition and enforcement in a foreign jurisdiction.

Section Five will discuss the enforceability of foreign judgments, with its focus on several leading regional regulations and certain well-known national jurisdictions. The enforcement of foreign judgment has been largely exercised in compliance with the parameters of sovereign interests.

At the end of this Chapter, Section Six will outline the Vietnamese rules on the international commercial dispute settlement with a view to assessing the extent to which Viet Nam has integrated into international law in this regard. The aim of this Section is to suggest that Viet Nam should adapt to well-established and harmonizing international regulations in order to facilitate commercial dispute resolutions within its jurisdiction, as well as to enhance its reputation as a favourable forum in which to conduct the settlement of international commercial disputes.

Section Two. MODES OF THE DISPUTE RESOLUTION - THE CHOICE

1. Negotiation

It is of common knowledge that negotiation is probably the first step adopted by parties in dealing with disputes arising in their international commercial transactions. While disputes cannot usually be settled

through negotiation, it helps parties to address the matter of the disputes and understand one another's position. In addition, parties may resume their negotiation at any time even if other dispute resolution processes are continuing, with a view to reaching agreement. This part therefore introduces as comprehensively as possible the tactics and strategies that have been applied in international negotiation.

A. *Why Negotiate?*

Negotiation may be defined as back-and-forth communication designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different.[4] As such, negotiation is one of the most basic forms of interaction, intrinsic to any kind of joint action, as well as to problem solving and dispute resolution. It may be verbal or nonverbal, explicit or implicit, direct or through intermediaries, oral or written, face-to-face, ear-to-ear, or by letter or e-mail.

Once parties enter into negotiation, they should consider the seven-element framework developed by the Harvard Negotiation Project to obtain a clear result. The seven-element framework includes interests,[5] fairness, legitimacy,[6] relationship,[7] options,[8] commitments,[9]

[4] R. Fisher *et al., Getting to YES: Negotiating Agreement without Giving in,* New York: Penguin, (1991).

[5] A party's needs, wants, and motivations are commonly referred to as its interest. Interests are the fundamental drivers of negotiation. People negotiate because they are hoping better to satisfy their interests through an agreement than they could otherwise. The measure of success in negotiation is how well your interests are met, which is also the criterion you use to compare and choose among different possible outcomes.

[6] Fairness and legitimacy are two of the most powerful of human motivations, and thus constitutes a special category of interests. They routinely play a major role in negotiation, too often (and unwisely) overlooked. It is not uncommon for negotiations to fail, for example, not because the option on the table is unacceptable, but because it does not feel fair to one or both parties. In effect, people pay to avoid accepting a solution that feels illegitimate.

[7] The negotiator's relationship both with those across the table and with anyone else who might affect the negotiation. Sometimes, as with a business partner or ongoing relationship, maintaining a certain kind of relationship may be a much more important interest than the particular substantive issues in disputes.

[8] A major reason to negotiate is to seek an outcome that offers more value than one's BATNA (Best Alternative to A Negotiated Agreement), enough more to justify the investment of time and efforts in negotiating. Options are possible agreements or pieces of a potential agreement upon which negotiators might possibly agree. The most basic form of option is trade - 'I give you this, you give me that in exchange'.

[9] A commitment is an agreement, demand, offer, or promise by one or more parties, and any formalization of that agreement.

and communication.[10] It is up to the negotiators to apply procedural tactics or strategies to manage the negotiation; however, those elements have been the ground for both sides to define the terrain of their negotiation process.

B. *Process of Negotiation*

A seven-element checklist for defining success in negotiation and for preparing to negotiate is relatively manageable and easy to remember. Juggling seven variables simultaneously in the course of interaction is a difficult matter. Negotiators face almost limitless possibilities as they consider which elements to emphasize or ignore and how to handle each one. In practice, however, there are a few major archetypal approaches to the process of negotiation at the root of most interactions. Four of the most common are described here:

1. Positional Bargaining

The simplest and most common approach is haggling, or positional bargaining. One party stakes out a high (or low) opening position (demand or offer) and the other a correspondingly low (or high) one. A series of (usually reciprocal) concessions are made until an agreement is reached somewhere in the middle of the opening positions, or no agreement is reached and the parties walk away to pursue other dispute settlements.

In addition to its simplicity, positional bargaining has the advantages that it is universally understood, frequently expected, and concrete. There are also strategic benefits from effectively staking out a favourable position. However, the simplicity of positional bargaining and its overwhelming focus on commitments have substantial drawbacks. Perhaps the most significant, by discouraging the exploration of interests, is that it makes it difficult to find creative, value-maximizing options. Without knowing the parties' interests, it is hard to find opportunities for joint gain. Moreover, a negotiation climate focused on commitment discourages creativity and brainstorming. Secondly, positional bargaining tends to be slow and inefficient. Each party tries to make the smallest concessions possible, and even then only when necessary to avoid a failed negotiation. Thirdly, positional

[10] 'Communication' here means the manner in which parties discuss and deal with the preceding six elements of negotiation. This would be carried out in adversaries, colleagues, beseech or threaten, trade concessions or brainstorm without commitment.

bargaining tends to produce arbitrary 'split-the-difference' outcomes that poorly satisfy either party's interest in fairness, are hard to explain to constituents, and do little to set a precedent that reduces the future need for additional (time-consuming) negotiation. Finally, positional bargaining tends to promote an adversarial relationship as it may focus on the areas of conflict between the parties and establish a distributive 'win-lose' frame.

2. Favours and Ledgers

A second important process archetype also involves trading commitments, by taking advantage of an ongoing relationship between the parties to produce more creative and value-maximizing outcomes. The basis is to agree to a one-sided outcome now in exchange for a reciprocal favour in the future. Negotiators then keep a 'ledger' of who owes whom what. The result is a creative way to 'expand the pie' by relaxing the timeframe for trades, which often permits deals and dispute resolutions that otherwise seem impossible.

3. The 'Chicken' Approach

A third common archetype of negotiation process focuses on alternatives: whose are better, and whose have the upper hand. 'Our walk-away is better than yours, and furthermore, we will make yours worse by….'. This is commonly called the game of 'chicken' - 'Give in to my demands, or I will kill us both'.

4. Problem-solving 'Circle of Value' Negotiation

As scholars began to subject the negotiation process to more systematic analysis, the drawbacks of positional bargaining became more starkly apparent. The outline of an alternative problem-solving approach emerged from a combination of theoretical analysis, on the one hand, and case studies and extrapolations form atypical negotiations on the other. In essence, it argues that (i) negotiators should work together as colleagues to determine whether an agreement is possible, far better for both than no agreement; (ii) in doing so, they should postpone commitments while exploring how best to maximize and fairly distribute the value of any agreement; and (iii) it makes sense for one party to take this approach even if the other does not. This problem-solving approach is intended to overcome the drawbacks of traditional positional bargaining by focusing on the parties' underlying interests, looking for ways to maximize the satisfaction of shared interests and

no commitment made until the end of negotiation; encouraging explainable, well-reasoned outcomes that set sustainable precedents; allowing parties to maintain and build their relationship even as they disagree by uncoupling the quality of the relationship from the degree of agreement. There is an argument that the problem-solving approach also helps manage each of their three tensions. The first tension, between creating and distributing value, is also sometimes called the 'negotiator's dilemma' because to create value requires that negotiators disclose their interests.

Being the first party to disclose may put it at a strategic disadvantage in capturing the results value. The problem-solving approach helps manage the tension between creating and distributing value by fostering a collaborative working relationship that permits the gradual and reciprocal disclosure of interests while brainstorming options without commitment, and that helps negotiators address distributional questions side-by-side with objective standards, rather than through adversarial 'claiming' and subjective valuation.

The problem-solving method is sometimes called the 'circle of value' approach to negotiation,[11] because the core of the process involves negotiators exploring options for creating and distributing value with collaborative, side-by-side, problem-solving mentality. This way of working together with has to be carefully created and maintained, as is a special space or 'circle'.

2. Conciliation/Mediation

In fact, conciliation and mediation have been rarely better triggered in international commercial disputes. Mediation and conciliation appear more suitable means to settle environmental related disputes. In the realm of commercial disputes, they usually mix with another dispute resolution method to address the wishes of the parties in question. This would be exemplified by the mediation-arbitration mechanism. Therefore, this part is intended to outline those two processes. Conciliation/Mediation differs from arbitration because it is nonbinding. An arbitral institution is likely to have rules for conciliation as well as for mediation. A mediator will try to make sure each party understands the other's point of view, will meet with each party privately and listen to

[11] *See* B. Patton, 'Building Relationship and the Bottom Line: The Circle of Value Approach to Negotiation', in 7 *Negotiation* (2004), at 4 and 7.

their respective view-points, stress common interests, and try to help them reach a settlement.

Conciliation/Mediation is usually confidential. Conciliation/Mediation can occur at any time in the dispute. If parties get to a point in litigation, or in arbitration, where they want to settle, and need some help, they can get a conciliator/mediator.

A. *Conciliation*

1. Definition

Conciliation is a system in which a third party, designated by the litigants, attempts to reconcile the disputant parties either before they resort to litigation or arbitration, or after. The attempt to conciliate is generally based upon showing each side the contrary aspects of the dispute, in order to bring the sides together and to reach a solution, generally found between the two parties' positions. The conciliation process may take many forms and in some legal systems they are presented in a modern fashion.

What is the difference between conciliation and mediation is that often, the terms are used interchangeably, however there is a difference. A conciliator listens to the parties, hears their different positions, and then sets forth a proposed settlement agreement, representing what he believes to be a fair compromise of the dispute. If the proposal does not resolve the dispute, the conciliator may offer another proposal. Although a mediator try to get the parties to come up with a settlement agreement themselves, they may also, at the parties' request, make a specific proposal, similar to what a conciliator would do.

2. Application of Conciliation

Conciliation, given its importance, is mentioned in the most recent arbitration conventions. The Washington Convention 1965 provides that a conciliation committee should be set up, at the request of a contracting state, or of a subject of a contracting state, and rules its procedure.[12] Conciliation is also mentioned in the international arbitration rules of the American Arbitration Association and is governed as to domestic commercial arbitration by the Commercial Mediation Rules.[13] Reference to conciliation is found in the international arbitration rules of the Milan Chamber of Arbitration,[14] and in the Inter-American Commercial Arbitration Commission ('IACAC').[15] No reference is made to it in the 1999 arbitration rules of the Institute of Arbitration of the Stockholm Chamber of Commerce, yet the Stockholm Chamber of Commerce has set up Mediation Institute of the Stockholm Chamber of Commerce, which has published its own set of rules. Conciliation is given much coverage by the rules of the Euro-Arab Chambers of Commerce.[16]

B. *Mediation*

1. Introduction

Mediation is a form of third-party intervention that has the consent of the parties to a dispute. A mediator's function is to provide a solution to a dispute in the hope that the parties will accept it. The mediator is to be a neutral person with knowledge and expertise in the subject-matter of the dispute.[17]

A mediator will en sure each party understands the other's point of view, will meet with each party privately and listen to their respective viewpoints, stress common interests, and try to help them reach a settlement. Mediation is confidential. There is usually a provision in the chosen rules that no disclosure made during the mediation may be used at the next level of the dispute, whether arbitration or litigation. If the rules do not provide for this, then there should be an agreement in writing to the effect that anything disclosed in the mediation process may not be used at the next level, except to the extent that it comes in through documents not created for the mediation.

Mediation may occur at any time in the dispute. If parties get to a point in litigation or in arbitration where they wish to settle and require help, they may engage a mediator. Mediators are also sometimes used in the negotiation stage of a contract, when negotiations have reached an impasse yet both parties actually want the deal to proceed.

[12] Convention for the Settlement of Disputes Concerning Investments between States and Nationals of Other States, Washington 18 March 1965.

[13] Rule 10 of the AAA International Arbitration Rules.

[14] The International Rules of the Milan National and International Chamber of Arbitration (the Milan Chamber devote the whole of their Title I to this issue - Conciliation Proceedings), Articles 12-17.

[15] *See* an overview at: http://www.sice.oas.org/dispute/comarb/iacac/iacac1e.asp

[16] Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce, Paris, 1983, Articles 12-18.

[17] Charles Chatterjee and Anna Lefcovitch, *Alternative Dispute Resolution: A Practical Guide* (2008), at 20.

Because mediators try to understand and reconcile the interests of the parties, mediation is referred to as an 'interest-based' procedure, while arbitration is referred to as a 'rights-based' procedure.

2. Application of Mediation

Normally, the initiation of mediation is the most difficult task to achieve, as at this stage the relationship between the parties is already acrimonious. At this stage even a third party's intervention to initiate a friendly settlement proves to be difficult. Nevertheless, a neutral third party may be required to put forward suggestions to the other side without giving the impression that the party on whose initiation mediation began has any weakness. The legal issue remains that, in the event of a party's refusing to participate in ADR for settling its disputes, a breach of contractual obligation would not arise, on the ground that ADR is not specified in the contract. There are four different ways to initiate mediation: party to party, lawyer to lawyer, third party's persuasion, and a party's prerogative to approach mediation. Where a dispute is already in litigation, involves large claims or entails complex legal issues, the parties may engage solicitors and barristers for their participation in the mediation process. In such a situation, the mediation becomes a law-orientated one and may be subordinated by their lawyers' role and the lawyers might express their ideas in complex legal jargon that would be beyond the comprehension of the parties. In fact, where legal representation is allowed, a mediator is often required to remind them of their remit in order to ensure that a forum suitable for court proceedings may not be created.[18] It is essential for the mediator to determine at what point legal representatives might be allowed to make their presentation (not be abused but necessary to make a clear point).

3. Advantages of Mediation

Mediation is a far more flexible process in comparison with litigation therefore parties may alter their postures without 'losing face'. The aftermath of a successful mediation is generally cordial, since both parties have been made a winner. Dissimilarly to a court case, there are fewer causes for animosity between the parties. This feature of mediation is particularly important if the parties either must have or desire to have ongoing dealings, as is frequently true in labour, business, or family disputes.[19]

[18] Charles Chatterjee and Anna Lefcovitch, *supra,*at 70.

[19] Sam Kagel and Kathy Kelly, *The Anatomy of Mediation: What Makes It Work* (1989), at 192.

Mediation, as a form of alternative dispute resolution, 'is premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved'.[20] Mediation is unique, as it is non-binding, and the mediator is present to facilitate communication and negotiation between the parties, and not to impose a settlement on them.[21]

4. Disadvantages of Mediation

Mediation should not be applied in cases where dispute is centred more on law than on fact,[22] or if one or both parties will not participate in 'good faith'.[23] If the dispute is based on a contract, the parties must be mindful of the limitation period. Under simple contracts, the limitation period operates for six years from the date of the occurrence of the breach of contract. If the contract is under seal the limitation period is 12 years. It would not be advantageous to commence a mediation process just about the time when the limitation period is running out. There is inequality of bargaining position between the parties. This does not necessarily manifest itself in their respective sizes, although size may often be a crucial factor.

C. *Differentiating Conciliation and Mediation*

Often, the terms conciliation and mediation are used interchangeably although there is a difference. A conciliator listens to the two parties, hears their different positions, and then sets forth a proposed settlement agreement, representing what s/he believes to be a fair compromise of the dispute. If the proposal fails to resolve the dispute, the conciliator may offer another proposal.

[20] Maureen A. Weston, 'Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good- Faith Participation, Autonomy, and Confidentiality', 76 *IND. L.J.* 591, 592, (2001).

[21] Maureen A. Weston, *supra,*at 598.

[22] Where a dispute relates to the interpretation of a term of a contract, a breach of which would necessarily entail allowing legal remedies, and where a dispute relates to the interpretation of a statute or legislation, alternative dispute resolution should not be activated because it is a matter that must be resolved by judicial means; *See* Charles Chatterjee and Anna Lefcovitch, *supra*, at 11.

[23] *For example*, either one or the other, or even both, party is happy to exaggerate or even lie to a mediator and has no real commitment to resolving the dispute; one of the parties wishes to prolong mediation for as long as possible.

Mediators try to encourage the parties to suggest a settlement agreement themselves, and may also, at the parties' request, make a specific proposal, similarly to conciliators.

In another explanation, conciliation differs from mediation in the way Lord Donaldson stated:

> In conciliation proceedings, the neutral party listens to the complaints of the disputants and seeks to narrow the field of controversy. The Chinese word for a conciliator is said to be 'a go between who wears out 1,000 sandals' while the mediator performs the functions of a conciliator but also express his view on what would constitute a sensible settlement.[24]

Lord Wilberforce, himself a Law Lord, has expressed a view along the same lines:

> The difference between the two methods of settling disputes would thus be that the purpose of a conciliator would be to induce the parties themselves to realize what benefits they might obtain from settling the matter out of court in whichever way they deem most convenient. Mediation, on the other end, would have the more concrete aim of advising each litigant to waive part of his claim in order to reach a settlement through an '*aliquid datum*' and an 'aliquid retentum' (giving a part of a claim in exchange for receiving the rest of it).[25]

This distinction is perhaps theoretically accurate, but somewhat artificial. If a real distinction between these two systems must be drawn, it is submitted that it lies in the granting of the authority to the third party to issue in the end of binding settlement.

3. International Commercial Arbitration

A. *Why Arbitrate?*

Arbitration is a private system of adjudication. Parties who arbitrate have decided to resolve their disputes outside any judicial system. In most instances, arbitration involves a final and binding decision, producing an award that enforceable in a national court. The decision-makers (the arbitrators), are generally chosen by the parties. Parties also decide whether the arbitration will be administered by an international arbitral institution, or will be ad hoc, which means no institution is involved.

Dispute resolution in international business transactions runs the gamut from friendly consultations to litigation everywhere. Non-binding conciliation and mediation do their best at facilitating a compromise, an approach common to Asia. In between also lies international commercial arbitration (hereinafter the 'ICA'). The volume of ICA has grown enormously in recent decades, particularly in North America, Western Europe, the Middle East and East Asia. ICA is, therefore, the focus of this Chapter. Parties to an international contract may include a jurisdiction clause in the contract.

The growth of ICA is in part a retreat from the vicissitudes and uncertainties of international business litigation. More positively, ICA offers predictability and neutrality as a forum (irrespective of where the court resides) and the potential for specialized expertise (many national judges know little of international commercial law). ICA also allows parties to select and shape the procedures and costs of dispute resolution. Clearly, ICA has its pros and cons. Necessity has shown how the use of arbitral dispute resolution methods is increasing.

One of the most attractive attributes of ICA is its enforceability in national courts of arbitral awards under the New York Convention. As of the end of 2017, 157 nations participate in this Convention.[26] There is no comparable convention for the enforcement of court judgments around the world, yet The Hague Convention on Jurisdiction and Enforcement of Judgments is being concluded.

Another major advantage of ICA is the support of even those legal regimes that give arbitration agreements negative effects. In the US, for example, the Federal Arbitration Act provides a level of legal security unknown to international business litigation. Many countries have similar statutes, thus avoiding issues of subject matters and personal jurisdiction, '*forum non conveniens*' and the like. International Arbitration has become the established method of determining international commercial disputes.[27] All over the world, states have modernized their laws of arbitration to take account of this fact. New arbitral centres have

[24] Donaldson, 'Alternative Disputes Resolutions', (1992), at 58, *JCI Arb*. 2, at 102.

[25] Donaldson, *supra*, at 104.

[26] UNCITRAL Website.

[27] Alan Redfern *et al.*, *Law and Practice of International Commercial Arbitration*, Thomson, Sweet and Maxwell, 4th edn., (2004).

been established and the rapidly evolving in dispute settlement. Law and practice of ICA is a subject for study in universities and law schools.

ICA is a private method of dispute resolution, chosen by the parties themselves as a way of putting an end to disputes between them, without recourse to the courts of law. It is conducted in different countries and against different legal and cultural backgrounds, with a striking lack of formality. ICA gives the parties substantial autonomy and control over the process that will be used to resolve their own disputes. Parties decide whether the arbitration will be administered by an international arbitral institution, or will be '*ad hoc*' which means no institution is involved. The rules that apply are the rules of the arbitral institution, or other rules chosen by the parties. In addition to choosing the arbitrators and the rules, parties may choose the place and the language of the arbitration. This is particularly important in the international commercial disputes, because parties do not want to be subject to the jurisdiction of the other party's court system. Each party fears the other party's 'home court advantage'. Arbitration offers a more neutral forum, where each side believes it will have a fair hearing. Moreover, the flexibility of being able to tailor the dispute resolution process to the needs of the parties, and the opportunity to select arbitrators who are knowledgeable in the subject matter of the dispute, make arbitration particularly attractive. Today, ICA has become the dominant dispute resolution method in most international business transaction.

An arbitral award is generally easier to enforce internationally than a national court judgment, because under the New York Convention, courts are required to enforce an award unless there are serious procedural irregularities, or problems that go to the integrity of the process. The New York Convention is considered to have a pro-enforcement bias, and most courts will interpret the permissible grounds for non-enforcement quite narrowly, leading to the enforcement of the vast majority of awards.

Other advantages include the ability to keep confidential the procedure and the resulting award. Confidentiality is provided in some institutional rules, and may be expanded (to cover witnesses and experts, for example) by the parties' agreement to require those individuals to be bound by a confidentiality agreement. Many companies prefer confidential procedures because they do not wish information disclosed about their company and its business operations, nor the kinds of disputes it is engaged in, nor do they want a potentially negative outcome of a dispute to be public.

Parties prefer to be able to choose arbitrators with particular subject matter expertise. There are fewer discoveries in arbitration, thereby generally resulting in a shorter process than in a full-scale litigation. The lack of opportunity for multiple appeals of the decision on the merits is also an attractive aspect. For business people, there is great value in finishing a dispute so they can get on with their business.

Some Western European countries long have been accustomed to arbitration (e.g., *see* English Arbitration Act 1889 and English Arbitration Act 1950, as amended by Arbitration Act 1979); the London Court of Arbitration, a private arbitration institution, has existed since 1892. Arbitration in international commercial contracts is favoured by China, either through the Chinese International Economic and Trade Arbitration Commission (hereinafter the 'CIETAC') or the Chinese Maritime Arbitration Commission ('MAC'). In terms of volume, CIETAC is now the world's largest arbitration centre. The Japan Commercial Arbitration Commission has been active since 1953. Virtually all countries in Latin Americas, Asia and Africa have arbitration statues and international commercial arbitration centres or courts.

B. *Disadvantages of Arbitration*

To an extent, some of the disadvantages of arbitration are the same as the advantages, only viewed from the opposite perspective. For example, having fewer discoveries may be generally viewed as an advantage. Certain kinds of disputes typically involving extensive discovery, such as antitrust disputes, are increasingly arbitrated. These disputes often require the aggrieved party to prove a violation, which it is able to achieve only if it has sufficient access to documents under the control of the offending party. Fewer discoveries in this kind of case mean less of a chance for a claimant to meet its burden of proof.

Moreover, the lack of any right of appeal may be beneficial in terms of ending the dispute. If an arbitrator has rendered a decision that is clearly wrong in the law or on the facts, the lack of an ability to bring an appeal may be frustrating to a party. Another disadvantage is that arbitrators have no coercive powers - that is, they do not have the power

to force an action by threatening a penalty. A court, *for example*, may impose a fine for contempt if a court order is not followed. Arbitrators may not impose penalties, although they may draw adverse inferences if a party fails to comply with an order of the tribunal. However, with respect to non-parties, arbitrators have no power. Thus, it may be necessary at times for the parties or the tribunal to seek court assistance (*for example*, interim measures[28]), when coercive powers are necessary to ensure compliance with the orders of the tribunal.

In multiparty disputes, an arbitral tribunal frequently does not have the power to require the presence of all relevant parties, even though all may be involved in some aspect of the same dispute. Because the tribunal's power derives from the consent of the parties, if a party has not agreed to arbitrate, usually it may not be included in the arbitration. A tribunal has no rights to consolidate similar claims of different parties, even if this would be more efficient for all concerned to do so.

Finally, it could be viewed as a disadvantage that the pool of experienced international arbitrators lacks both gender and ethnic diversity. Although some institutions and a few individual members of this group made efforts to broaden that pool, on the whole there has been little change.

C. *Types of International Commercial Arbitration*

There are two types of ICA: institutional and '*ad hoc*'. '*Ad hoc*' arbitrations involve selection by the parties of the arbitrators and rules governing the arbitration. The classic formula involves each side choosing one arbitrator who in turn chooses a third arbitrator. The '*ad hoc*' arbitration panel selects its procedural rules (such as UNCITRAL Arbitration Rules). '*Ad hoc*' arbitration may be agreed upon in advance or, quite literally, selected as disputes arise. '*Ad hoc*' arbitration presupposes a certain amount of goodwill and flexibility between parties. It may be faster and less costly than institutional arbitration.

One of the choices parties must make when they decide to arbitrate is whether they want their arbitration to be administered by an arbitral institution, or *ad hoc* arbitration.[29] There are advantages and disadvantages for each choice. With institutional arbitration, the advantages are that the institution performs important administrative functions. It makes sure the arbitrators are appointed in a timely way, that the arbitration moves along in a reasonable manner, and that fees and expenses are paid in advance. From the arbitrators' point of view, it is an advantage not to have to deal with the parties about fees, because that subject is handled by the arbitral institution. Moreover, the arbitration rules of the institution are time-tested and are usually quite effective to deal with most situations that arise. Another advantage is that an award rendered under the auspices of a well-known institution may have more credibility in the international community and the courts. This may encourage the losing party not to challenge an award.

With an *ad hoc* arbitration, there is no administered institution. One advantage, therefore, is that the parties are not paying the fees and expenses of the administering institution. The parties also have more opportunity to craft a procedure that is very carefully tailored to the particular kind of dispute. They may draft their own rules, or they may choose to use the UNCITRAL Arbitration Rules, which are frequently used in ad hoc arbitration. (UNCITRAL itself does not administer arbitrations and is not an arbitral institution). *Ad hoc* arbitrations are sometimes particularly useful when one of the parties is a State, and there may be a need for more flexibility in the proceedings. It can be decided, *for example*, that neither party is the respondent, since both sides have claims against each other. Then each party will simply have the burden of proof of the claims it raises against the other party. An *ad hoc* proceeding can be disadvantageous, however, if either of the parties engages in deliberate obstruction of the process. In that situation, without an administering institution, the parties may have to seek the assistance of the court to move the arbitration forward.

Institutional arbitration involves the selection of a specific arbitration centre, accompanied by its own rules of arbitration. Institutional arbitration is professional, a quality lost in '*ad hoc*' arbitration. Awards from well-established arbitration centres (including default awards) are more likely to be favourably recognized in the court if enforcement is needed. Many institutional arbitration centres now also offer 'fast track' or 'mini' services to the international business

[28] Interim measures could be understood as 'awards' or 'orders' sought by the parties to arbitrate in order to protect their rights from damage during the course of the arbitral process; *See* Gary B. Born, *International Commercial Arbitration* (2009), at 1944.

[29] *Ad hoc* arbitration is not an option in China. See Jingzhou Tao and Clarisse von Wunschheim, 'Article 16 and 18 of the PRC Arbitration Law - The Great Wall of China for Foreign Arbitration Institutions', *23 Arb. Int.* 309, 324 (2007).

community. One of the choices parties must make when they decide to arbitrate is whether they prefer their arbitration to be administered by an arbitral institution, or to be '*ad hoc*'.[30]

1. Institutional Arbitration Institutions

The advantages are that the institution performs important administrative functions. It ensures that the arbitrators are appointed in a timely way; that the arbitration moves along in a reasonable manner, and fees and expenses are paid in advance. From the arbitrator's point of view, it is an advantage not to have to deal with the parties about fees, which are handled by the arbitral institution. Moreover, the arbitration rules of the institution are time-tested and are usually quite effective to deal with most situations that arise. Another advantage is that an award rendered under the auspices of a well-known institution may have greater credibility in the international community and the courts. This may encourage the losing party not to challenge an award.

(a) The International Chamber of Commerce (ICC) Court of Arbitration

The ICC International Court of Arbitration is one of the better-known and most prestigious arbitral institutions. It is neither an actual court nor a part of any judicial system. Rather, the Court is the administrative body responsible for overseeing the arbitration process. Its members consist of legal professionals from all over the world. In addition, the ICC has a Secretariat, members of a permanent, professional, administrative staff. The ICC is different from other arbitral institutions is that every ICC arbitral award is scrutinized by the Court of Arbitration, meaning that the award is not provided to the parties until it has been reviewed by the Court.

A few features distinguishing the ICC as an arbitral institution. *Firstly*, every ICC arbitral award is scrutinized by the Court of Arbitration, meaning award is not provided to the parties until it has been reviewed by the Court. While the Court does not have the power to change the award, if it finds anything amiss, it sends the award back to the arbitrators with its comments. *Secondly*, another requirement of the ICC is that at the outset of the arbitration, the parties are asked to complete and sign a document called the 'Terms of Reference' ('ToR'), which lists all the issues in the dispute, all the parties, the place of arbitration, the rules, and sometimes other information pertaining to discovery or scheduling. This ensures that everyone know at the beginning of the process what the parameters of the arbitration will be. In addition, practitioners before the ICC like the fact that actual case administrators, who are part of the Secretariat staff, are lawyers. Although the seat of the ICC International Court of Arbitration is in Paris, it administers arbitrations all over the world.

(b) The American Arbitration Association's ('AAA'), International Centre for Dispute Resolution ('ICDR')

The ICDR has greatly expanded the number of arbitrations it handles yearly. The number of international arbitration cases filed with the AAA or the ICDR in the ten years between 1993 and 2003 has more than tripled, from 206 to 646. Moreover, the ICDR has opened offices in other countries.

(c) The London Court of International Arbitration ('LCIA')

It is also not a court; rather, the responsible supervising body of the arbitration institution. The LCIA Court is the final authority for the proper application of the LCIA Rules. It also has the responsibility of appointing tribunals, determining challenges to arbitrators, and controlling costs. The LCIA is the oldest international arbitration institution, founded in the late nineteenth century. Its Secretariat is headed by a Registrar, and is responsible for the administration of disputes referred to the LCIA. The LCIA is headquartered in London although will administer cases and apply its rules at any location the parties choose.

(d) Other Arbitral Institutions

The Arbitration Institute of the Stockholm Chamber of Commerce ('SCC'), particularly well-known for handling East-West arbitrations; The China International Economic and Trade Arbitration Commission ('CIETAC') adopted new rules in 2005; The WIPO Arbitration and Mediation Centre (which has rules on mediation and arbitration appropriate for technology, entertainment, and other disputes involving IPRs). International arbitrations are handled by institutions in Hong Kong, Switzerland, Vienna, Cairo, Germany, Venezuela, Mexico, and other countries. In addition, there are some specialized arbitral institutions such as the Grain and Feed Trade Association ('GAFTA'), the London Maritime Arbitration Association ('LMAA'), the Federation of Oils, Seeds, and Fats Association ('FIOFA'), and the London Metal Exchange ('LME'),

[30] With a notice that '*ad hoc*' arbitration is not an option in China, *see* Jingzhou Tao and Clarisse von Wunschheim, 'Articles 16 and 18 of the PRC Arbitration Law - The Great Wall of China for Foreign Arbitration Institutions,' 23 *Arb. Int. 309* (2007), at 324.

all of which have industry-based rules and procedures for resolving the disputes of their members.[31]

2. UNCITRAL Arbitral Rules

The UNCITRAL Rules were issued in 1976 following ten years of study. The UNCITRAL Rules are intended to be accepted in all legal systems and in all parts of the world. Rapidly, DCs favour the UNCITRAL Rules because of the care with which they have been drafted, and because UNCITRAL was one forum for developing arbitration rules in which their concerns would be heard. The Arbitral Institute of the Stockholm Chamber of Commerce has been willing to work with the UNCITRAL Rules, as has the London Court of Arbitration. The Iran-US Claim Tribunals has used the UNCITRAL Rules.

UNCITRAL Rules provide, among other points, that an 'appointing authority' shall be chosen by the parties or, if they fail to agree upon that point, shall be chosen by the Secretary-General of the Permanent Court of Arbitration at The Hague (comprised of a body of persons prepared to act as arbitrators if required). The UNCITRAL Rules also cover notice requirements, representation of the parties, challenges of arbitrators, evidence, hearings, the place of arbitration, language, statements of claims and defences, pleas to the arbitrator's jurisdiction, provisional measures, remedies, experts, defaults, waivers, the form and effect of the award, applicable law, settlement, interpretation of the award, and costs.

In addition to its Model Arbitration Rules 1976, UNCITRAL has also promulgated a Model Law on International Commercial Arbitration 1985. The Model Law has been adopted in Australia, Canada, Hong Kong and Scotland. It has been adopted as state law by several states of the US, including California, Florida, North Carolina, Connecticut, Georgia, Ohio, Oregon, and Texas.

Under the UNCITRAL Model Law, submission to arbitration may be '*ad hoc*' for a particular dispute, yet is most often accomplished in advance of the dispute by a general submission clause within a contract. Under Article 8 of the Model Law, an agreement to arbitrate is specifically enforceable. UNCITRAL recommends the following model submission clause: 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as a present in force.'

[31] Margret L. Moses, *The Principles and Practice of International Commercial Arbitration,* Cambridge University Press, (2008), at 13-14.

3. ICC and LCIA Arbitral Rules and Clauses

Many arbitration clauses use the Rules of the Court of Arbitration of the International Chamber of Commerce (ICC) at Paris. The ICC recommends use of the following model clause to engage its rules:

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

Parties who wish to refer any dispute to the equally active London Court of Arbitration may use the following model clause:

> The validity, construction and performance of this contract (agreement) shall be governed by the laws of England and any disputes that may arise out of or in connection with this contract (agreement), including its validity, construction and performance, shall be determined by arbitration under the Rules of the London Court of Arbitration at the date hereof, which Rules with respect to matters not regulated by them, incorporate the UNCITRAL Rules. The parties agree that service of any notices in reference to such arbitration at their address as given in this contract (agreement) (or as subsequently varied in writing by them) shall be valid and sufficient.

D. *Enforcement of Arbitral Awards under the New York Convention*

In nearly 160 countries, the enforcement of foreign arbitral awards is facilitated by the New York Convention. The New York Convention commits the courts in each contracting state to recognize and enforce arbitration clauses and writing agreements for the resolution of international commercial disputes. Where the court finds an arbitral clause or agreement, it 'shall… [r]efer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed'. The New York Convention also commits the courts in each contracting state to recognize and enforce (under local procedural rules) the awards of foreign arbitral tribunals under such clauses or agreements, and also set forth the limited grounds under which recognition and enforcement may be refused. Under the New York Convention, grounds for refusal to enforce include:

- Incapacity or invalidity of the agreement containing the arbitration clause 'under the law applicable to' a party to the agreement;
- lack of proper notice of the arbitration proceedings, the appointment of the arbitrator or other reasons denying an adequate opportunity to present a defense;
- failure of the arbitral award to restrict itself to the terms of the submission to arbitration, or decision of matters not within the scope of that submission;
- composition of the arbitral tribunal not according to the arbitration agreement or applicable law; and
- non-finality of the arbitral award under applicable law.

In addition to these grounds for refusal, recognition or enforcement may also be refused if it would be contrary to the public policy of the country in which enforcement is sought; or if the subject matter of the dispute cannot be settled by arbitration under the law of that country. Courts in the US have taken the position that the 'public policy limitation on the New York Convention is to be construed narrowly [and] to be applied only where enforcement would violate the forum state's most basic notion of morality and justice'. Recourse to other limitations of the Convention, in order to defeat its applicability, has been greeted with judicial caution in the absence of violation of basic US notions of morality and justice. Whether the New York Convention applies generally turns upon where the award was or will be made, not the nationality of the parties.

Arbitration agreements, traditionally called compromises, come in a variety of forms. Many arbitration centres sponsor model clauses that may be incorporated into business agreements. The existence and validity of an arbitration agreement must be proved, and may be litigated before arbitration takes place. Article II of the New York Convention requires states to recognize written arbitration agreements signed by the parties 'or contained in an exchange of letters or telegrams'. In most jurisdictions, exchanges of fax, email or the like embracing arbitration will be recognized. However, arbitration clauses in unsigned purchase orders do not amount to a written agreement to arbitrate. Delay in triggering arbitration or invocation of litigation rights may constitute a waiver of arbitration rights.

When arbitral awards are null, courts in enforcing jurisdictions have taken different positions on the enforceability of the award. French courts enforced an improperly vacated award to the detriment of the claimant who had prevailed in a second arbitration (*Hilmarton v. OTV*, [1997] Rev. Arb. 376). An US federal court refused to honour the clearly legitimate annulment of an arbitral award by an Egyptian court because the parties had agreed not to appeal the award (*Chromalloy Aeroservices v. Egypt*, 939 F. Supp. 907 (DDC [1996]). The US Supreme Court has repeatedly affirmed that arbitrators have jurisdiction to decide their own jurisdiction. Silence or ambiguity should favour judicial review of issues of whether arbitration may be relevant. US courts are split on whether contract parties may alter the scope of judicial review of arbitration awards.[32]

4. International Commercial Litigation

A. *Introduction*

Arbitration is commonly used for commercial contracts. Trade agreements have developed unique processes for dispute resolution especially the dispute panel process, often combining elements of litigation and arbitration. But many international commercial disputes are handled by traditional litigation.

Compared to negotiation, mediation and even arbitration, litigation is a highly structured and formalized dispute resolution process. Well-established rules and procedures address nearly every detail of the process from the time a lawsuit is initiated to final appeal and enforcement of the outcome. This has the advantage of making the procedural aspects of the case reasonably predictable. The parties are aware of the basic stages of the process, the steps within them, and related deadlines at the time a lawsuit is filed, or soon thereafter.

Litigation's great emphasis on procedure, its strict adherence to formal rules of evidence, the opportunity to appeal an unfavourable outcome, and other features also make many lawsuits long and cumbersome. Advocates of alternatives to litigation frequently claim that litigation takes longer and is more expensive than other dispute resolution processes. However, arbitration that may be nearly as

[32] *See Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F. 3d 987 (9th Cir. [2003]).

structured and formalized as litigation is not always speedier or cheaper.[33] Some disputants actually prefer a costly, time-consuming process, because they have greater financial resources or less need of a quick resolution, or both.

Precisely because the litigation process is so laden with intricate rules, litigants are often tempted to engage in tactical gamesmanship to delay the process, force their adversaries to incur unnecessary costs, or gain other advantages unrelated to the merits of the case. A judge may impose penalties on a party that abuses the process, but courts are overburdened and unable to police all questionable behaviour.[34]

B. *Advantages of Litigation*

One of the advantages of litigation is that disputants who do not want to negotiate or otherwise cooperate with one another during the proceeding need not do so. An independent tribunal will consider the dispute and render a decision that is legally binding upon the parties, even if one or more of the parties is uncooperative. When one party is unwilling to deal with other parties, litigation ensures that some opportunity for redress of legally recognized claims will be available. Of course, parties who submit their dispute to a court for resolution may be disappointed by the outcome.

Decisions regarding key aspects of the process also are left to the judge. The court may compel one party to disclose information it would rather not produce, establish inconvenient dates for pre-trial hearings and the trial itself, and impose other burdens to which one or more of the parties objects. Once again, one of the benefits of involving a third party with the power to make decisions that are binding on the disputants is that the process progresses even when the disputants are unable or unwilling to cooperate. Each party has the potential to make the others bend to its will, provided one party can persuade the court to embrace its own perspective on a disputed procedural issue. In contrast, one party's opponent may persuade the court to impose requirements of which the other party disapproves.

One of the clear advantages of litigation is the ability to compel others to respond to one's grievances. Dissimilarly to mediation, arbitration and other common dispute resolution processes, litigation proceeds whether or not all participants consent to their involvement. Parties who otherwise would be content to ignore the claims against them must defend themselves or suffer the consequences of failing to do so. Litigation thus ensures that some resolution of a dispute will occur, provided the plaintiff's claims are recognized by law and the litigation is filed in the right court. The initial defendant may convince the court that another party is potentially liable, or a non-party may convince the court that it has a critical stake in the outcome and therefore must be included in the litigation. Separate lawsuits arising out of the same incident or failed transaction may be consolidated to conserve judicial resources and eliminate the possibility of inconsistent decisions. When these occur, these instructions in a lawsuit may or may not have a negative effect; however, they will affect one party's case. Nonetheless, the existing participants in other dispute resolution processes generally retain greater control over the admission of new participants, and many disputants and their lawyers view this as an attractive feature of alternatives to litigation.

Because litigation is highly formalized and the law applicable to a case may be technical, thus difficult for a non-lawyer to research and interpret, litigants typically hire lawyers to serve as their agents during the process. Examples of lawyers complicating lawsuits and other matters are legion, although they may simply increase the likelihood that the process will unfold as it should, with the right issues and claims being presented and addressed according to established procedure and protocols. The rule of discovery, which courts will enforce against parties who do not voluntarily comply with them, ensure that a great deal of legally relevant information about the dispute will be exchanged among the parties. Information that would be useful to a party in advocating its perspective, and which is in the possession of another party, may or may not be obtainable in any other dispute resolution process. Even in arbitration proceedings in which discovery is permitted, discovery may have been limited in an arbitration provision to which the parties bound themselves before the dispute arose or by the rules of the organization providing arbitration services.

Many of the characteristics of litigation already discussed make it a rather impersonal process for the litigants and arguably increase the odds that the dispute will escalate before it is resolved. Litigation as a social institution is sometimes referred to as the 'adversary system', and

[33] *See* Public Citizen, *The Costs of Arbitration*, http://www.oubliccitizen.org/publications/release. cfm?ID=7173

[34] *See Chambers v. NASCO, Inc,* 501 U.S. 32 [1991], at 44.

its structure and many of its procedures do indeed tend to encourage competitive, rather than cooperative, behaviour. In the pretrial phases of litigation, the parties and their lawyers communicate primarily through documents that are filed with the court and delivered to one another by mail. Through these documents, often burdensome and expensive fact-finding activities designed to strengthen one party's own claims and weaken the other's. Most lawsuits are analogous to debates, in which interlocutors listen to one another primarily to gather fodder for attacking the other's positions. When disputants are deeply estranged from one another or have no expectation of further interaction apart from the lawsuit, they may appreciate the fact that litigation largely spares them from having to deal with each other. Yet, when the parties expect an ongoing relationship or cooperation, they miss an important opportunity to begin to reorient their relationship in constructive ways, because they use litigation as a means of avoiding one another. Even when the parties anticipate no ongoing relationship after the dispute is resolved, however, the discomfort of continuing to litigate may outweigh the relatively fleeting discomfort of having to deal with other disputant in the context of a negotiation or mediation process that may produce a resolution of the dispute more quickly.

The relative openness of litigation is an advantage to parties seeking public awareness of their claims and perspectives. However, one or more of the parties may prefer to resolve the case more discreetly, especially in commercial disputes.

C. *Jurisdiction of A Court*

1. Definition of Jurisdiction of A Court

The jurisdiction of a court may be viewed in various ways. Many aspects of judicial jurisdiction are purely domestic (internal). What is often called 'subject-matter jurisdiction' is an example. It deals with the question as to whether a court has jurisdiction with regard to a particular subject. Specialized courts are sometimes set up with jurisdiction over certain subjects only, *e.g*. they have no jurisdiction to decide other matters. For example, a specialized tax court may not grant a divorce. In the US, 'subject-matter jurisdiction' has a different meaning. It is concerned with the question whether the federal courts can hear a particular case or whether it has to be brought in the state courts.

2. Types of Jurisdictions: 'in personam' or 'in rem'

International judicial jurisdiction may be analyzed on the basis of the effect that the judgment is intended to have. Here, the most common division is between jurisdiction '*in personam*' and jurisdiction 'in rem'. There are also certain other proceedings - *for example*, divorce or custody proceedings - that do not fit into either category, thus will not be addressed.

(a) Jurisdiction 'in personam'

Few areas of the US law or English law are as difficult to explain to jurists from civil law jurisdictions as personal jurisdiction. The history of personal jurisdiction in the US involves difficult and complex notions of 'minimum contacts' and constitutional 'due process'. Where a suit is initiated in the US and the defendant believes a 'forum conveniens' motion will prevail, possible defects in jurisdiction are overlooked, or deferred pending the resolution of the 'forum non conveniens' motion (*see* more detailed below). The reason may be that predicting answers to questions of jurisdiction is less certain than predicting answers to 'forum non conveniens'. 'Minimum contacts' were held necessary to meet constitutional 'due process' requirements under the XIV Amendment. If the 'minimum contacts' test is satisfied, the court next considers reasonableness, *i.e*., whether exercising jurisdiction meets notions of fair play and substantial justice?

Jurisdiction '*in personam*' (over the person), or personal jurisdiction as it is sometimes known, leads to a judgment '*in personam*'. A claim '*in personam*' is one in which the claimant seeks a judgment requiring the defendant to pay money, deliver property, do, or refrain from doing, some other act. A judgment 'in personam' is a judgment that binds only a specific person (or several specific persons), and requires that person to do or not to do something (usually to pay money). This is the most common form of judgment.

In England, there are three main regimes governing the '*in personam*' jurisdiction of the English court. The *firstly*, which has a European origin, is the Brussels I Regulation (derived from the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters). The *second* regime is a modified version of the European jurisdiction rules, which in certain circumstances allocate jurisdiction within the UK. *Thirdly*, there are traditional rules that apply in

cases not regulated by the European rules and/or the modified version, which allocates jurisdiction within the UK.

At common law, the basis of the English court's jurisdiction in claims '*in personam*' is that the defendant is amenable to the court's jurisdiction, in the sense that the claim form commencing the proceedings may be served on him/her (whether in England or abroad). If the defendant is present in England, process may be served on him/her in England. If the defendant is not present in England at the commencement of the proceedings, but s/he has submitted to being sued in England, the English court has jurisdiction. If the defendant cannot be served with process in England, and does not submit to the jurisdiction, then the court may have the power under Rule 6.20 of the Civil Procedure Rules (hereinafter the 'CPR Rule 6.20') to assume jurisdiction by giving permission for process to be served on the defendant outside of the jurisdiction. This power arises where, notwithstanding the fact that the defendant is foreign, the events or subject matter of the dispute are connected with England. The court will not give permission unless satisfied that England is 'the proper place in which to bring the claim'. In *Seaconsar Far East Ltd v. Bank Markazi Jomhouri Islami Iran*, the House of Lords confirmed that there are three issues to be considered: *firstly*, the claimant must show that there is a serious issue to be tried; *secondly*, the claimant must show that his claim falls within one of the paragraphs of CPR Rule 6.20; and *thirdly*, the court must also be satisfied that England is the 'forum conveniens', that is, the forum in which the case may most suitably be tried in the interests of the parties and the ends of justice.

(b) Jurisdiction 'in rem'

Jurisdiction '*in rem*' (over property) leads to a judgment '*in rem*'. This is binding on everyone in the world, although only to the extent that they have an interest in the property with regard to which the action is brought. In English law, actions '*in rem*' are directed against property, usually a ship. It is not uncommon for the ship to be referred to as the defendant in a claim '*in rem*', while the reality is that the claim is brought against the owner of the ship.[35] A typical case is where the claimant has a claim against a ship-owner in respect of his ship, *for example*, where the claimant's cargo has been damaged as a result of the negligent navigation of the vessel. Proceedings '*in rem*' are commenced by process being affixed to the mast or any suitable part of the superstructure of the ship. The claimant will normally also seek to arrest the ship so that it

[35] *Republic of India v. India Steamship Co* (N2) [1998] AC 878.

may be sold to meet any judgment granted to the claimant. Such cases may be brought only for a limited number of claims - *for example*, claims by cargo owners for damage to the cargo, claims by seamen for their wages, and claims by persons who have repaired the ship for the cost of the repairs. Where action is '*in rem*' only, it can be enforced only against the '*res*' (the ship) - by seizing and selling it by order of court. It cannot, therefore, be enforced for more than the value of the *res*. In proceedings that proceed solely '*in rem*', the claimant is confined to the proceeds of sale of the ship for the satisfaction of his judgment, but where a claim proceeds both '*in rem*' and '*in personam*', the claimant is not so limited.

D. *Service of Process*

Service of process abroad is effectively regulated by The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965. Service under The Hague Convention is available in some 40 countries. Service is made upon a 'central authority' in the foreign nation, which subsequently transmits the documents to the proper location. There is some limited authority to send documents by mail, but whether sending constitutes service is debated. Service that does not comply with an applicable convention will almost certainly cause any judgment to be rejected if there is an attempt to enforce it abroad. The German Government made it very clear in the *Schlunk* case that, unless service was made under The Hague Convention, German courts would not enforce a judgment.

E. *'Forum non conveniens'*

The 'forum non conveniens' doctrine is a creature of equity. It allows a court to dismiss a case that it believes is better brought in another forum. Not all nations recognize the doctrine, but some reach a similar conclusion under other titles. The US doctrine has origin in *Gulf Oil Corp. v. Gilbert*, a case involving two US forums. In this case, the Supreme Court allowed courts to decline to exercise jurisdiction where public and private factors favoured another forum.

'Forum non conveniens' motions are presented by defendants as part of litigation strategy. If they are successful, the case is sometimes moved to a forum distant from where the case 'dies'. The 'death' is because US attorneys no longer have visions of large punitive damages

judgements. Indeed, they may have little involvement as attorneys in the foreign forum.

One problem for defendant in obtaining a successful 'forum non conveniens' ruling is that control over the case may be diminished or lost. If the case is moved abroad, the attorneys will not be able to appear before the foreign court, and foreign counsel must be hired. The defendant will have to learn about the foreign law and legal system. The better choice for the defendant may be to keep the matter in the US court and, at the same time, to seek the application of foreign law. Many such cases merit the application of foreign law, and when a court so rules the difficulty of proving foreign law may be an impossible burden for the plaintiff. The law is a product of equity and, as is equity, it is somewhat amorphous and difficult to foresee.

Section Three. CHOICE OF LAWS AND JURISDICTIONS FOR THE DISPUTE SETTLEMENT

1. Arbitration

A. The Choice of Venue and Its Effects

The venue is the place where the arbitral proceedings are to be held, and in this respect may be compared to the seat of a court of law. In arbitration, the role of venue is more important. In court proceedings the place where the judge actually signs his/her judgment is not a matter, since that will be treated as a judgment of that court, independently of the place the judgment is actually signed. In contrast, in arbitral proceedings, the choice of the venue of the arbitral proceedings produces effects in various respects. *Firstly*, the mandatory provisions of the 'lex fori' shall apply. *Secondly*, in some jurisdictions, the arbitrators as well as state courts will apply to the proceedings the national substantive law of the forum. *Thirdly*, the venue may influence the validity of the arbitration agreement. The choice of a given venue may, depending on the chosen state, allow national state courts to interfere with the arbitral proceedings or prevent them from so doing. Also it may or may not allow national state courts to intervene in assistance to the proceedings. *Fourthly*, the choice of a given venue may favour one of the parties from the point of view of the distance, the costs to be met,[36] and the need to

[36] *For example*, in order to transfer the parties, counsel and witnesses.

instruct local counsel. If so, one of the parties may find itself in a better position than the other; the choice made may affect the possibility for a party to defend its case easily,[37] or to ensure that its witnesses attend the hearings.[38] Recognition of the award in the countries where the parties reside may depend on the place of arbitration. An example of this is the *Keban*[39] arbitration.

There are other effects of the choice of the place of arbitration. Its being chosen by the designating authority, in the absence of a choice by the parties, has a good chance of influencing the choice of the procedural law. Even if it does not, the applicable procedural rules must comply with the procedural public policy of that particular state.[40] For all of these reasons the place of arbitration is an element of the greatest importance in arbitral proceedings and its choice deserves particular attention.

B. *The Choice of Laws*

1. The Law Governing An Arbitration Agreement

Arbitration is a consensual process; it depends on there being a legally binding agreement between the parties. Arbitration agreements are excluded from the material scope of the Rome Convention on the Law Applicable to Contractual Obligations (Article 1(2)(d)). Accordingly, the validity and construction of an arbitration agreement are governed by its 'proper law', as determined by general principles of law. It follows that the 'proper law' of the arbitration agreement may be different from the law governing the substantive dispute between the parties. If the contract contains an express choice of law, the chosen law governs the arbitration clause. If the contract does not include an express choice of law, the law governing the contract (and the arbitration agreement) is normally

[37] This is one of the sources of the 'forum non conveniens' defence.

[38] It is sufficient to imagine proceedings taking place in some Arab countries and the consequent impossibility or difficulty of having witnesses of Israeli nationality attending them.

[39] The arbitral proceedings between Italian and French contractors and the general management of the Turkish Ministry of Public Works took place in Switzerland, which had not entered into any convention with Turkey for the recognition of awards. When the contractors, who had won the dispute, tried to enforce the award in Turkey, the award was not recognized on this as well as on other grounds. *See Compagnie de Constructions Internationales, Compagnie Française d'Entreprise et Société Impregilo v. DSI, Court of Cassation* (Turkey), Decree No 76/1052, March 10 (1976), Arbitration, Vol. 46, No 4, December 1980, at 241.

[40] It has been pointed out that the '*lex loci arbitri*' not only regulates domestic arbitral proceedings; it also provides references for the conduct of the arbitrator.

implied from the seat of arbitration. Thus, if the parties agree to arbitrate their disputes in England yet do not make an express choice of the law governing the contract, the 'proper law' of the arbitration agreement is normally English law.[41] If the parties fail to make an express choice of law and do not designate the seat of arbitration (from which a choice of law may be inferred), the 'proper law' of the arbitration agreement is, according to general principles of law, the law of the country with which it is most closely connected. Only in exceptional circumstances will this be different from the law governing the substantive contract.[42]

In the context of proceedings for enforcement of an award under the New York Convention, it is possible for the award to be challenged on the basis that the arbitration agreement is invalid (*see* Article V(2)(a)).

2. The Law Governing Arbitration Proceedings

The '*lex arbitri*', which governs the arbitral proceedings, is almost always the law of the place of arbitration. The '*lex arbitri*' is mostly a procedural law, with certain substantive elements. The line between substance and procedure is not always clear, and is not always viewed the same way in different countries. What is important to understand is the type of issues governed by the '*lex arbitri*', how this law interacts with the rules chosen by the parties, and with substantive law governing the main contract.

> Arbitration proceedings include two elements: *firstly*, the procedure to be followed in the arbitration itself and the powers of the arbitral tribunal in relation to that procedure (the internal procedure); and *secondly*, the power of the court to support and supervise the arbitration (the external procedure). Power of support includes, for example, the court's power to appoint an arbitrator and to grant an interim injunction (such as an injunction freezing the respondent's assets). The most important of the court's powers of supervision is the power to set aside an award, in the case where the arbitrator has exceeded his/her jurisdiction or where there has been serious irregularity affecting the arbitral tribunal, the proceedings or the award. The extent to which courts control arbitrations varies from country to country.

The rules determining which law governs the arbitration procedure have to try to satisfy two potentially conflicting objectives.

[41] *Hamlyn Co v. Talisker Distillery* [1894] AC 202, cited in C. M. V. Clarkson and Jonathan Hill, *The Conflict of Laws*, 3rd edn., Oxford, (2006), at 252.

[42] Dicey and Morris, *The Conflict of Laws*, 13th edn., (2000), at 598.

On the one hand, the country in which the seat of arbitration is located has a legitimate interest in exercising a measure of control over local arbitrations to ensure that arbitrations proceedings meet certain minimum standards of fairness. On the other hand, arbitration is a consensual process and the parties should, as a general rule of law, be free to determine for themselves how to resolve their disputes.

The Arbitration Act 1996 of England contains provisions that seek to reconcile these competing objectives. The general principle of law is that the various provisions of the Act are 'prima facie' applicable to an arbitration whose seat is in England. Thus, if two foreign companies refer their dispute to arbitration in England, the English court has the power to remove an arbitrator on the basis of doubts as to his/her impartiality or to set aside the award if it is obtained by fraud. Most of the powers conferred by the Act are discretionary, however, and the court will have regard to the parties' connections with England when deciding whether or not to exercise its statutory powers. Where the seat of arbitration is abroad, as regards procedural questions, English law is less relevant. Certain provisions of the Arbitration Act 1996 are applicable regardless of the seat of arbitration. For example, the provisions relating to the staying of proceedings brought in breach of an arbitration clause are of universal application. There can, however, be no question of the court's being able to set aside an award on the basis of serious irregularity in a case where the seat of arbitration is abroad, even if the parties have expressly agreed that the arbitration procedure should be governed by English law.

Legal proceedings under the Arbitration Act 1996 are governed by the Civil Procedure Rules ('CPR'). In order for the court to have jurisdiction, the arbitration claim form, which initiates the proceedings, must be served on the defendant in accordance with the relevant procedural rules. In appropriate cases, the court will give permission for the defendant to be served outside of its jurisdiction.

3. The Law Governing the Merits of the Dispute (Substantive Law)

Where a dispute is referred to arbitration, usually the dispute arises out of a contract. The arbitral tribunal must determine which rules to apply in deciding the dispute. It is well established that the arbitral tribunal is required to apply the choice of law rules of the law of the seat of arbitration. At common law, it was assumed that English arbitrators were bound to apply the choice of law rules that were binding on the

English courts. This rule was the consequence of the traditional English approach that awards could be reviewed by the courts on points of law, including a choice of law issues. Other countries have taken a different approach; an established feature of many foreign arbitration laws is a statutory provision setting out a special choice of law principles to be applied by arbitrators. The Arbitration Act 1996 broke with English tradition by introducing such a provision into English law. The choice of law rules in Section 46 deals with three different types of situation: *firstly*, the parties make a choice; *secondly*, the parties choose 'other considerations'; and *thirdly*, the parties fail to make a choice.

The first principle is that arbitral tribunal shall decide the dispute 'in accordance with the law chosen by the parties as applicable to the substance of the dispute'. The doctrine of 'renvoi' is excluded.[43]

Arbitration is seen by some as a mechanism for avoiding the idiosyncrasies of national laws. Why should the parties not authorize the arbitral tribunal to decide the dispute by reference to other standards? There are various options that the parties might consider. *Firstly*, if one party is English and the other French, the parties might agree that the contract should be governed by principles common to English law and French law,[44] or the parties might agree on principles common to the law of country X and public international law. *Secondly*, the parties may wish to choose rules detached from any particular legal system. A choice of law clause may stipulate, for example, 'internationally accepted principles of law governing contractual relations' (such as *lex mercatoria*), a non-national corpus of rules (such as the UNIDROIT PICC) or a religious law (such as Jewish law or Shari law). *Thirdly*, the parties may wish the arbitral tribunal to decide the dispute by reference to principles of 'equity' or fairness rather than in accordance with strict rules of law. Arbitration under an 'equity clause' is often referred to by its Latin label, 'arbitration *ex aequo et bono*', or by the broadly equivalent French term, '*aimable composition*'. The Arbitration Act 1996 permits the parties to make any of these choices. It is provided that, if the parties so agree, the arbitral tribunal shall decide the dispute 'in accordance with such other considerations as are agreed by them or determined by the tribunal'.

[43] *Orion Compani Espanola de Seguros v. Belfort Maatschappij voor Algemene Verzekgringeen* [1962] 2 Lloyd's Rep 27.

[44] This was the choice of the parties in some of the contracts relating to the Channel Tunnel project. *See* Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* 4th edn., (2004), at 125-127.

If the parties fail to make a choice of law, the UK Arbitration Act 1996 provides that 'the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'. It is not uncommon for parties who have little or no connection with England to agree to arbitration in England. Indeed, the parties may choose London as the seat of arbitration precisely because it is a neutral venue. In such a case, the arbitrators might choose to apply the conflict rules common to the laws of both parties' countries. Where, *for example*, a Singaporean claimant and a New Zealand respondent are referred to arbitration in England, the tribunal might decide that the governing law is to be determined by the 'proper law doctrine' within the common law system, rather than by the choice of law rules to be found in the Rome Convention, on the basis that the proper law doctrine is applicable in both Singapore and New Zealand. The advantage of such an approach is that it reduces the chance that the outcome of the dispute will turn simply on where the arbitration happens to be held. The arbitral tribunal is not entitled, in the absence of authorization by the parties, to ignore all choice of law rules and decide in accordance with the *lex mercatoria* or by reference to the arbitrators' own conception of what is fair; the arbitral tribunal must apply 'law', a term inapt to describe principles of fairness or the *lex mercatoria*.

If, in a case where the parties have not designated the applicable law, the arbitrators are free in their discretion to choose conflict rules to determine the applicable law, there is a danger that the parties will be permitted to evade imperative rules imposed in the public interest which would have to be applied by the court if the parties' dispute were resolved by litigation. The extent to which arbitrators should have regard to imperative rules is a controversial issue. The practical reality, however, is that if arbitrators fail to take into account the imperative rules of a country which has a close connection with the situation (by virtue of being the seat of arbitration or the country in which the award will be enforced), there is a likelihood that the award will be legally ineffective. If England is the seat of arbitration, a party may challenge the award on the ground of serious irregularity. It is provided, *for example*, that the court may set aside an award contrary to public policy. An award set aside by the courts of the country in which it was made is a nullity; enforcement of such an award may be refused in any country party to the New York Convention. The New York Convention also provides that enforcement of an award may be refused on the ground that it infringes the public policy of the forum in which enforcement is sought.

The possible impact of public policy may be illustrated by a simple example. Suppose that two US corporations conclude an anti-competitive agreement to be performed exclusively in Europe. The agreement is void under Article 81 TEC (Article 101 TFEU) (*see* Section Two - Chapter Three of the Textbook), yet is valid under New York law, the law chosen by the parties. When a dispute arises it is referred to arbitration in England. What is the likely outcome if the English arbitrator upholds the agreement on the ground that it is valid under New York law? The answer is that the losing party may be expected to apply to have the award set aside on the ground that it infringes English public policy (which includes European public policy). Since, in the final analysis, the whole arbitration is a waste of time and money if the award is not enforceable (because, *for example*, it violates the public policy of the seat of arbitration), the arbitrator must, in practice, consider the potentially relevant imperative rules.

The choice of the applicable law in international arbitration, if not made by the parties, frequently is one of the most difficult issues the arbitrators have to decide.[45] The alternative to the application by the arbitrators of a national law is the principles of international law, the general principles of the law ('in foro domestico'), or the *lex mercatoria.*

4. Principles of International Law and General Principles of the Law

It must also be mentioned that, although not frequently, the parties refer to the principles of international law, or to the general principles of the law. These sources of law are used to limit the applicable scope of the legal system in question, or to fill its possible lacunae.

5. Lex mercatoria ('Merchant Law')

Lex mercatoria could be understood as a system of transnational legal principles, rules and standards derived from the usages, customs, and practice of international commerce,[46] *i.e.*, from the customary commercial law.[47] The *lex mercatoria* is not based on any legal system, but incorporates international commercial rules, general principle of law, standards, and mercantile usages. An example of today's *lex mercatoria* is found in the UNIDROIT PICC (*see* Section Three - Chapter Five of the Textbook).[48] These principles are not 'law' as such, because they are not adopted as law by any jurisdiction. Rather, they are a restatement of the law of international commercial contracts. The *lex mercatoria* is thought to include other kinds of rules, such as the ICC's UCP 600 (*see* Section Four - Chapter Five of the Textbook), these are the rules that govern virtually all letters of credit; and the ICC's INCOTERMS, international commercial terms such as FOB and CIF (*see* Section Two - Chapter Five of the Textbook). Some commentators include in the *lex mercatoria* international arbitration awards, as well as principles derived from international conventions or international public law. Although *lex mercatoria* are not 'law', however, they will be accepted to govern the arbitration if the parties agree to choose them. However, it should be noted that many practitioners resist any reference to the *lex mercatoria* in drafting international commercial contracts between private parties. This is because the parties usually prefer a law that is accessible, clear, and has an established jurisprudence that can provide some amount of certainty. Arbitrators, too, even when using some transnational rules to reach a decision, have sometimes been reluctant to admit they are relying upon *lex mercatoria*. In some situations,[49] the *lex mercatoria* is likely to be useful.

6. Unrelated National Law

If parties cannot agree to choose the national law of one of them, and they do not want to choose general principles of law, another option is to choose a national law of a neutral country, that is, a country with no particular relationship to any party. In most jurisdictions, the strong concept of party autonomy will permit parties to choose an unrelated national law. Parties might prefer to choose a law that is well developed in a particular sector, or simply a law of a country where many international transactions occur. A number of international conventions support free choice by parties to the law for arbitration. Party autonomy is limited, however, by imerative rule (a rule that cannot be derogated by a contract term) and by the public policy of a country.

45 O. Lando, *The Law Applicable to the Merits of the Dispute, Arbitration International* (1986), at 104.

46 *See* L. Yves Fortier, 'The New *Lex mercatoria*, or, Back to the Future', 17 *Arb. Int. 121* (2001), at 128.

47 Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration', 17 *Arb. Int.* (2001), at 21.

48 UNIDROIT (the International Institute for the Unification of Private Law) is an independent intergovernmental organization with its seat in Rome. Its goals include drafting conventions, model laws, and other legal guides to help in harmonizing international commercial law, http://www.unidroit.org.

49 For example commercial contracts between states or state-controlled entities; commercial contracts between a state and a private company; the *lex mercatoria* have been usually referred as to the fact that neither sovereign state wants to be subject to the laws of any other sovereign state.

In the US, parties are not free to choose any law. Under the Restatements (Second) of Conflict of Laws, there must be a substantial relationship between the party or the transaction and the law that is chosen, or a reasonable basis for the parties' choice. Therefore, an US court might not honour a choice of Florida law if the transaction was between a German and a Japanese company, and the transaction had no connection to Florida. New York law is a special case. New York courts will enforce the parties' choice of New York law under certain conditions even if there is no reasonable relationship to the State. The contract [which is considered by New York courts] must not involve personal or household services, or labour, and the amount involved must be at least 250,000 USD. Moreover, if foreign parties stipulate that New York law is the law of the contract, New York courts provide personal jurisdiction and its courts may not dismiss for 'forum non conveniens' if the amount in question is at least 1,000,000 USD. New York is trying to secure and increase its reputation as an international business centre, with ease of access to its legal system for parties with relatively significant transactions.

2. Litigation

'Jurisdiction' in the present account is used in its widest sense to refer to the question of whether a court will hear and determine an issue upon which its decision is sought.

A. The Choice of Jurisdiction

Usually the choice of jurisdiction will initially rest within the claimant. The claimant will commence the litigation in the courts of the country that it believes has the jurisdiction to hear the claim. However, if a company is warned that it is about to be sued in respect of a major claim, it may prefer to commence an action itself (*for example*, for a declaration that it is not liable). The effect of this is for the company to attempt to ensure that the proceedings are heard before a court of the jurisdiction that is most favourable to it.

International Consideration to Choice of Jurisdiction

The question of whether the courts of a country have jurisdiction to determine a claim will be decided according to international treaties to which a country has acceded or the national private international law (in other words, the conflict of laws provision under the national law of that country).

Choice of Jurisdiction under the Brussels Regulation

Within the EU, there are several relevant treaties. The Brussels Regulation 44/2001 on the Recognition and Enforcement of Judgments in Civil and Commercial Matters was issued on 22 December 2000. This Regulation applies in respect of claims against defendants domiciled within the EU or to cases brought before courts of participating member states. The Brussels Regulation contains detailed rules on jurisdiction within the EU and defines which country has jurisdiction over a particular action. It reduces the possibility of forum shopping, that is, the number of jurisdictions in which a plaintiff may choose to commence proceedings.

Choice of Jurisdiction under the Lugano Convention

On 16 September 1988 in Lugano, the EFTA (European Free Trade Association) countries, namely, Austria, Finland, Iceland, Norway, Sweden and Switzerland, entered into the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters with the member states of the EC. The Lugano Convention contains materially the same provisions as those of the Brussels Regulation and has largely been superseded by the latter. The Lugano Convention is currently in force in Norway and Switzerland of the EFTA countries, as well as France, Italy, Luxemburg, the Netherlands, Portugal and the UK.

Outside the EU, there are currently no significant international treaties on the subject. This means that there is almost no harmonization. The respective rules of each country and their inter-relation have to be considered in turn. There is a proposal for The Hague Convention on International Jurisdiction and Judgments in Civil and Commercial Matters that would provide a degree of global harmonization.

B. The Choice of Law

The issue of which law the courts will apply in determining a dispute arising from an international agreement is governed by relevant international conventions and treaties (such as the EU directives and regulations) and/or relevant national legislations (such as the private international laws of the relevant countries involved). The questions

of which law will be applied in relation to a dispute will not always be answered in the same way.

1. The Choice of Law under the United Nations Convention for the International Sale of Goods 1980 (CISG)

There is no global convention dealing with choice of law in international commercial contracts. Dealing with the substantive law, by far the most important international convention outside the EU relating to the international sales contracts is the CISG (*see* Section three - Chapter five of the Textbook).

2. The Choice of Law under the Rome I Regulation

In England, under the traditional rules, the 'proper law' of a contract is determined primarily by reference to any express agreement on choice of law concluded by the parties to the contract. Only in the absence of any - or any valid - express choice is reference made, secondarily, to implied choice or closest connection.

For example, the Rome I Regulation[50] specifies that a contract is governed by the law chosen by the parties, and that the choice may be made expressly by the terms of the contract.[51] Since no requirement of writing or other formality is required for an express choice of law, an oral agreement on the applicable law, concluded in the negotiations leading to the conclusion of a substantive contract in writing, will be effective.[52] Any express choice of law will usually be made by a clause contained in the contract as concluded; Article 3(2) permits an express choice to be agreed on after the conclusion of the contract. A subsequent choice could usually have retroactive effect, unless a contrary intention is indicated.

In the absence of an express choice, Article 3 of the Rome I Regulation directs the court to consider next whether an implied choice of law by the parties can be discovered. It is sufficient under Article 3(1) that the parties' choice, although not expressed in the contract, is 'clearly demonstrated by the terms of the contract or the circumstances of the case'. The Regulation agrees with the traditional rules of English law in its post-war phase in adopting a fairly restrictive approach to the discovery of an implied choice. In the absence of any valid express or implied choice by the parties, the proper law of a contract is in most cases determined in accordance with the default rules laid down by Articles 4 and 5 of the Rome I Regulation, which favour the law of the place that has the closest connection with the performance of the contract.

Applicable Law in the Absence of Choice

According to Article 4(1) of the Rome I Regulation, to the extent that the parties have made no choice of law, expressed or implied, a contract is governed by the law of the country with which it is the most closely connected. Subject to the provisions of Paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance characteristic of the contract has, at the time of conclusion of the contract, his/her habitual residence, or, in the case of body corporate or incorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, under the terms of the contract, the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. This rather vague rule has been developed to cover specific situations. *For example*, in a dispute regarding property, the law of the place where the immovable property is situated will usually apply. If one party is in a weaker position, the applicable law will often be that best suited to protect them. This is so in the case of a consumer, where the law of the consumer's habitual residence is often cited to govern.

The general presumption in Article 4(2) applies neither to contracts relating to rights in immovable property nor to contracts for the carriage of goods. Special presumptions are set out in paragraphs 3 and 4:

Contracts relating to rights in immovable property. Article 4(3) provides that 'To the extent that the subject matter of the contract is rights in immovable property or a right to use immovable property, it shall presumed that the contract is most closely connected with the country where the immovable property is situated.'

Contract for the carriage of goods: A contract for the carriage of goods is presumed to be most closely connected with the country in

[50] *See* text at [2008] OJ L177/6, http://eur-lex,europa.eu/LexUriServ

[51] Article 3(1) of the Rome I Regulation.

[52] *See Oakley v. Ultra Vehicle Design Ltd* [2005] EWHC 872 (Ch) (Lloyd LJ) or note 27 in Indira Carr, *supra*, at 567.

which the carrier has, at the time the contract is concluded, his principal place of business, if that country is also the place of loading or the place of discharge or the principal place of business of the consignor. If the country in which the carrier has his principal place of business does not coincide with any of the other connecting factors, the presumption in Paragraph 4 cannot be applied.

C. Recommendation

1. Recommendation on the Service of Proceedings

If jurisdiction is to be exercised in respect of a party who does not reside in the territory, leave from the court is usually needed to serve proceedings outside the jurisdiction. If a company enters into a commercial agreement with an overseas party, it is desirable to include an 'agent for service' clause in the contract. This means that the other party appoints a third party resident in the company's countries to accept service on its behalf. Such appointment eliminates the need to apply to court for leave to serve proceedings outside the jurisdiction. A typical 'agent for service clause' would be 'X hereby irrevocably appoints Y as its agent for service to accept all proceedings and legal documents on its behalf'. This would be a useful for Vietnamese companies entering into international commercial contract with foreign partners. Given that, this would avoid the complication and weakness of Vietnamese enterprises in several cases.[53]

2. Jurisdiction Clause to Eliminate Forum Shopping[54]

In international contracts there will therefore often be several countries where the courts may have jurisdiction to hear a dispute. To avoid arguing with another party about where a case should be brought before considering the substance of a case, it is best to include a jurisdiction clause in the contract. An example of a jurisdiction clause is as follows: 'The parties hereby irrevocably submit to the exclusive jurisdiction of the courts of Viet Nam to determine all disputes in connection with this agreement'. This jurisdiction clause guarantees that the chosen courts will hear the dispute. However, it should be noted that some countries may have mandatory rules that override such a choice.

[53] The case that 'Can Gio' Ship was arrested in Tanzania in compliance with the court's judgment to take hostage of 'Can Gio' Ship as deposit for the compensation to a Tanzania entity who won another case against another Vietnamese State-own company before the Tanzanian courts.

[54] International commercial agreements.

If a party commences an action in one country while the other party does not consider it to be an appropriate choice of jurisdiction, the latter party must usually oppose the choice of jurisdiction at the outset, before issuing a defence. The opposing party will need to prove in the first court that another country's courts are a more appropriate forum in which to hear the dispute. Only once the first court has decided that the courts of another country are more appropriate, will the initial action be struck out and proceedings recommended in the second country's courts. If the opposing party seeks, pending the first court's decision, to bring proceedings in the second country's courts, they will be stopped. The other party will successfully be able to stay the second set of proceedings by pleading that there is another case being brought in a different country's courts.

Section Four. RECOGNITION AND ENFORCEMENT OF THE FOREIGN ARBITRATION'S AWARDS

As noted above, one of the prime reasons parties include an arbitration clause in an international contract is the relatively certain enforceability of the award. The likelihood of enforcement is high because so many countries have adopted international conventions that are pro-enforcement, that is, they provide only narrow grounds for refusing to enforce. This Section will discuss some of issues and procedures pertinent to recognition and enforcement of awards under international conventions and various national laws, as well as the limited grounds for refusing enforcement.

1. Application of International Conventions

A. *The New York Convention*

There would have been no boom in international commercial arbitration[55] had the community failed to resolve a crucial problem: how to enforce its award. Because arbitrators are unable to compel compliance with judgments as national judges do - through commands backed by coercive state authority - the question of how to guarantee

[55] A 2014 assessment of trends in arbitration' reports that twelve of the most important international arbitral centers now process more than 3,000 new claims annually, worth more than 1.7 trillion USD. Mark Bezant, James Nicholson, and Howard Rosen, *Trends on International Arbitration: A New World Order*, FTI Consulting, February 2015.

the 'finality', that is, the enforceability of awards has been a permanent preoccupation. The solution involved harnessing State power. Under its own initiative, the ICC drafted what became the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and ICC associates closely supervised the process that led to its entry into force.

The New York Convention requires courts of contracting States to enforce arbitration agreements and arbitration awards. Currently, nearly 160 countries are parties to the New York Convention. This Convention has contributed to the growth of international arbitration because parties in contracting States are confident that if they prevail in an arbitration hearing, they will obtain a remedy. A recent study noted that for corporate counsel, the most important reason for choosing arbitration over litigation to settle disputes was the enforceability of awards.[56] Because the New York Convention is the predominant arbitration enforcement convention, this Section will focus primarily on its function, requirements, and effect.

B. *Principles Governing Recognition and Enforcement*

Article III of the New York Convention (the "Convention") requires countries to recognize arbitral awards as binding, and to enforce them in accordance with national laws, consistent with the provisions of the Convention. Although the terms 'recognition' and 'enforcement' tend to be said together, they have different meanings. When a court 'recognizes' an award, it acknowledges that the award is valid and binding, and thereby gives it an effect similar to that of a court judgment. Thus, a recognized award may be relied upon as a set-off a defence in related litigation or arbitration. The award has an official legal status, so that issues determined by the award usually cannot be re-litigated or re-arbitrated.[57]

Suppose, *for example*, the party that prevailed in the arbitration was the respondent, and the award simply said the respondent had no liability. The respondent might want to have the award recognized in order to defeat claims on the same facts that might be brought against it in other proceedings, either before a court or in another arbitral tribunal. Enforcement means using whatever official means are available in the enforcing jurisdiction to collect the amount or otherwise carry out any mandate provided in the award.

When an award has provided that the respondent is liable to the claimant for money damages, and the respondent appears in no hurry to pay the amount awarded, then the claimant - the award creditor - may seek recognition and enforcement of the award in a jurisdiction where assets of the respondent - the award debtor - are located. In some jurisdictions, the award must first be recognized before the award creditor is able to use the enforcement mechanisms of the enforcing court. Once the award is recognized, the award creditor may use whatever methods are normally used to collect the amount of the award, *for example*, by seizing assets in accordance with legal procedures in enforcing jurisdiction. In other jurisdictions, there may be no practical difference between procedures for recognition and for enforcement. When the award is enforced, it is '*a priori*' recognized.

C. *Forum Shopping for Enforcement of Foreign Arbitral Awards*

'Forum shopping' is the search, by a party to an arbitration agreement, for the most favourable venue for the proceedings or for the place where to try to enforce or to attack the award. The premise for this choice is the identification of assets of the award debtor in the various jurisdictions. If assets are available only in one of them, frequently there will be no alternatives among which to choose.

If the factual premise for a choice exists, then the interested party will compare the advantages and disadvantages of each jurisdiction. Among the basic elements to be given weight are the degree of liberalism in recognizing a foreign award and in this respect whether the New York Convention has been adopted; whether it has been implemented? how strict the notion of public policy and suitability for arbitration are? whether the enforcement proceedings may be stayed? how long these will last? whether immunity from enforcement is granted, and in which situations, to governmental agencies? what are the grounds for setting aside, and duration of the related proceedings?

[56] Loukas Mistelis, 'International Arbitration-Corporate Attitudes and Practices - 12 Perceptions Tested: Myths, Data and Analysis Research Report', 15 *American Review of International Arbitration* 525, 545, describing results of a survey conducted in 2005.

[57] In the US, an award can have '*res judicata*' effect, even if it has not been confirmed or recognized. *See* Gary Born, *International Commercial Arbitration* (2001), at 916.

D. *Recognition and Enforcement of Foreign Arbitral Awards under the New York Convention*

The New York Convention has been one of the most successful international treaties. Along with other conventions that support the enforcement of international awards, it has contributed to the growth of international arbitration as a preferred method of resolving commercial disputes. Parties are willing to engage in international arbitration because they have confidence that if they obtain an award, it will be readily enforceable in almost any country in the world where the award debtor's assets are found.

1. Requirements for Enforcement

(a) Scope

The Convention was intended to apply to international awards, and expressly states that it covers awards made in a state other than the one where enforcement is sought.[58] It permits the enforcement of awards considered 'non-domestic' by the enforcing jurisdiction.[59]

(b) Jurisdiction and 'forum non conveniens'

When an award creditor seeks enforcement in a contracting state, the presence of the award debtor's assets in that state will usually suffice to provide a jurisdictional basis for the enforcement of the award under the Convention. In the US, however, some courts have refused to enforce foreign arbitral awards either on the ground that there was no personal jurisdiction (jurisdiction '*in personam*') over the award debtor, or that the forum was inappropriate under the doctrine of 'forum non conveniens'.[60] While this doctrine has been internationally criticized as regards it application to the enforcement of an arbitral award under the New York Convention, the fact is that some courts in the US have refused enforcement on these grounds. This suggests that parties should contemplate this issue in an arbitration clause, if enforcement is likely to be sought in the US.

58 Article I of the New York Convention.

59 *Ibid*.

60 *See* the notorious judgment of the Court of appeals in the case *Base Metal Trading, Ltd. v. OJSC 283 F3d 208* [2002]; *see* also *Monegasque de Reassurances v. Nak Naftogaz of Ukraine and State of Ukraine* 311 F.3d 488 498 [2002] discussed in Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration,* Cambridge, (2008), at 206.

2. Procedure for Enforcement

Procedure for enforcing an award will vary by jurisdiction, because a contracting state will enforce an award in accordance with its own rules of practice.[61] It may not, however, impose any higher fees or any more onerous conditions on the process than would be applicable in enforcing a domestic award.[62] The only requirements imposed by the Convention are that the party applying for recognition and enforcement must provide the court with the authenticated original award or a certified copy, and the original arbitration agreement or a certified copy. If the award or the agreement is not in the same language used in the enforcing jurisdiction, the party must provide a certificated translation of the documents.[63] Otherwise, the procedures are determined by each jurisdiction, although are frequently similar to the procedures used to enforce court judgments within that jurisdiction.[64]

However, the Convention also provides several defences to enforcement, including: the incapacity and invalidity; a lack of notice or fairness; the arbitrator acted in excess of authority; the tribunal or the procedure was not in accord with the parties' agreement, and the award is not yet binding or has been set aside.[65] Other defences to enforcement are a lack of grounds for arbitration and the violation of public policy (of that jurisdiction).[66] The most important characteristic of those defences is that they are not based on the merits of the awards. It has been estimated that voluntary compliance combined with the court enforcement results in 98 per cent of international arbitration awards being paid or otherwise carried out.[67]

In the absence of international convention, each legal system shall apply its own procedural law to make a foreign award effective in its territory, whether through enforcement or simply through recognition.

61 Article III of the New York Convention.

62 *Ibid*.

63 Article IV of the New York Convention.

64 Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration,* Cambridge, (2008), at 207.

65 Article V(1) of the New York Convention.

66 Article V(2) of the New York Convention.

67 Michael Kerr, 'Concord and Conflict in International Arbitration', 121 *Arb. Int.*, [1997], at 128.

2. The Arbitral Order and National Systems

Three factors - global expansion in transnational commerce and arbitration; the juris-generative activities of IACs and the professional organizations they serve; and the demands of the 1958 New York Convention - combine to produce enormous pressure on national legal systems to recognize the autonomy and authority of the arbitral order.

The underlying strategic situation confronting States can be described simply. The explosion in trade, the development of arbitration as a substitute for courts, and enforcement of award under the New York Convention combined to generate two dynamics serving to consolidate the domain of arbitration, as it has expanded. The first is enhanced regulatory competition among national legal orders. States compete with one another to show the world that they support transnational business, freedom of contract, and arbitral autonomy. It is of crucial importance that the dominant competitor states are also the strategically most important: the United States, the United Kingdom, France - and increasingly - Hong Kong and Singapore. Each is a major trading nation, with highly developed infrastructures in law, banking and finance, insurance, and so on; and each hosts one of the global arbitral centres. Also crucial, the evolution of American, English, and French law heavily influences the development of most other important national legal systems, on every continent.[68] There are virtually no important instances of a court in the United States, the United Kingdom, or France refusing to enforce a major award on such grounds since the 1970s. Indeed, all three legal systems have gone beyond the requirements of the Convention in various ways. French law, for example, formally recognizes the transnational basis of awards, that is, their validity is not rooted in law of any state; French courts have even enforced awards that have been annulled by a court at the state of arbitration.

Arbitration is a lucrative business. Powerful private actors, including local and national bar associations, chambers of commerce, firms, and trade groups, now routinely build partnerships with public entities to promote the relative advantages of their law of contract, pro-arbitration policies, and courts as instrument of enforcement. In doing so, these actors help to institutionalize the market for arbitration, while generating a clear, best-practice template for what it means to be a 'pro-arbitration state'. Germany, Hong Kong, Singapore, Sweden, and Switzerland among many others have fully embraced the pro-arbitration template, with dramatic results.

The more any State is integrated into the global economy, the more it will be pressured to liberalized its policies toward arbitration by embracing elements of the template. States can do so by copying the approaches of major pro-arbitration states when is comes to recognition and enforcement, and by adopting a statute based on the UNCITRAL Model Law.

Section Five. RECOGNITION AND ENFORCEMENT OF THE FOREIGN COURT'S JUDGEMENTS

1. The Common Approaches to Recognition and Enforcement of Foreign Court's Judgments

The most fundamental tenet of the law of recognition of foreign country judgments prescribes that foreign judgments have no local legal effect.[69] The prevailing party may not use a foreign judgment in any way to the detriment of the opposing party. A formal legal process of recognition by the local forum is required in order to make a foreign judgment legally effective in the forum. Such a formal recognition process entails an examination of several peripheral issues, including: the jurisdiction of the foreign court to give the judgment; the finality of the judgment; compliance of the proceedings in which the foreign judgment was obtained with the forum's principles of natural justice and 'due process'; and a lack of contradiction between the foreign judgment and the forum's principles of public policy. The examination deliberately ignores the merits of the dispute as the dispute has already been litigated before the foreign forum.

Each nation, through its sovereignty is able to unilaterally decide whether and how it will use the judgments of another nation's courts. Usually, nations will give effect to foreign judgments only if doing so is

[68] Alec Stone Sweet & Florian Grisel, The Evolution of International Arbitration, Oxford, 2017, p. 64.

[69] *See* for example, *Hilton v. Guyot*, 159 US 113, 163 [1895] in which 'no law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations'. Although the phrase has often been criticized, no satisfactory substitute has been suggested; Lawrence Collins *et al*., (eds) *Dicey, Morris and Collins on the Conflict of Laws*, Sweet and Marwell, 14th edn., (2006), at 567.

in the nation's best interest. The case of China provides an interesting case study. China's laws formally entertain the possibility of recognizing foreign judgments, although in reality foreign judgments have rarely been recognized by its courts.[70]

On this issue, there are currently two hypotheses. The *first* analogizes countries as being captured criminals in the canonical prisoners' dilemma.[71] Each individual country prefers that its own judgments be recognized whenever possible, since extensive worldwide recognition generates an incentive for litigants to choose that country as a litigation venue and ensures that the legal outcome pronounced by the forum's judgments becomes truly relevant and effective.[72] For the international legal system as a whole, an agreement to enforce foreign judgments seems ideal. Such cooperation would engender cooperation and reduce the overall costs of litigation. However, no country rushes to recognize foreign judgments.[73] Countries are reluctant to recognize foreign judgments in order to protect local defendants, to encourage an incoming transfer of asset and capital, and to allow additional litigation and increased income for certain influential groups.[74] As a sovereign entity, no country can be compelled to recognize foreign judgments.

The *second* hypothesis argues that countries recognize at least some foreign judgments, because it directly benefits them through economic savings, rather than only through the inducement of similar behaviour from other nations. Recognizing foreign judgments decreases litigation costs for the parties and relieves the forum's overcrowded courts. The relevant assumption is that recognition of a foreign judgment would be a cheaper process through which to settle the dispute than litigating the dispute as to its merits the second time. The effect of recognition by other countries is appreciated, yet secondary. Recognition is thus a weakly dominant strategy - in other words, one that is always at least as good as any other strategy, but it may be better than other strategies depending on how the other player acts. Thus, even if the other country does not cooperate, the forum is still better off recognizing certain foreign judgments from that country.

70 *See* Lu Song, 'The EOS Engineering Corporation Case and the Nemo Debet Bis Vexari Pro Una et Eadern Causa Principle in China', 7 *Chinese Journal of Intenational Law,* (2008), at 143 and 156.

71 For an explanation of the game in a different context of international law, *see* Andrew T. Guzman, *How International Law Works: A Rational Choice Theory,* Oxford, (2008), at 30-32.

72 Andrew T. Guzman, *supra.*, at 421-423.

73 Andrew T. Guzman, *supra*, at 421-422.

74 Andrew T. Guzman, *supra*, at 423.

Neither of these hypotheses has won the day. The conflicting evidence supports both.[75]

2. Recognition and Enforcement of Foreign Court's Judgments under International Conventions

The pursuit of recognition agreements seems to be considered by various countries as productive. However, few recognition agreements have thus far been executed. For example, the US is not a party to any such agreement,[76] and several attempts to form such agreements to which the US would be a party have failed.[77] Those countries that are party to such agreements are generally parties to only a few.[78] A small number of multilateral recognition agreements exist worldwide: two in the EU;[79] the Inter-American Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments;[80] and three conventions for the recovery abroad of maintenance.[81] A recent famous attempt to produce a multilateral recognition agreement, by The Hague Convention on Private International Law, has also failed.[82] Nevertheless, it is necessary to discuss further the content of The Hague Convention in brief in order to capture the international attempt in this regard.

75 Yaad Rotem, 'The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments', in 10 *Chicago Journal of International Law* (2010), at 2 and 510.

76 *See* Brian R. Paige, 'Comment, Foreign Judgments in American and English Courts: A Comparative Analysis', 26 *Seatle U L Rev 591* (2003), at 621-622.

77 *For example*, negotiations for a Convention with the UK in the mid-1970s ultimately failed in 1981. *See Ibid*., at 622.

78 Some countries such as the UK, Australia and Canada, adopt a registration track for foreign judgments coming from countries which are considered to be reciprocating countries; but not each country, the judgments of which are eligible for registration in these as a party to a respective agreement with the forum.

79 Council Regulation 44/2001, OJ 2001 (L 12) 1 (Brussels I); and Council Regulation 1347/2000, OJ 2000 (L 160) 19, (Brussels II).

80 Inter-American Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments, 24 ILM 468 (1985).

81 UN Convention on the Recovery Abroad of Maintenance 1956; The Hague Convention Concerning the Recognition and Enforcement of Decisions Concerning Maintenance Toward Children 1958; and The Hague Convention on the Recognition and Enforcement of Decisions Relative to Maintenance Obligations 1973. *See* David F. Cavers, 'International Enforcement of Family Support', 81 *Colum L Rev 994* (1981).

82 *See* Eckart Gottschalk *et al*., *Conflict of Laws in a Globalized World* (2007), at 29-31.

A. *The Hague Convention on Choice of Court Agreements*

The Convention is the counterpart for litigation of the New York Convention,[83] promulgated on 30 June 2005. This was published in September 2007.[84] It has never been possible to achieve a multilateral treaty, because of the diversity of substantive and procedural laws and of legal cultures. Courts, unlike commercial arbitrators, are regarded as manifestations of national sovereignty which governments are reluctant to compromise, even in the promotion of economic growth.

B. *Brussels and Lugano Conventions*

There are currently two sets of rules in relation to recognition and enforcement of foreign judgments, depending on where the judgment in question was rendered. If it was rendered within EC/EFTA states and related to a civil or commercial matter, then the issue would be exclusively governed by the Civil Jurisdiction and Judgments Acts 1982 and 1991 ('CJJA'). However, if the judgment was rendered outside those states, then the traditional rules would apply. Matters are complicated further by the fact that the traditional law rules comprise three sets of rules. There are those rules which govern judgments of courts of Commonwealth countries to which the Administration of Justice Act 1920 (hereinafter the 'AJA 1920') applies; those which govern judgments of courts of other countries to which the Foreign Judgments (Reciprocal Enforcement) Act 1933 (hereinafter the 'FJA 1993') applies; and those of the common law which apply to judgments of courts of other countries.

3. Recognition and Enforcement of Foreign Court's Judgment at Common Law of England

At common law, foreign judgments have been recognized and enforced by English courts since the seventeenth century. This was initially based on the ground of 'comity'. However, this theory has been superseded by 'the doctrine of obligation' developed from *Schibsby v. Westenholz* [1870].[85]

[83] *See* Spigelman J.J., 'International Commercial Litigation: An Asian Perspective', 37 *Hong Kong LJ* (2007), at 859.

[84] *See* T. Hatley and M. Dogauchi, *Explanatory Report on the 2005 The Choice of Court Convention*, http://www.hcch.net/index_en.php?act=publications.details&pid=3959.

[85] The true principle on which the judgments of foreign tribunals are enforced in England is that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; consequently anything which negates that duty, or forms a legal excuse for not performing it, is a defence to the action. *See* Abla Mayss, *Principles of Conflict of Laws*, Cavendish Publishing Limited, (1999), note 88.

Requirements for recognition and enforcement: At common law, a successful litigant seeking to enforce a foreign judgment in England has to institute fresh legal proceedings, that is, s/he must sue on the obligation created by the judgment. Alternatively, s/he may plead the judgment 'res judicata' in any proceedings that raise the same issue. If a fresh action is brought in England, s/he may apply for summary judgment under civil procedure rules, so long as the defendant has no defence to the claim as was held by *Grant v. Easton* [1883]. This is so, provided that the action in England satisfies the English rules as to jurisdiction and service of writs.

The most essential requirement for recognizing or enforcing foreign judgments in England, whether at common law or under both the AJA 1920 and FJA 1933, is that the foreign court that rendered the judgment in question had jurisdiction in the international sense to entertain the action. In other words, the English court would not give effect to a foreign judgment unless the foreign court was jurisdictionally competent according to the English conflict of laws rules.

Section Six. VIETNAMESE RULES GOVERNING INTERNATIONAL COMMERCIAL DISPUTE SETTLEMENT

When the parties to an international commercial contract decide to choose Vietnamese court to be the forum in which to settle disputes over the contract, Vietnamese rules shall govern the process of such international commercial dispute settlement.

1. Sources of Law

Vietnamese rules governing international commercial dispute settlement can be found in the Civil Procedure Code 2015 (hereinafter the 'Civil Procedure Code'); Law on Commercial Arbitration 2010 (hereinafter the 'Law on Commercial Arbitration'); Commercial Law 2005; Law on Investment 2014 (hereinafter the 'Investment Law') and other related delegated legislations.

2. Definition of Commercial Disputes

There is no official definition of commercial disputes in Vietnamese rules. It may be understood indirectly that commercial disputes are disputes between parties arising from commercial activities or arising between parties at least one of whom is engaged in commercial activities as stated in Article 2(1) and (2) of the Law on Commercial Arbitration. Also, Article 3(1) of the Commercial Law describes 'commercial activities' as activities for the purpose of generating profits, including: sale and purchase of goods, provision of services, investment, commercial promotion and other activities for profit. Therefore, disputes between parties over activities in which at least one of whom engaged in for the purpose of generating profit are considered commercial. They may be settled through courts or arbitrations depending on the choice of forum in the international commercial contract.

3. Commercial Dispute Settlement through Courts

A. *Vietnamese Court System and Jurisdiction*

Before 2015, there were three levels in the court system in Viet Nam. The lowest level is the People's District Court, followed by the People's Province Court. The highest court in Viet Nam is the People's Supreme Court. There are specialized tribunals in People's Province Courts and the People's Supreme Court, although not in the People's District Courts. They are civil, criminal, labour, economic and administrative tribunals. Commercial disputes are settled by economic tribunals in the People's Province Courts and in the People's Supreme Court.

Article 33 of the Civil Procedure Code 2011 states that:

1. The people's courts of rural districts, urban districts, provincial capitals, provincial towns (hereinafter referred collectively to as people's district courts) shall have the jurisdiction to settle according to first-instance procedures the following disputes:

(b) … *[b]usiness, commercial disputes* … [86(*)]

…

2. [d]isputes and requests prescribed in paragraphs 1 and 2 of this Article, which involve parties or properties in foreign countries or which must be judicially entrusted to Vietnamese consulates overseas or to foreign courts, shall not fall under the jurisdiction of the people's district courts.

Article 33 clearly excludes the jurisdiction of the People's District Courts over international commercial disputes. Such disputes shall in the first instance be under the jurisdiction of the People's Provincial Courts. Moreover, Article 29(1) of the Civil Procedure Code emphasizes that disputes arising from business or commercial activities among individuals and/or organizations with business registration must all be for the purpose of profit. Therefore, if one party does not enter into the agreement for the purpose of profit, the dispute between that party and the other party over the agreement cannot be considered as those arising from business or commercial activities under the jurisdiction of the courts.

Article 3 of the Law on People's Court Organization 2014, court system in Viet Nam comprises of 4 levels: Supreme Court, High Court, Provincial Court and District Court.

There are tribunals in Supreme Court, High Court and Provincial courts, including Criminal tribunal, Civil tribunal, Administrative tribunal, Economic tribunal, Labour tribunal, Family and Minor tribunal. It is not necessary to set up tribunals at District courts.

Commercial disputes can be settled at criminal tribunals, civil tribunals, administrative tribunals and economic tribunals.

Articles 30 and 35 of the Civil Procedure Code 2015 vest the jurisdiction over commercial disputes to the courts with the identification of each level as bellows:

'1. People's Courts of districts shall have the jurisdiction to settle according to first-instance procedures the following disputes:

……

b) Disputes over business/trade activities ….

……

3. Disputes and petitions prescribed in Clauses 1 and 2 of this Article, which involve parties or properties in foreign countries

86 (*) *Emphasis added.*

or which must be judicially entrusted to representative agencies of the Socialist Republic of Viet Nam overseas or to foreign courts/competent agencies, shall not fall under the jurisdiction of people's Courts of districts, except for cases specified in clause 4 of this Article.'

Section three of the Article 35 take out the dispute settlement of commercial disputes involving foreign elements from the jurisdiction of the district courts. The territorial jurisdiction of Courts to settle civil lawsuits shall be determined in Article 39 as bellow:

'1.

a) The Courts of the localities where the defendants reside or work, applicable to defendants being individuals, or where the defendants are headquartered, applicable to defendants being agencies or organizations, shall have the jurisdiction to settle according to first-instance procedures for civil, marriage- and family-related, business, trade or labour disputes prescribed in Articles 26, 28, 30 and 32 of this Code;

b) The involved parties shall have the right to agree with each other in writing to petition the Courts of the localities where the plaintiffs reside or work, applicable to plaintiffs being individuals, or where the plaintiffs are headquartered, applicable to plaintiffs being agencies or organizations, to settle civil, marriage and family-related, business, trade or labor disputes prescribed in Articles 26, 28, 30 and 32 of this Code;

c) Disputes over real estates must be settled by Courts where such real estates are located.

……

3. If a civil lawsuits has been accepted by a Court and is being resolved according to regulations of this Code on the territorial jurisdiction of Courts but the residence, headquarter or transaction place of the involved parties is changed, such civil lawsuits shall be continuously resolved by that Court.'

B. *The Principles of Court Proceedings*

Court proceedings are stipulated from Article 3 to Article 25 of the Civil Procedure Code 2015. Besides common principles as in other countries, some should be paid attention to. Court hearings shall be public, closed hearings may be held only in special cases provided for by law. The courts have the responsibility to conduct conciliation and create favourable conditions for the involved parties to reach agreement with one another. The courts settle the disputes only when parties fail to reach agreement. Even so, conciliation may occur at any time of the proceedings after the courts start hearing.

During the hearing, the courts do not verify or gather evidence. The parties to the disputes have the duty to provide evidence to support their arguments.

Generally, the courts will decide collectively, *i.e.,* in a panel of one judge and three laypersons or between three and five judges.

The spoken and written language to be used in civil procedures is Vietnamese. Hence, the foreign party involved in the dispute should arrange for interpretation and translation.

The courts shall follow the regime of two-level hearings. The courts' first-instance judgments or decisions may be appealed or protested against under the provisions of the law. First-instance judgments or decisions that are not appealed or protested against according to appellate procedures within the time limit provided for by the law shall become legally effective. Where first-instance judgments or decisions are appealed or protested against, the cases must undergo appellate trials. The appellate judgments or decisions shall be legally effective. The courts' first-instance judgments or decisions already to have taken legal effect but have been detected as containing law violations or new details shall be reviewed according to the cassation or reopening procedures under the provisions of the law.

C. *Procedures*

A lawsuit shall be commenced by a written statement of claim with the court. The statement of claim may be submitted by an authorized representative of the plaintiff, including by a lawyer. The plaintiff will be required to pay an advance on the court fee. The normal duration of a lawsuit is around one year, although may vary widely from case to case.

Where the law does not otherwise prescribe the statute of limitations for lawsuits or for requests, the statute of limitations for

initiating a lawsuit to request the court to settle a dispute is two years as from the date the legitimate rights and interests of individuals or organizations infringed upon.

D. *Recognition and Enforcement of Court Judgments in Viet Nam*

Application for recognition and enforcement in Viet Nam of civil judgments or decisions of foreign courts must be filed to the Ministry of Justice of Viet Nam (MOJ). The Ministry of ustice MOJ must, within seven days after receiving the application and accompanying papers and/or documents, transfer dossiers to competent courts, which are People's Province Courts as stated in Article 37, 39 of the Civil Procedure Code 2015. Within five working days as of the date of receiving the dossiers transferred by the MOJ, the competent courts must accept these and notify the prosecution of the same level thereof.

The courts shall, within the time limit for preparing to consider the applications, have the right to request the applicants or the foreign courts that have rendered the judgments or decisions to explain any unclear matters in the dossiers. The written requests for additional explanations and written replies shall be sent via the MOJ. Application shall be considered at a meeting conducted by a Panel consisting of three judges, one of whom shall act as the presiding judge under the court's chief judge's assignment. Note that the prosecutors of the same level must participate in the meeting; in cases where the prosecutors are absent, the meeting must be postponed.

The basis upon which the application for recognition and enforcement in Viet Nam is denied includes: (i) the civil judgments or decisions which have not yet taken legal effect under the provisions of law of the countries where the courts have rendered such judgments or decisions; (ii) the loser or their lawful representative(s) were absent from court hearings of foreign courts, because they had not been duly summoned; (iii) the cases fall under the exclusive jurisdiction of the Vietnamese court; (iv) there has been a legally effective civil judgment or decision on the same case, that has been made by the Vietnamese court or by the foreign court but has been recognized and permitted by the Vietnamese court for enforcement in Viet Nam, or the Vietnamese court has accepted and been settling the case before it is accepted by a foreign court; (v) the statutes of limitation for judgment execution have expired under the law of the countries where the courts rendered such civil judgments or decisions or under Vietnamese law; and (vi) the recognition and enforcement in Viet Nam of the judgments or decisions of foreign courts are contrary to fundamental principles of Vietnamese law.

4. *Commercial Dispute Settlement through Arbitration*

A. *Jurisdiction*

When the parties wish to settle their international commercial disputes through arbitration, they must show the legal arbitration agreement. According to Vietnamese rules, a legal arbitration agreement must be in writing. 'Being in written form' may be widely described as the exchange of a statement of claim and defence that expresses the existence of an agreement proposed by one party and not denied by the other party. An arbitration agreement may be made either prior to or after the dispute arises.

Where the parties in dispute already have an arbitration agreement but one party still takes an action to court, the court must refuse to accept jurisdiction unless the arbitration agreement is void or incapable of being performed.

Under current regulations, parties may agree on the type (institutional or '*ad hoc*'), language, place (Viet Nam or foreign country) as well as procedures of arbitration in the case of an '*ad hoc*' type.

B. *Principles*

Dispute resolution sessions shall be conducted in private, unless otherwise agreed by the parties.

Parties may personally attend dispute resolution sessions or may authorize their representatives to attend; and parties shall have the right to invite witnesses and a person to protect their legal rights and interests. The arbitration tribunal may permit other people to attend dispute resolution sessions, if the parties so consent.

The language to be used in arbitration proceedings shall be as agreed by the parties. If the parties do not have an agreement, then the language to be used in arbitration proceedings shall be as decided by the arbitration tribunal.

An arbitration tribunal shall issue an arbitral award on the basis of its majority vote. If voting does not result in a majority decision, then the arbitral award shall be made in accordance with the opinion of the chairman of the arbitration tribunal.

C. *Arbitration Procedures*

The arbitration proceedings will be initiated at a party's written request, sent to the arbitration centre in the case of dispute resolution at an arbitration centre or forwarded to the respondent in the case of dispute resolution by '*ad hoc*' arbitration.

Unless otherwise agreed by the parties or otherwise stipulated by the procedural rules of the arbitration centre, within 10 days from the date of receipt of the statement of claim with accompanying materials and a receipt of the provisional advance of arbitration fees, the arbitration centre must send to the respondent the statement of claim with accompanying related materials.

A respondent shall have the right to file a counterclaim against the claimant on issues relevant to the dispute. The counterclaim of the respondent must be sent to the arbitration centre. In the case of dispute resolution by '*ad hoc*' arbitration, the counterclaim must be sent to the arbitration tribunal and the claimant. Counterclaims must be submitted at the same time as the defence.

An arbitration tribunal may consist of one or more arbitrators, depending on the agreement of the parties. If the parties have on agreement on the number of arbitrators, an arbitration tribunal shall consist of three arbitrators.

An arbitral award must be in writing. The arbitral award must be sent to the parties immediately after the date of its issuance. An arbitral award shall be final and shall be of full force and effect as from the date of its issuance.

D. *Enforcement*

Arbitral awards should achieve voluntary compliance from the parties in question. If at the expiry of the time-limit for carrying out an arbitral award the award debtor has not voluntarily carried out the award and has not requested that the award be set aside pursuant to the law, the award creditor shall have the right to request the competent civil judgment enforcement agency to enforce such award.

Foreign Arbitral Awards

The enforcement in Viet Nam of a foreign arbitral award requires a formal recognition by a Vietnamese Court in accordance with the Civil Procedure Code. Viet Nam has since 1995 been a signatory to the New York Convention; therefore, the award by an arbitrator in any other member country of the Convention is, subject to certain resolutions, now enforceable in Viet Nam and '*vice versa*'. For countries neither members of the New York Convention nor signatory to relevant bilateral agreements with Vietnam, the arbitrator's awards are recognized and enforceable on a reciprocal basis and the recognition shall not contrast with public policies.

The procedures of recognition and enforcement of arbitral awards in Viet Nam are stated in Articles 364 to 374 of the Civil Procedure Code, following these, the application for the recognition and enforcement in Viet Nam of foreign arbitral awards must be sent to the MOJ. Application in foreign languages must be accompanied by their Vietnamese versions lawfully notarized or authenticated. Within seven days as from the date of receiving the application as well as accompanying papers and documents, the MOJ shall transfer the dossiers to competent courts, which are the People's Province Courts. Within three working days as from the date of receiving case files from the MOJ, the competent courts must accept the files and notify the judgment debtors being individuals, agencies or organizations as well as the prosecutions of the same level thereof. Within two months as from the date of accepting applications, the competent courts shall, on a case-by-case basis, issue one of the following decisions: (i) to suspend the consideration of application in the case of receiving written notices from the MOJ saying that the foreign competent agencies are reviewing foreign arbitral awards; (ii) to stop the consideration of application if the parties voluntarily executed the awards, the judgment debtors being agencies or organizations have been dissolved or gone bankrupt and their rights and obligations have been handled according to the law or the judgment debtors being individuals have died while their rights and obligations are not inherited; (iii) to stop the consideration of the application in the case of receiving written notices from the Ministry of Justice saying that foreign competent agencies have cancelled the

foreign arbitral awards or stopped the enforcement thereof; (iv) to stop the consideration of application and return the files to the MOJ in cases where such consideration does not fall within the courts' jurisdiction, where the judgment debtors being agencies or organizations have no head offices in Viet Nam, where the judgment debtors being individuals neither reside nor work in Viet Nam, or where it is impossible to identify the places where exist the assets related to the enforcement of the awards in Viet Nam; and (v) to open hearing sessions to consider application.

5. Courts and Arbitral Awards in Viet Nam

The courts are able to avoid arbitral awards if one party can show with all necessary supporting documents that there was no arbitration agreement or the arbitration agreement is void; or the composition of the arbitration tribunal was (or the arbitration proceedings were) inconsistent with the agreement of the parties or contrary to the provisions of this law; or the dispute was not within the jurisdiction of the arbitration tribunal; or the evidence supplied by the parties on which the arbitration tribunal relied to issue the award was forged, or the arbitral award is contrary to the public policies of Viet Nam.

Summary of Chapter Seven

Parties to an international commercial contract have normally considered at the outset how any arising dispute between them may be resolved. Apart from the dominant arbitration, several popular dispute resolution modes are usually contemplated by the parties including negotiation, mediation, conciliation, and litigation. It should be noted that only outcome of arbitral or litigant proceedings is legal binding on the parties while negotiation and mediation or conciliation may only facilitate the parties to settle their disputes by their own in good faith. Although negotiation, mediation and conciliation would normally provide 'win-win' outcome, there are few international commercial disputes recorded as being resolved solely by those non-binding modes. Instead, those modes would be used in aid of arbitration and/or litigation to settle the disputes in a way that best serve the interests of the disputant parties.

The process and outcome of arbitration or litigation are likely to largely depend on which is the applicable law (both procedural and substantive law) to the dispute in question, and which is the jurisdiction in charge. Given the largely contented principle of party autonomy, parties may agree to choose the law and the jurisdiction to govern their perspective disputes. Yet, in many cases, parties have to trace out the answers for those questions by applying relevant international treaties, international customary practices, or regulations of private international law under relevant national legislations.

At the final stage, an arbitral award or a court judgment is normally provided. The crucial point for the prevailing party is to seek their enforcement. Owing to the availability of the New York Convention, the enforceability of foreign arbitral awards has been largely favoured by nearly 160 contracting States. Under the New York Convention, the grounds for non-enforcement have been narrowly interpreted. By contrast, the enforceability of foreign court's judgments has been rather limited. Several regional regulations have been established to enhance the enforceability of foreign judgments, yet this is not applied globally. There is still a long way to go until foreign judgments would be treated as arbitral awards with regard to enforceability in foreign jurisdiction.

It is also necessary to briefly introduce how international commercial dispute would be resolved under Vietnamese rules with a view to make a comparative study. That is to imply that Vietnam should speed up its adaptation to internationally regulations in order to becoming a favourable forum in the resolution of international commercial disputes.

QUESTIONS/EXERCISES

1. What are negotiation, conciliation, mediation, arbitration and litigation? How would those dispute resolution modes be differentiated?
2. What are the differences between an '*ad hoc*' arbitration and an institutional arbitration?
3. How courts would assist arbitral tribunals in settling international commercial disputes?
4. To what extent do you think the rules and practice within the common law system have influenced the resolution of international commercial disputes worldwide?
5. How the choice of venue would affect the process and the outcome of an arbitration?

6. How different is it between the principle of party autonomy in the context of arbitration and the principle of party autonomy in the context of litigation?
7. Where should the prevailing party seek recognition and enforcement of the arbitral award?
8. In which case where it is important to differentiate 'recognition' and 'enforcement' of the foreign arbitral award?
9. Do you agree with the premise that 'foreign judgment doesn't have local effect'? In which case where do you think the enforcement of foreign court's judgment should be favoured?
10. What is The Hague Convention on the choice of courts about? Do you believe in its success in the future?
11. Do you think a foreign court's judgment may be easier to be enforced under the common law? And how it may be enforced?
12. What are the advantages and disadvantages of court proceedings in Viet Nam?
13. What are the advantages and disadvantages of arbitration proceedings under Vietnamese law?

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MUTRAP
EU - VIETNAM
DỰ ÁN HỖ TRỢ CHÍNH SÁCH THƯƠNG MẠI VÀ ĐẦU TƯ CỦA CHÂU ÂU

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HANOI LAW UNIVERSITY

TRƯỜNG ĐẠI HỌC LUẬT HÀ NỘI

GIÁO TRÌNH
LUẬT THƯƠNG MẠI QUỐC TẾ

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NHÀ XUẤT BẢN THANH NIÊN
HÀ NỘI - 2017

Giáo trình này được biên soạn với sự hỗ trợ tài chính của Liên minh châu Âu. Quan điểm trong Giáo trình này là của các tác giả và do đó không thể hiện quan điểm chính thức của Liên minh châu Âu hay Bộ Công Thương.

CÁC TÁC GIẢ

Nguyễn Thanh Tâm	Chương 1; và Chương 3 - Mục 1, Mục 2; và Chương 4 - Mục 3
Nguyễn Đăng Thắng	Chương 2 - Mục 1, Mục 2
Nguyễn Đức Kiên	Chương 2 - Mục 3 ; và Chương 5 - Mục 4
Federico Lupo Pasini	Chương 2 - Mục 4, Mục 7; và Chương 4 - Mục 1
Nguyễn Như Quỳnh	Chương 2 - Mục 5
Nguyễn Thị Thu Hiền	Chương 2 - Mục 6
Nguyễn Ngọc Hà	Chương 2 - Mục 8
Andrew Stephens	Chương 3 - Mục 3
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Lê Hoàng Oanh	Chương 3 - Mục 5
Nguyễn Minh Hằng	Chương 5 - Mục 1
Hồ Thúy Ngọc	Chương 5 - Mục 2, các Mục 3.4 và 3.5; và Chương 7 - Mục 6
Võ Sỹ Mạnh	Chương 5 - các Mục 3.1 và 3.3
Marcel Fontaine	Chương 5 - Mục 3.2
Nguyễn Bá Bình	Chương 6 - Mục 1
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Hà Công Anh Bảo	Chương 6 - Mục 3
Trịnh Đức Hải	Chương 7 - các Mục từ 1 đến 5
Laurent Manderieux và Nguyễn Thanh Tâm	Rà soát, cập nhật toàn bộ các chương, mục của Giáo trình

NGƯỜI BIÊN DỊCH

Nguyễn Anh Tùng	Lời mở đầu; và Chương 1; và Chương 2 - Mục 3; và Chương 3 - Mục 2
Nguyễn Ngọc Lan	Chương 2 - Mục 1 và Mục 2
Phạm Thị Thanh Phương	Chương 2 - Mục 3; và Chương 3 - Mục 1 và Mục 3
Nguyễn Quỳnh Trang	Chương 2 - Mục 4; và Chương 5 - Mục 3.2 và Mục 4
Nguyễn Như Quỳnh	Chương 2 - Mục 5
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Nguyễn Ngọc Hà	Chương 2 - Mục 8
Trịnh Hải Yến	Chương 3 - Mục 4; và Chương 4 - Mục 2 và Mục 3
Lê Hoàng Oanh	Chương 3 - Mục 5
Nguyễn Thị Anh Thơ	Chương 3 - Mục 5
Văn Khánh Thư	Chương 5 - Mục 1 và Mục 4
Hồ Thúy Ngọc	Chương 5 - Mục 2, Mục 3.4 và Mục 3.5; và Chương 7 - Mục 6
Võ Sỹ Mạnh	Chương 5 - Mục 3.1, Mục 3.3
Nguyễn Bá Bình	Chương 6 - Mục 1
Nguyễn Thị Thanh Phúc	Chương 6 - Mục 2
Hà Công Anh Bảo	Chương 6 - Mục 3
Trịnh Đức Hải	Chương 7 - các Mục từ 1 đến 5
Hà Thị Phương Trà	Chương 4 - Mục 1

LỜI GIỚI THIỆU TÁI BẢN GIÁO TRÌNH LẦN THỨ BA

Dự án Hỗ trợ chính sách thương mại và đầu tư của châu Âu (EU-MUTRAP) và Trường Đại học Luật Hà Nội (HLU) quyết định tiếp tục tái bản lần thứ 3 cuốn Giáo trình này, tiếp nối sự thành công của 2 lần xuất bản trước lần lượt vào các năm 2011 và 2014. Nhiều trường đại học lớn tại Việt Nam đã sử dụng Giáo trình này làm tài liệu giảng dạy chủ yếu. Hơn thế, các công ty luật, viện nghiên cứu và cơ quan nhà nước cũng sử dụng giáo trình này một cách rộng rãi như một công cụ quan trọng hỗ trợ công việc hàng ngày. Giống như hai ấn phẩm trước, Giáo trình tái bản lần thứ 3 này được thực hiện với sự hỗ trợ tài chính và chuyên môn của Dự án EU-MUTRAP do Liên minh châu Âu tài trợ. Dự án EU-MUTRAP đã tuyển các chuyên gia quốc tế và học giả trong nước sửa đổi và cập nhật cuốn Giáo trình, dựa trên những phát triển trong chính sách thương mại của Việt Nam trong những năm vừa qua.

Dự án Hỗ trợ chính sách thương mại và đầu tư của châu Âu (EU-MUTRAP) và Trường Đại học Luật Hà Nội (HLU) xin trân trọng giới thiệu đến quý độc giả cuốn Giáo trình Luật thương mại quốc tế tái bản lần thứ 3.

Bùi Huy Sơn

Giám đốc
Dự án EU-MUTRAP

Lê Tiến Châu

Hiệu trưởng
Trường Đại học Luật Hà Nội

LỜI GIỚI THIỆU

Giáo trình này được biên soạn với sự hỗ trợ của Dự án hỗ trợ thương mại đa biên giai đoạn III (EU-Việt Nam MUTRAP III) do Liên minh châu Âu tài trợ và là kết quả đóng góp của các chuyên gia trong nước, chuyên gia nước ngoài về luật thương mại quốc tế. Sự phối hợp giữa chuyên gia Việt Nam và chuyên gia quốc tế chứng tỏ Việt Nam đang trao đổi và tiếp nhận những tiến bộ của cộng đồng khoa học và văn hoá thế giới. Có được kết quả này một phần là do quá trình Việt Nam hội nhập thương mại và kinh tế đem lại, nhất là từ khi Việt Nam gia nhập WTO năm 2007. Rõ ràng là ngày càng có nhiều nhà khoa học và sinh viên Việt Nam tham gia vào các chương trình hợp tác, trao đổi khoa học quốc tế. Giáo trình này chính là một bằng chứng cho điều đó.

Với sự hỗ trợ của Dự án EU-Việt Nam MUTRAP III và các chương trình hợp tác phát triển khác, các trường đại học lớn ở Việt Nam đã cập nhật và đổi mới chương trình giảng dạy nhằm phản ánh diễn biến nhanh chóng của tình hình thương mại và kinh tế. Giáo trình này, chủ yếu dành cho sinh viên trình độ đại học, nhằm cung cấp bức tranh toàn cảnh về khía cạnh pháp luật trong hầu hết các vấn đề thương mại quốc tế. Mặc dù ghi nhận sự khác biệt giữa công pháp và tư pháp quốc tế, nhóm tác giả giáo trình cho rằng hai lĩnh vực pháp luật này không thể nghiên cứu tách rời nhau. Các luật gia phải có kiến thức toàn diện về tất cả các lĩnh vực liên quan đến giao dịch thương mại quốc tế, từ pháp luật điều chỉnh hợp đồng quốc tế cho đến quyền tiếp cận thị trường ở nước thứ ba được WTO bảo hộ. Bên cạnh đó, giáo trình này cũng tập hợp các quy định toàn cầu (WTO, Công ước Viên về hợp đồng mua bán hàng hoá quốc tế), quy định khu vực (EU, NAFTA và ASEAN), quy định song phương (các hiệp định giữa Việt Nam và một số đối tác), và các quy định có liên quan của pháp luật Việt Nam.

Giáo trình đã nhận được sự đóng góp của nhiều chuyên gia và các học giả am hiểu cả kiến thức chuyên môn và hiểu biết về khu vực. *Ví dụ,* chuyên gia người Hoa Kỳ viết một nội dung về NAFTA, chuyên gia châu Âu viết phần liên quan đến châu Âu, còn chuyên gia Việt Nam lại tập trung vào những khía cạnh thương mại liên quan của Việt Nam. Sự kết hợp đó đã tạo ra một cuốn Giáo trình quy tụ nhiều quan điểm khác nhau về pháp luật thương mại quốc tế. Giáo trình là cẩm nang tốt về những tình huống mà luật gia Việt Nam có thể gặp phải: một thế giới với các quy tắc được hài hoà hoá, cách giải thích thuật ngữ giống nhau nhưng cách tiếp cận lại khác nhau trong từng trường hợp giao dịch

thương mại hàng ngày. Nhu cầu tăng cường quan hệ thương mại, đặc biệt quan trọng đối với nền kinh tế mở như Việt Nam, đòi hỏi khả năng hiểu được các cách áp dụng khác nhau này và nếu có thể, khả năng xác định được các thông lệ quốc tế tốt nhất để áp dụng trong khuôn khổ pháp luật quốc gia.

Cuốn sách còn là công cụ hữu ích giúp cho các cán bộ chính phủ hàng ngày phải làm việc trong môi trường quốc tế đầy biến động, cũng như những cán bộ mong muốn tìm hiểu thêm những thông tin cơ bản liên quan đến các khía cạnh của pháp luật thương mại quốc tế.

Cuốn sách thực sự là bức tranh thu nhỏ thế giới mà các luật gia Việt Nam sẽ phải đối mặt, và là điểm khởi đầu rất tốt cho những ai yêu thích tìm hiểu và mong muốn có được những hiểu biết cơ bản nhất về hệ thống các quy định phức tạp về thương mại quốc tế.

Nguyễn Thị Hoàng Thúy

Giám đốc Dự án EU-Việt Nam MUTRAP III

LỜI MỞ ĐẦU

Pháp luật thương mại quốc tế một mặt góp phần nâng cao vị thế của các quốc gia trong một số lĩnh vực, tạo thuận lợi cho các quan hệ kinh doanh, thương mại cũng như các quan hệ khác diễn ra giữa các quốc gia và các tổ chức; nhưng mặt khác, cũng đặt ra những hạn chế trong một số lĩnh vực để bảo vệ lợi ích lớn hơn của các cá nhân và toàn xã hội, ở quy mô trong nước và quốc tế. Mục tiêu của lĩnh vực pháp luật này là đề ra các quy tắc công bằng trong các quan hệ kinh tế quốc tế, hướng đến xã hội công bằng hơn cho tất cả mọi người. Nói khác đi, vai trò của pháp luật thương mại quốc tế là đảm bảo sân chơi bình đẳng cho tất cả các quốc gia, cho phép các quốc gia phát huy tối đa tiềm năng và/hoặc tối ưu hoá các thế mạnh riêng có của mình. Mỗi con người sinh ra có những phẩm chất và năng lực riêng biệt; pháp luật của bất kì quốc gia nào cũng cần tạo điều kiện cho các cá nhân phát huy tốt nhất khả năng của mình mà không xâm hại tới lợi ích của người khác trong xã hội, để mỗi người có thể theo đuổi giấc mơ của mình - cho dù giấc mơ đó có ý nghĩa như thế nào với họ.

Với các quốc gia cũng vậy - về cơ bản, cộng đồng các quốc gia là tập hợp của những cá thể gắn kết với nhau bởi một số đặc điểm và mục đích tương đồng. Do đó, pháp luật thương mại quốc tế được xây dựng nhằm cho phép các quốc gia đóng góp cho cộng đồng quốc tế những gì mình có và nhận lại những gì do các quốc gia khác đóng góp. Sự có đi có lại và thúc đẩy lợi ích quốc gia là những yếu tố cốt lõi trong hành vi của con người, cũng như của các quốc gia. Điều này đặc biệt đúng đối với pháp luật thương mại quốc tế.

Khác với những lĩnh vực cụ thể khác của pháp luật quốc tế, pháp luật thương mại quốc tế liên quan trực tiếp đến nền kinh tế và sự thịnh vượng của quốc gia. Nói cách khác, nó liên quan trực tiếp đến những lợi ích kinh tế cơ bản của quốc gia. Do đó, bất cứ quốc gia nào cũng rất thận trọng trong việc chấp nhận các quy tắc điều chỉnh thương mại quốc tế. Tuy nhiên, các quốc gia đều hiểu rằng nếu không chấp nhận một số nguyên tắc cơ bản của pháp luật thương mại quốc tế, thì sẽ không thể tiến hành thương mại với các quốc gia khác hay tham gia vào các hoạt động thương mại khác.

Điều nghịch lí trong thương mại quốc tế là quốc gia nào cũng muốn các quốc gia khác thực hiện chính sách tự do hoá thương mại và mở cửa thị trường càng rộng rãi càng tốt; nhưng ngược lại, chính mình lại cố gắng để đóng cánh cửa của mình chặt nhất, bằng cách theo đuổi chính sách

bảo hộ. Chính trong tình huống này cần có sự can thiệp của pháp luật để đảm bảo 'cuộc chơi' công bằng, và nếu xảy ra hành vi 'chơi xấu' thì các tranh chấp cũng được giải quyết một cách công bằng. Pháp luật có vai trò cũng giống như vị trọng tài trong trận đấu thể thao, hướng tới mục đích đảm bảo sự công bằng. Gắn liền với ý tưởng về 'cuộc chơi công bằng' là sự hình thành 'sân chơi bình đẳng' cho các chủ thể tiến hành hoạt động thương mại quốc tế.

Thương mại là một trong những thuộc tính sơ khai trong hoạt động của con người. Khái niệm 'thương mại' có nghĩa là hoạt động kinh tế tự nguyện, dựa trên nguyên tắc có đi có lại. Từ thời cổ đại, con người trao đổi hàng lấy hàng; sau này, khi nghĩ ra tiền tệ, con người trao đổi hàng hoá lấy tiền. Thực tế là, chính thương mại đã góp phần cho sự ra đời của tiền tệ. Khi đã phát triển cả về phạm vi địa lí và quy mô, thương mại được điều chỉnh bởi các quy định, ban đầu là của giới thương nhân và sau đó là của các cơ quan nhà nước, để đảm bảo sự công bằng và không bị bóp méo.

Với mục đích sinh tồn và tìm kiếm sự thịnh vượng từ thương mại, phần lớn tiến trình phát triển của nền văn minh nhân loại đã luôn gắn liền và xoay quanh sự mở rộng của thương mại. Nhằm thúc đẩy thương mại, ban đầu việc điều tiết được thực hiện dưới hình thức các quy tắc ứng xử cơ bản đối với các chủ thể tham gia thương mại quốc tế. Các quy tắc ứng xử này được ban hành rất đúng lúc trong cả lĩnh vực công pháp và tư pháp quốc tế, làm phát triển các hoạt động thương mại. Bởi vậy, một trong những tầm nhìn về trật tự thế giới mới sau Chiến tranh thế giới lần thứ II chính là tự do hoá thương mại quốc tế để thúc đẩy tăng trưởng kinh tế thông qua việc thành lập Tổ chức thương mại quốc tế ('ITO').

Mặc dù ITO đã không ra đời nhưng tư tưởng của tổ chức này về tự do hóa thương mại quốc tế đã được GATT và một số văn kiện pháp lí quốc tế khác thực hiện; rất nhiều trong số đó sau này trở thành một phần của luật WTO khi tổ chức này được thành lập vào năm 1995, sau khi kết thúc Vòng đàm phán Uruguay về thương mại đa phương (1986 - 1993). Kể từ sau Chiến tranh thế giới lần thứ II, tư pháp quốc tế cũng phát triển để tạo thuận lợi, đồng thời điều tiết các hoạt động thương mại quốc tế. Bởi vậy, ngày nay có một phần đáng kể của cả công pháp quốc tế và tư pháp quốc tế cùng điều chỉnh các quan hệ thương mại quốc tế. Giáo trình Luật thương mại quốc tế này cũng nhằm cung cấp cái nhìn tổng quan toàn diện đó một cách ngắn gọn.

Giáo trình đề cập nhiều vấn đề của pháp luật thương mại quốc tế liên quan đến cả công pháp quốc tế và tư pháp quốc tế, là kết quả của dự án với nhiều tham vọng nhằm cung cấp công cụ học tập và nghiên cứu toàn diện cho sinh viên, công chức nhà nước, luật sư và học giả Việt Nam.

Năm 1986, Việt Nam bắt đầu thực hiện chính sách đổi mới kinh tế, tiến trên con đường tự do hoá và cải cách kinh tế. Là một phần của chính sách này, Việt Nam nộp đơn xin gia nhập WTO và đã chính thức trở thành thành viên của WTO vào năm 2007. Từ khi tiến hành 'Đổi mới' và đặc biệt là sau khi trở thành thành viên WTO, Việt Nam đã chứng kiến sự tăng trưởng rất lớn trong thương mại quốc tế và hoạt động kinh doanh. Thực tế đòi hỏi cần có các quy định pháp luật và chính sách mới để điều chỉnh những hoạt động này.

Việc trở thành thành viên WTO là chất xúc tác cho sự phát triển của hệ thống pháp luật Việt Nam, bởi để thực hiện các cam kết gia nhập WTO, Việt Nam cần ban hành nhiều chính sách và quy định pháp luật mới. Sự kiện này làm thay đổi môi trường pháp lí của Việt Nam. Giờ đây, Việt Nam không chỉ là thành viên chính thức của WTO với đầy đủ tư cách, mà còn là một nền kinh tế thị trường đang phát triển với hệ thống chính trị xã hội chủ nghĩa. Đất nước này trong thời gian qua đã thu hút lượng lớn vốn đầu tư nước ngoài và trở thành một trong những quốc gia có tốc độ tăng trưởng nhanh nhất thế giới. Cùng với những cơ hội là trách nhiệm của Việt Nam phải tuân thủ pháp luật thương mại quốc tế. Để đạt đến thành công, Việt Nam cũng cần có nguồn nhân lực được giáo dục và đào tạo tốt, có khả năng tương tác với các yếu tố toàn cầu, thúc đẩy và bảo vệ các lợi ích của quốc gia.

Việt Nam ngày càng tiếp xúc nhiều hơn với các yếu tố của thương mại quốc tế. Hệ thống pháp luật Việt Nam đã và đang đáp ứng với những thách thức và thay đổi diễn ra trong các hoạt động kinh tế và pháp luật quốc tế. Bởi vậy, Việt Nam cần chuẩn bị cho thế hệ mới các luật gia và công chức nhà nước những hiểu biết và khả năng ứng phó tốt với các vấn đề đặt ra do những thay đổi phi thường đang diễn ra cả ở trong nước và trên phạm vi quốc tế; giúp người dân tận dụng tối đa lợi ích và cơ hội từ những thay đổi này. Để làm được điều đó, họ cần có nguồn tài liệu tốt và Giáo trình Luật thương mại quốc tế được biên soạn nhằm đáp ứng một phần nhu cầu và đòi hỏi này.

Giáo trình bao gồm các chương do các tác giả Việt Nam và nước ngoài cùng biên soạn, giải quyết cả những vấn đề pháp lí quốc tế và những vấn đề pháp lí của Việt Nam, liên quan đến cả lĩnh vực pháp luật thương

mại quốc tế công và pháp luật thương mại quốc tế tư. Cách tiếp cận tổng hợp này giúp sinh viên có thể nhìn nhận dưới cả góc độ quốc tế và góc độ Việt Nam về những lĩnh vực pháp luật được đề cập.

Các tác giả trình bày một cách toàn diện những chủ đề được đề cập trong Giáo trình này, như luật WTO, bao gồm cả lĩnh vực thương mại hàng hoá, dịch vụ, quyền sở hữu trí tuệ; vấn đề giải quyết tranh chấp thương mại quốc tế, bao gồm trọng tài thương mại quốc tế; các hiệp định thương mại khu vực hay các mô hình hội nhập kinh tế khu vực như NAFTA, EU và ASEAN; thương mại điện tử. Các chương trong Giáo trình vừa chứa đựng thông tin vừa có tính phân tích, được đóng góp bởi giới hàn lâm, các nhà thực hành luật, các nhà nghiên cứu thuộc những thế hệ khác nhau, có chuyên môn và khá nhiều kinh nghiệm trong những lĩnh vực liên quan.

Do được thiết kế chủ yếu dành cho đối tượng là sinh viên luật, công chức nhà nước, các nhà nghiên cứu và luật sư tại Việt Nam, Giáo trình này tiếp cận các vấn đề dưới góc độ pháp luật, dựa trên việc phân tích các văn bản pháp luật trong nước và quốc tế, án lệ hoặc các quan điểm của khoa học pháp lí và các tập quán thương mại quốc tế. Chúng tôi đã cố gắng biên soạn để Giáo trình này thân thiện nhất với độc giả và sinh viên. Các chương trong Giáo trình kết thúc bằng các câu hỏi để kích thích sự tư duy và phân tích của sinh viên và độc giả. Tương tự, các chương có danh mục tài liệu tham khảo cho những người muốn tìm hiểu sâu hơn về lĩnh vực pháp luật nhất định. Mặc dù độ dài và phong cách trình bày của các chương có thể khác nhau do chúng được thực hiện bởi các tác giả khác nhau, với nền tảng pháp lí, thực tiễn và học thuật riêng biệt, nhưng chúng tôi đã cố gắng đảm bảo sự nhất quán tương đối trong toàn bộ Giáo trình, trình bày nó theo kết cấu chặt chẽ. Chúng tôi hi vọng rằng Giáo trình này sẽ là nguồn tư liệu tham khảo có giá trị đối với những người quan tâm đến pháp luật thương mại quốc tế, cũng như quan tâm đến việc áp dụng và phổ biến nó ở Việt Nam.

Được làm việc cùng với Ban điều phối tiểu dự án của Trường Đại học Luật Hà Nội (HLU) để thực hiện Giáo trình này là vinh dự của cá nhân tôi. Tôi xin gửi lời cảm ơn về sự hợp tác tuyệt vời của họ.

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DANH MỤC NHỮNG TỪ VIẾT TẮT

AAA	Hiệp hội trọng tài Hoa Kỳ
AANZFTA	Khu vực thương mại tự do ASEAN-Australia-New Zealand
ABAC	Hội đồng tư vấn kinh doanh APEC
ACFA	Hiệp định khung về hợp tác kinh tế toàn diện giữa ASEAN-Trung Quốc
ACFTA	Khu vực thương mại tự do ASEAN-Trung Quốc
ACIA	Hiệp định đầu tư toàn diện ASEAN
ACP	Các nước châu Phi, Caribê và Thái Bình Dương
AD	Chống bán phá giá
ADA	Hiệp định chống bán phá giá của WTO
ADR	Phương thức giải quyết tranh chấp thay thế
AEC	Cộng đồng kinh tế ASEAN
AFAS	Hiệp định khung về dịch vụ ASEAN
AFT	Quỹ uỷ thác Á-Âu
AFTA	Khu vực thương mại tự do ASEAN
AHTN	Danh mục hài hoà thuế quan ASEAN
AIA	Khu vực đầu tư ASEAN
AITIG	Thương mại hàng hoá ASEAN-Ấn Độ
AJCEP	Hiệp định đối tác toàn diện ASEAN-Nhật Bản
AKAI	Hiệp định đầu tư ASEAN-Hàn Quốc
AKFA	Hiệp định khung về hợp tác kinh tế toàn diện ASEAN-Hàn Quốc
AKTIG	Hiệp định thương mại hàng hoá ASEAN-Hàn Quốc
AKTIS	Hiệp định thương mại dịch vụ ASEAN-Hàn Quốc
AMS (Total AMS)	Tổng lượng hỗ trợ tính gộp
APEC	Diễn đàn hợp tác kinh tế châu Á-Thái Bình Dương
APEC-MRA	Hiệp định công nhận lẫn nhau trong APEC
ASEAN	Hiệp hội các quốc gia Đông Nam Á
ASEM	Diễn đàn hợp tác kinh tế Á-Âu
ATC	Hiệp định về hàng dệt may của WTO
ATIGA	Hiệp định thương mại hàng hoá ASEAN
BDC	Nước đang phát triển là người thụ hưởng
BFTAs	Hiệp định thương mại tự do song phương
BIT	Hiệp định đầu tư song phương
BTA	Hiệp định thương mại song phương Việt Nam-Hoa Kỳ
BTAs	Hiệp định thương mại song phương
CAP	Chính sách nông nghiệp chung châu Âu
CDB	Công ước về đa dạng sinh học

CEPEA	Quan hệ đối tác kinh tế toàn diện Đông Á
CEPT	Hiệp định về chương trình ưu đãi thuế quan có hiệu lực chung trong Khu vực thương mại tự do ASEAN
CFI	Toà án cấp sơ thẩm
CFR	Tiền hàng và cước phí (trước đây viết tắt là C&F)
CIETAC	Uỷ ban trọng tài kinh tế quốc tế và thương mại Trung Quốc
CIF	Tiền hàng, bảo hiểm và cước phí
CIP	Cước phí và phí bảo hiểm trả tới
CISG	Công ước Viên năm 1980 về hợp đồng mua bán hàng hoá quốc tế
CJ	Toà án công lí (trước đây là ECJ - Toà án công lí châu Âu)
CJEU	Toà án công lí Liên minh châu Âu
CLMV Countries	Các nước Cam-pu-chia, Lào, Mi-an-ma và Việt Nam
CM	Thị trường chung
COMESA	Thị trường chung Đông và Nam Phi
CPC	Hệ thống phân loại sản phẩm trung tâm của Liên hợp quốc
CPT	Cước phí trả tới
CTG	Hội đồng thương mại hàng hoá
CTS	Hội đồng thương mại dịch vụ
CU	Liên minh hải quan
CVA	Hiệp định của WTO về định giá hải quan
DAP	Giao tại nơi đến
DAT	Giao hàng tại bến
DCs	Các nước đang phát triển
DDP	Giao hàng đã nộp thuế
DSB	Cơ quan giải quyết tranh chấp của WTO
DSU	Hiệp định về quy tắc và thủ tục điều chỉnh việc giải quyết tranh chấp của WTO
EAFTA	Khu vực thương mại tự do Đông Á
EC	Cộng đồng châu Âu; hoặc Ủy ban châu Âu
ECB	Ngân hàng trung ương châu Âu
ECJ	Toà án công lí châu Âu (nay là CJ - Toà án công lí)
ECSC	Cộng đồng than và thép châu Âu
EDI	Trao đổi dữ liệu điện tử
EEC	Cộng đồng kinh tế châu Âu
EFTA	Khu vực thương tự do châu Âu
EMU	Liên minh kinh tế và tiền tệ
EP	Giá xuất khẩu
EPAs	Hiệp định quan hệ đối tác kinh tế
EU	Liên minh châu Âu
EU-MUTRAP	Dự án ……..

EURATOM	Cộng đồng năng lượng nguyên tử châu Âu
EXW	Giao tại xưởng
FAS	Giao dọc mạn tàu
FCA	Giao cho người chuyên chở
FDI	Đầu tư trực tiếp nước ngoài
FIOFA	Liên đoàn dầu, hạt và chất béo
FOB	Giao lên tàu
FPI	Đầu tư gián tiếp nước ngoài
FSIA	Luật về miễn trừ chủ quyền của quốc gia nước ngoài của Hoa Kỳ năm 1976
FTAs	Hiệp định thương mại tự do
GAFTA	Hiệp hội mua bán gạo và lúa mạch
GATS	Hiệp định chung về thương mại dịch vụ của WTO
GATT	Hiệp định chung về thuế quan và thương mại của WTO
GCC	Hội đồng hợp tác vùng Vịnh
GSP	Chương trình ưu đãi thuế quan phổ cập
HFCS	Ngô có hàm lượng fructose cao
IACAC	Uỷ ban trọng tài thương mại liên Mỹ
IAP	Kế hoạch hành động quốc gia
IBRD	Ngân hàng tái thiết và phát triển quốc tế
ICA	Trọng tài thương mại quốc tế
ICC	Phòng thương mại quốc tế
ICDR	Trung tâm quốc tế về giải quyết tranh chấp
ICJ	Toà án quốc tế (Toà án quốc tế ở La Haye, thuộc hệ thống Liên hợp quốc)
ICSID	Trung tâm quốc tế về giải quyết tranh chấp đầu tư (thuộc Ngân hàng thế giới)
IEG	Nhóm chuyên gia về đầu tư
IGA	Hiệp định về khuyến khích và bảo hộ đầu tư ASEAN
IL	Danh sách giảm thuế
ILO	Tổ chức lao động quốc tế
ILP	Hiệp định về thủ tục cấp phép nhập khẩu của WTO
IMF	Quỹ tiền tệ quốc tế
INCOTERMS	Các điều kiện cơ sở giao hàng trong mua bán hàng hoá quốc tế
IPAP	Kế hoạch hành động xúc tiến đầu tư
IPRs	Quyền sở hữu trí tuệ
ISBP	Tập quán ngân hàng theo tiêu chuẩn quốc tế
ISP	Quy tắc thực hành về tín dụng dự phòng quốc tế
ITO	Tổ chức thương mại quốc tế
LCIA	Toà án trọng tài quốc tế Luân-đôn

LDCs	Các nước kém phát triển
LMAA	Hiệp hội trọng tài hàng hải Luân-đôn
LME	Sàn giao dịch kim loại Luân-đôn
MA	Tiếp cận thị trường
M&A	Sáp nhập và mua lại
MAC	Uỷ ban trọng tài hàng hải
MERCOSUR	Thị trường chung Nam Mỹ
MFN	Tối huệ quốc
MMPA	Đạo luật bảo vệ động vật có vú ở biển
MNCs	Các công ty đa quốc gia
MTO	Các nhà khai thác vận tải đa phương thức
MUTRAP	Dự án hỗ trợ thương mại đa biên EU-Việt Nam do EU tài trợ
NAALC	Hiệp định về hợp tác lao động Bắc Mỹ
NAFTA	Khu vực thương mại tự do Bắc Mỹ / Hiệp định thương mại tự do Bắc Mỹ
NGOs	Các tổ chức phi chính phủ
NME	Nền kinh tế phi thị trường
NT	Đối xử quốc gia
NTBs	Rào cản phi thuế quan
NTR	Quan hệ thương mại bình thường
NV	Giá trị thông thường
PCA	Hiệp định hợp tác và đối tác
PECL	Bộ nguyên tắc về luật hợp đồng châu Âu
PICC	Bộ nguyên tắc về hợp đồng thương mại quốc tế của UNIDROIT
PNTR	Quan hệ thương mại bình thường vĩnh viễn
PPM	Quy trình và phương thức sản xuất
PSI	Hiệp định về giám định hàng hoá trước khi xuống tàu của WTO
PTAs	Các hiệp định thương mại ưu tiên
ROK	Hàn Quốc
RoO	Hiệp định về quy tắc xuất xứ của WTO
RTAs	Các hiệp định thương mại khu vực
S&D	Đối xử đặc biệt và khác biệt
SA	Hiệp định tự vệ của WTO
SCC	Phòng thương mại Stockholm
SCM	Hiệp định về trợ cấp và các biện pháp đối kháng của WTO
SMEs	Các doanh nghiệp vừa và nhỏ
SMEWG	Nhóm công tác doanh nghiệp vừa và nhỏ của APEC
SOMs	Các cuộc họp quan chức cấp cao
SPS	Hiệp định về các biện pháp kiểm dịch động thực vật của WTO
SSG	Tự vệ đặc biệt
TBT	Hiệp định về rào cản kĩ thuật trong thương mại của WTO
TEC	Hiệp ước Cộng đồng châu Âu
TEL	Danh mục loại trừ tạm thời
TEU	Hiệp ước Liên minh châu Âu
TFAP	Kế hoạch hành động thuận lợi hoá thương mại
TFEU	Hiệp định về hoạt động của Liên minh châu Âu
TIFA	Hiệp định khung về thương mại và đầu tư
TIG	Hiệp định thương mại hàng hoá
TNC	Uỷ ban đàm phán thương mại; hoặc Công ty xuyên quốc gia
TPP	Hiệp định đối tác xuyên Thái Bình Dương
TPRB	Cơ quan rà soát chính sách thương mại của WTO
TPRM	Cơ chế rà soát chính sách thương mại của WTO
TRIMs	Hiệp định về các biện pháp đầu tư liên quan đến thương mại của WTO
TRIPS	Hiệp định về quyền sở hữu trí tuệ liên quan đến thương mại của WTO
TRQs	Hạn ngạch thuế quan
UCC	Bộ luật thương mại thống nhất Hoa Kỳ
UCP	Quy tắc thực hành thống nhất về tín dụng chứng từ của ICC
UNCITRAL	Uỷ ban của Liên hợp quốc về luật thương mại quốc tế
UNIDROIT	Viện quốc tế về thống nhất luật tư
URDG	Quy tắc thống nhất về bảo lãnh theo yêu cầu
USDOC	Bộ thương mại Hoa Kỳ
WCO	Tổ chức hải quan thế giới
WIPO	Tổ chức sở hữu trí tuệ thế giới
WTO	Tổ chức thương mại thế giới

MỤC LỤC

PHẦN MỞ ĐẦU

CHƯƠNG 1.
TỔNG QUAN

TỔNG QUAN

Mục 1. GIAO DỊCH THƯƠNG MẠI QUỐC TẾ VÀ CÁC GIAO DỊCH CÓ LIÊN QUAN

1. Lịch sử phát triển của các giao dịch thương mại quốc tế

Các giao dịch thương mại quốc tế và pháp luật thương mại quốc tế không phải là hiện tượng mới. Các nhà sử học cho rằng, ngay từ thời cổ xưa, khi con người sống theo bộ lạc, họ đã biết trao đổi hàng hoá với nhau. Các khu chợ có thể đã xuất hiện ở khu vực giáp ranh giữa các lãnh thổ của các bộ lạc. Mạng lưới thương mại quốc tế đầu tiên mà các nhà khảo cổ biết đến xuất hiện vào khoảng 3.500 năm trước Công nguyên, tại khu vực Lưỡng Hà cổ đại (lãnh thổ Iran và Irắc hiện nay). Ngoài ra, còn phải kể đến mạng lưới thương mại quốc tế xuất hiện ở Trung Quốc vào khoảng thời kì 1000-2000 năm trước Công nguyên, được gọi là 'Con đường tơ lụa'. Trước khi xuất hiện kỉ nguyên văn minh Hy Lạp, vùng Địa Trung Hải là một trung tâm thương mại quốc tế được tổ chức rất thành công bởi người Phê-ni-xi. Các thành bang Hy Lạp bắt đầu cạnh tranh với người Phê-ni-xi từ khoảng năm 800 trước Công nguyên bằng việc phát triển hệ thống thương mại cùng với nền văn minh rực rỡ của họ. Cuộc chinh phục của Alexandre Đại Đế đã tạo ra những con đường thương mại kéo dài đến tận châu Á và Địa Trung Hải. Tiếp đó, người La Mã đã xây dựng đế chế thương mại hùng mạnh hơn hướng về phía Anh Quốc và Bắc Âu ngày nay.

Thương mại quốc tế ở châu Âu thời kì tiền Trung cổ đã trải qua giai đoạn suy thoái sau sự suy tàn của Đế chế La Mã. Sau đó, trong suốt thời kì Trung cổ, truyền thống thương mại quốc tế được các thương nhân Ả-rập tiếp tục phát triển. Họ xây dựng những mạng lưới thương mại rộng khắp quanh khu vực Vịnh Pếc-xích, châu Phi, Ấn Độ, và cả Đông Nam Á. Trong thời kì này, quan hệ thương mại giữa Trung Quốc với Ấn Độ, Malaysia và Đông Nam Á cũng phát triển.

Chợ họp theo mùa bắt đầu xuất hiện ở các đô thị châu Âu thời Trung cổ. Đây là nơi các thương nhân mang hàng hoá từ nhiều nước đến bán. Kể từ thời kì này, các vua chúa, *ví dụ* như vị vua xứ Lombardy (Italia) thế kỉ XI, đã có chính sách áp thuế buôn bán ở chợ và áp thuế quan đối với hàng hoá được vận chuyển đến các chợ.

Vào cuối thời kì Trung cổ, các mạng lưới thương mại ở tầm khu vực đã rất phát triển ở châu Âu, *ví dụ*, ở những khu vực như vùng ven biển Địa Trung Hải, Venice, Florence, Genois hay Bắc Phi. Ở Bắc Âu, vào giữa thế kỉ XIV, khoảng 80 đô thị cùng với các thương nhân đã thiết lập liên kết chính trị mềm dẻo mang tên Liên minh Hansetic, với các luật lệ thương mại chung và đầy đủ sức mạnh quân sự, chính trị để đương đầu với cả vua chúa lẫn cướp biển. Trong thời kì này, các vua chúa cũng bắt đầu kí kết các điều ước nhằm bảo vệ các lợi ích thương mại, đồng thời áp dụng chính sách thuế quan thuận lợi cho các thương nhân.

Vào cuối thế kỉ XV, sự kiện Christophe Colombo phát kiến ra châu Mỹ cùng với các tiến bộ của khoa học-kĩ thuật và hàng hải đã mở ra kỉ nguyên chinh phục thương mại thế giới của người châu Âu. Thời kì này, các nước châu Âu đã thiết lập mạng lưới thuộc địa ở khắp nơi trên thế giới. Nhiệm vụ của các thuộc địa là cung cấp nguyên liệu thô để sản xuất thành phẩm tại chính quốc ở châu Âu, sau đó các thuộc địa sẽ nhập khẩu hàng hoá được sản xuất từ chính quốc.

Một trật tự kinh tế quốc tế mới bắt đầu xuất hiện khi Chiến tranh thế giới lần thứ II sắp kết thúc. Tại Hội nghị Bretton Woods năm 1944, các tổ chức kinh tế toàn cầu - Quỹ tiền tệ quốc tế (viết tắt là 'IMF') và Ngân hàng quốc tế về tái thiết và phát triển (viết tắt là 'IBRD') đã ra đời. Một tổ chức thương mại toàn cầu cũng đã xuất hiện tại Hội nghị La Havane năm 1948 - Tổ chức thương mại quốc tế (viết tắt là 'ITO'), nhưng tổ chức này đã không thể tồn tại được và bị thay thế bằng cơ chế điều chỉnh thương mại hàng hoá quốc tế 'tạm thời' - Hiệp định chung về thuế quan và thương mại năm 1947 (viết tắt là 'GATT 1947'). Hiệp định 'tạm thời' này đã điều chỉnh thương mại hàng hoá toàn cầu trong suốt gần 50 năm, cho đến khi Tổ chức thương mại thế giới (viết tắt là 'WTO') ra đời năm 1995 (*xem* Chương 2 của Giáo trình).

Kể từ khi Chiến tranh thế giới lần thứ II kết thúc, hệ thống thương mại toàn cầu liên tục phát triển trong suốt hơn 70 năm qua và giờ đây đang đứng giữa ngã tư đường. WTO sẽ đi về đâu cùng với các cam kết toàn cầu về tự do hoá thương mại hàng hoá, thương mại dịch vụ, bảo hộ và thực thi quyền sở hữu trí tuệ, vấn đề đầu tư quốc tế…? Để đối phó với sự không hiệu quả của các cam kết tự do hoá thương mại toàn cầu, việc thành lập các liên kết kinh tế khu vực đã trở nên hợp lí trong chính sách kinh tế đối ngoại của hầu hết các quốc gia trên thế giới. Các mô hình liên kết kinh tế khu vực như Liên minh châu Âu (viết tắt là 'EU'), Khu vực thương mại tự do Bắc Mỹ (viết tắt là 'NAFTA'), Khu vực thương mại tự do ASEAN (viết tắt là 'AFTA'), Hiệp định đối tác xuyên Thái Bình Dương

(viết tắt là 'TPP') đã trở thành những chủ đề quen thuộc trong các giáo trình cơ bản về luật thương mại quốc tế (*xem* Chương 3 của Giáo trình). Bên cạnh đó, các hiệp định thương mại song phương cũng sẽ có vai trò quan trọng (*xem* Chương 4 của Giáo trình).

2. Sự phân biệt tương đối giữa lĩnh vực thương mại quốc tế có sự tham gia chủ yếu của quốc gia và các thực thể công (International Trade) và lĩnh vực thương mại quốc tế có sự tham gia chủ yếu của thương nhân (International Business Transactions)

A. *Thương mại quốc tế (International Trade) và chính sách thương mại*

1. Vì sao các quốc gia tiến hành hoạt động thương mại với nhau?

Có hai nguyên nhân chính được đưa ra nhằm giải thích tại sao các quốc gia tiến hành hoạt động thương mại với nhau, đó là: (a) Nguyên nhân kinh tế; và (b) Nguyên nhân chính trị.

(a) Nguyên nhân kinh tế

Thương mại tự do không phải là ý tưởng mới. Nó đã xuất hiện trong nhiều học thuyết kinh tế từ thế kỉ XV-XVIII ở châu Âu, như các học thuyết về chủ nghĩa trọng thương, học thuyết về lợi thế tuyệt đối của Adam Smith, hay học thuyết về lợi thế so sánh của David Ricardo.

> Theo Adam Smith,
>
> ... [N]gười thợ may không nên đóng giày cho chính mình, mà nên mua giày của người thợ đóng giày. Người thợ đóng giày cũng không nên tự may quần áo cho mình, mà nên mua quần áo của người thợ may… [Đ]iều gì là sự khôn ngoan trong cách ứng xử của từng gia đình, thì cũng nên làm như vậy đối với một vương quốc. Nếu một quốc gia nước ngoài có thể cung cấp cho chúng ta hàng hoá rẻ hơn của chúng ta, thì nên mua các hàng hoá đó… [c]húng ta sẽ có lợi…[1]

Quan điểm của Adam Smith về 'chuyên môn hoá' và 'lợi thế tuyệt đối' trong thương mại quốc tế như đã nêu trên được David Ricardo tiếp tục phát triển. Ông đã xây dựng học thuyết về 'lợi thế so sánh' trong tác phẩm '*Những nguyên lí của kinh tế chính trị và thuế khoá*' xuất bản năm 1817. Lợi thế so sánh là khái niệm trung tâm của học thuyết về thương mại quốc tế, cho rằng quốc gia nên tập trung sản xuất và xuất khẩu những hàng hoá mà mình có ưu thế hơn, đồng thời nhập khẩu những

[1] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (1776), do E. Cannan biên tập, University of Chicago Press, (1976), tập 1, tr. 478-479.

hàng hoá mà mình không có ưu thế trong tương quan so sánh với các quốc gia khác. Đây là học thuyết làm nền tảng cho sự phát triển thịnh vượng về kinh tế của mỗi quốc gia thông qua thương mại quốc tế. Học thuyết này đề cao sự chuyên môn hoá sản xuất của quốc gia dựa trên những lợi thế như nguồn nguyên liệu thô dồi dào, đất đai màu mỡ, lao động có tay nghề, tích lũy tư bản… Học thuyết về lợi thế so sánh là lời giải cho câu hỏi vì sao các nước phát triển cũng như các nước đang phát triển (viết tắt là 'DCs') có thể và trên thực tế đều được hưởng lợi từ thương mại quốc tế. Theo học thuyết này, ngay cả những nước nghèo nhất và không có bất cứ lợi thế tuyệt đối nào cũng có thể hưởng lợi từ thương mại quốc tế, nhờ những lợi thế tương đối của mình. Có lẽ cũng không quá lời nếu nói rằng David Ricardo chính là vị 'kiến trúc sư của WTO ngày nay. Các nhà kinh tế học của thế kỉ XIX-XX sau đó đã nỗ lực hoàn thiện các mô hình của David Ricardo và cho ra đời các mô hình như Heckscher-Ohlin, Paul Samuelson, Josep Stiglit, …

Các nhà kinh tế học qua các thời đại đều hiểu rõ rằng, người dân của một nước sẽ được hưởng lợi từ việc nhập khẩu với khối lượng càng lớn càng tốt để đổi lấy những gì họ đã xuất khẩu, hoặc tương tự, họ sẽ phải xuất khẩu càng ít càng tốt để chi cho nhập khẩu với khối lượng nhỏ. Việc mở cửa cho thương mại và đầu tư sẽ thúc đẩy tăng trưởng theo nhiều cách, đó là:[2] Khuyến khích nền kinh tế phát triển theo hướng chuyên môn hoá sản xuất những sản phẩm họ có lợi thế so sánh so với các nền kinh tế khác; Mở rộng thị trường đến những nơi mà các nhà sản xuất nội địa có thể tiếp cận; Phổ biến các công nghệ và ý tưởng mới, làm tăng năng lực sản xuất của người lao động và các nhà quản lí nội địa; Việc loại bỏ thuế nhập khẩu sẽ giúp người tiêu dùng tiếp cận sản phẩm giá rẻ hơn, làm tăng sức mua và mức sống của người tiêu dùng, đồng thời giúp các nhà sản xuất tiếp cận sản phẩm đầu vào giá rẻ hơn, làm giảm chi phí sản xuất và tăng khả năng cạnh tranh.[3]

Ở không ít nước, tự do hoá thương mại và tốc độ tăng trưởng nhanh được đánh giá là góp phần quan trọng vào việc giảm nghèo, *ví dụ*, Trung Quốc, Ấn Độ, Thái Lan và Việt Nam.[4]

(b) Nguyên nhân chính trị

Có câu nói: '*Nếu không để hàng hoá đi qua biên giới thì người lính sẽ vượt qua biên giới*'.[5] Trong thực tế, bảo hộ thương mại thường là nguồn gốc của xung đột. Năm 1947, các đại điện đến từ 23 nước đã họp tại Geneva (Thụy Sĩ) để đàm phán về GATT, nhằm giảm thuế nhập khẩu theo nguyên tắc không phân biệt đối xử và tôn trọng pháp luật, bởi vì tất cả các nước đều hiểu rõ rằng chính sách bảo hộ 'lợi mình hại người' (hay có thể được dịch là 'nghèo hoá nước láng giềng') ('beggar-thy-neighbour') của những năm 30 thực sự là thảm họa kinh tế của nhân loại, thậm chí có thể nói đó là một trong những nguyên nhân dẫn tới cuộc Chiến tranh thế giới thứ II. Vì vậy, thương mại quốc tế đã trở thành một trong những chính sách ngoại giao quan trọng của hầu hết các quốc gia ngày nay. Triết lí của vấn đề là: nếu các nước có quan hệ thương mại với nhau, thì nguy cơ chiến tranh và xung đột vũ trang giữa họ sẽ giảm.

Đối với rất nhiều nước DCs, sức mạnh kinh tế là nhân tố quyết định sự tồn tại và vị thế của quốc gia trên trường quốc tế. Họ nhận thức rõ ràng tác động của thương mại quốc tế đối với chính sách thương mại quốc gia. Bên cạnh đó, thương mại quốc tế cũng là công cụ rất quan trọng trong quá trình hội nhập quốc tế của các quốc gia.

Theo những người ủng hộ thương mại quốc tế, thương mại tự do giữa các quốc gia được xem như chìa khoá của tăng trưởng kinh tế, hoà bình và cuộc sống tốt đẹp hơn. Tuy nhiên, triết lí của thương mại tự do cũng vấp phải sự phản đối.

2. Vì sao các quốc gia hạn chế thương mại quốc tế?

Có nhiều nguyên nhân, cả về kinh tế và chính trị, khiến các quốc gia quyết định áp dụng những biện pháp hạn chế thương mại quốc tế. Có những học giả cho rằng: 'Thương mại tự do không phải là một giải pháp tối ưu về mặt kinh tế. Chủ nghĩa bảo hộ và thực hành thương mại không công bằng được xem là đem lại những lợi ích kinh tế lớn hơn cho một quốc gia'.[6]

Ngay từ thế kỉ XV, các nhà kinh tế học đã tư vấn rằng các quốc gia nên thực hiện các chính sách nhằm thúc đẩy thương mại quốc tế phù hợp với lợi ích của mình và dựa trên lợi thế so sánh, tuy nhiên các chính khách không phải lúc nào cũng đánh giá cao lời khuyên này. Họ có nhiều lí do để theo đuổi chính sách bảo hộ thương mại.[7] Lí do *thứ nhất* là bảo vệ 'an ninh quốc gia' và thực hiện chính sách 'tự cung tự cấp'. Đây là lập luận của

2 Simon Lester và các tác giả khác, *World Trade Law - Text, Materials and Commentary*, Hard Publishing, Oxford and Portland, Oregon, (2008), tr. 12-13.

3 AusAid, 'Trade, Development and Poverty Reduction', http://www.ausaid.gov.au/publications/pdf/trade_devel_poverty.pdf

4 D. Dollar và A. Kraay, 'Trade, Growth and Poverty', *World Bank Policy Research Working Paper*, (2001).

5 Peter Van den Bossche, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, Cambridge University Press, 2nd edn., (2008), tr. 19.

6 Indira Carr, *International Trade Law*, Cavendish Publishing, 3rd edn., (2005), tr. 1xxxvii.

7 Simon Lester và các tác giả khác, Sđd, tr. 23-24; Peter Van den Bossche, Sđd, tr. 20-24.

Chính phủ Hoa Kỳ khi bảo hộ ngành công nghiệp thép và các sản phẩm nông nghiệp. Hoa Kỳ cần có một ngành công nghiệp thép nội địa hùng mạnh vì mục đích quốc phòng. Lí do *thứ hai* là cần bảo hộ 'ngành kinh tế non trẻ'. Đôi khi các quốc gia cần bảo hộ các ngành sản xuất trong nước và việc làm, trong đó có những 'ngành kinh tế non trẻ', trước sự cạnh tranh của hàng nhập khẩu, dịch vụ của nước ngoài hoặc các nhà cung ứng dịch vụ nước ngoài. Nếu một ngành kinh tế tiềm năng của quốc gia được bảo hộ khi nó còn 'non trẻ', thì nó sẽ có năng lực cạnh tranh bình đẳng trên thị trường thế giới. Lí do *thứ ba* là chính sách 'lợi mình hại người' ('beggar-thy-neighbour') (như đã nói ở trên). Thực tế cho thấy, chính sách thương mại quốc tế mang tính dân tộc chủ nghĩa này có thể dẫn tới nhiều khả năng trả đũa lẫn nhau giữa các nước. Bên cạnh đó, các vấn đề như đạo đức xã hội, sức khỏe cộng đồng, sự an toàn của người tiêu dùng, môi trường, bản sắc văn hoá và các giá trị xã hội khác cũng là lí do của chủ nghĩa bảo hộ thương mại. Chính phủ các nước có thể chịu ảnh hưởng từ áp lực của các nhóm lợi ích khác nhau, hoặc lợi ích quốc gia, và họ có thể quyết định thực hiện chính sách bảo hộ dưới nhiều hình thức đa dạng và tinh vi, nếu điều đó là cần thiết. Các quyết định bảo hộ thương mại, trong khá nhiều trường hợp, là sự lựa chọn chính trị khôn ngoan đối với chính phủ của cả các nước phát triển và các DCs.

3. Sự lựa chọn của các quốc gia là gì?

Câu trả lời phụ thuộc vào từng trường hợp. Các quốc gia nên lựa chọn con đường ủng hộ tự do thương mại quốc tế hay chính sách cô lập? Bảo hộ thương mại hay tự do hoá thương mại? Ngày nay, quyết định của các quốc gia thường nghiêng về tự do thương mại quốc tế, và sự lựa chọn này dựa trên logic về chính trị hơn là logic về kinh tế. Cũng như các điều ước quốc tế khác, cả chính sách đối nội (bị tác động bởi sức ép chính trị) và chính sách đối ngoại (trên cơ sở thoả hiệp) của các quốc gia đều tác động đến quá trình đàm phán và kết quả cuối cùng của một điều ước thương mại quốc tế.

4. Luật thương mại quốc tế có sự tham gia chủ yếu của quốc gia và các thực thể công (International Trade Law) là gì?

Hiểu đơn giản, đó là pháp luật điều chỉnh thương mại quốc tế có sự tham gia chủ yếu của quốc gia và các thực thể công. Nhưng thương mại quốc tế có sự tham gia chủ yếu của quốc gia và các thực thể công (International Trade) là gì? Ngoài quốc gia và các tổ chức kinh tế quốc tế là các chủ thể chủ yếu, thì ai có thể tham gia vào các quan hệ thương mại quốc tế này? Các quy định về thương mại quốc tế là gì?

(a) Thương mại quốc tế có sự tham gia chủ yếu của quốc gia và các thực thể công (International Trade) là gì?

Về cơ bản, thương mại quốc tế có sự tham gia chủ yếu của quốc gia và các thực thể công (International Trade) được hiểu là các quan hệ quốc tế ở cấp độ *chính sách* thương mại, *ví dụ*, chính sách thuế quan và phi thuế quan, chính sách thương mại tấn công hoặc phòng vệ, chính sách hội nhập kinh tế... của một quốc gia; hoặc sự lựa chọn hội nhập ở cấp độ toàn cầu, khu vực, song phương hoặc đơn phương trong hợp tác thương mại (*xem* Phần 1 của Giáo trình); hay mối quan hệ giữa việc thực hiện các cam kết thương mại quốc tế và pháp luật quốc gia. Hiện nay, vấn đề đối xử thương mại dành cho các DCs đang là một trong những mối quan tâm của thương mại quốc tế. Như vậy, chính sách thương mại sẽ được thể hiện rất rõ trong các điều ước thương mại quốc tế; và các mục tiêu kinh tế vẫn là trung tâm của bất kỳ điều ước thương mại quốc tế nào.

(b) Chủ thể của các quan hệ thương mại quốc tế này là ai?

Chủ thể chủ yếu của các quan hệ thương mại quốc tế nêu trên là *các quốc gia* và *các tổ chức kinh tế quốc tế*. Bên cạnh đó, trong 'sân chơi' thương mại quốc tế đang xuất hiện những 'người chơi' mới.

Nói một cách thực tế, thì các nước lớn và các nền kinh tế lớn luôn luôn thống trị thương mại thế giới. Tuy nhiên, thương mại quốc tế cũng rất quan trọng đối với các DCs và các nước chậm phát triển (viết tắt là 'LDCs'). Hoa Kỳ, EU và Nhật Bản vẫn giữ vai trò quan trọng nhưng không còn áp đảo. Những 'cường quốc mới nổi' như Trung Quốc, Ấn Độ và Brazil cũng chiếm vị trí ngày càng nổi bật trong quan hệ thương mại quốc tế. Các nước này xuất hiện như những chủ thể chủ đạo trong hoạt động sản xuất hàng chế tạo và cung ứng dịch vụ trên thị trường thế giới, từ đó tạo ra xu hướng mới cho các DCs khác đi theo. Mặc dù chỉ chiếm tỉ trọng không đáng kể trong thương mại toàn cầu, nhưng về tổng thể, các LDCs lại là các nhà sản xuất lớn về hàng nguyên liệu, hàng nhiên liệu, hàng dệt may và thực phẩm. Lưu ý rằng năng lực kinh tế của các nước này không giống nhau, phụ thuộc vào nhiều yếu tố, trong đó có yếu tố ổn định chính trị và chính sách thương mại.

Các tổ chức kinh tế quốc tế cũng tham gia mạnh mẽ vào các quan hệ thương mại quốc tế, trong đó phải kể đến WTO, IMF, WB, EU, ASEAN v.v.. Mặc dù WTO không phải là tổ chức quốc tế duy nhất có liên quan, nhưng nó đúng là tổ chức quốc tế lớn nhất và toàn diện nhất, điều

chỉnh cả các hiệp định thương mại khu vực và song phương trong phạm vi nhất định.

Có thể thấy rõ khả năng phát triển của các liên kết kinh tế khu vực. Chủ nghĩa khu vực ở châu Á sẽ có những tác động mang ý nghĩa toàn cầu, củng cố xu hướng hình thành ba khu vực thương mại với khả năng trở thành các khối liên kết là Bắc Mỹ, châu Âu và Đông Á (*xem* Chương 3 của Giáo trình). Sự hình thành của các khối này sẽ tác động đến khả năng đạt được những hiệp định toàn cầu trong khuôn khổ WTO trong tương lai. *Các liên kết kinh tế khu vực* cũng là chủ thể quan trọng trong quan hệ thương mại quốc tế, bên cạnh các chủ thể truyền thống là quốc gia.

Các chủ thể phi nhà nước, *ví dụ*, *các doanh nghiệp*, cũng có ảnh hưởng ngày càng tăng trong các hiệp định thương mại quốc tế vốn là 'sân chơi' của các quốc gia. *Ví dụ*, Việc Hiệp định của WTO về quyền sở hữu trí tuệ liên quan đến thương mại (viết tắt là 'TRIPS') thúc đẩy bảo hộ quyền sở hữu trí tuệ (viết tắt là 'IPRs') chặt chẽ hơn, rõ ràng là sự đáp ứng hoạt động lobby của các công ty phương Tây đang sở hữu và phát triển các IPRs, như các công ty dược phẩm, công ty kinh doanh lĩnh vực giải trí, công ty phần mềm.[8] Các *vùng lãnh thổ* (không có tư cách quốc gia) như Hong Kong, Macao, hiện nay có vị trí bình đẳng như các chủ thể khác trong quan hệ thương mại quốc tế. Hong Kong và Macao, cùng với Trung Quốc, đều là các thành viên độc lập của WTO.[9]

Sự đa dạng của các chủ thể tham gia 'sân chơi' này vừa có thể đem lại tiềm năng, vừa có thể dẫn nguy cơ đổ vỡ của hệ thống thương mại quốc tế.

(c) Các quy định về thương mại quốc tế là gì?

Luật thương mại quốc tế (International trade rules) quy định 'luật chơi' cho 'cuộc chơi' thương mại quốc tế. Đó là hàng loạt những quy định đồ sộ có tính 'quốc tế', liên quan đến 'thương mại' hoặc 'kinh tế', và có bản chất 'pháp luật'.

Do các quy định này phản ánh chính sách thương mại, nên chúng có liên quan chặt chẽ với các vấn đề kinh tế hơn bất cứ lĩnh vực pháp luật nào khác. Các quy định về thương mại quốc tế tập trung vào các công cụ điều chỉnh dòng thương mại, bao gồm cả các điều ước quốc tế về thương mại và một phần pháp luật nội địa điều chỉnh thương mại quốc tế.

[8] Simon Lester và các tác giả khác, Sđd, tr. 42.

[9] WTO, http://www.wto.org

Các hiệp định của WTO là các điều ước toàn cầu gần như đầy đủ nhất về thương mại quốc tế, là một bộ các quy định mang tính ràng buộc, liên quan đến rất nhiều vấn đề thương mại quốc tế (*xem* Mục 1 và Mục 2 - Chương 2 của Giáo trình). Ngoài các hiệp định của WTO, còn có nhiều điều ước thương mại khu vực và song phương. Các điều ước ở tất cả các cấp độ này tạo thành một hệ thống các quy tắc thương mại đa phương (*xem* Phần 1 của Giáo trình). Các điều ước thương mại khu vực nổi bật nhất là các điều ước liên quan đến EU (*xem* Mục 2 - Chương 3 của Giáo trình), NAFTA (*xem* Mục 3 - Chương 3 của Giáo trình), MERCOSUR (Thị trường chung Nam Mỹ), và Khu vực thương mại tự do ASEAN (*xem* Mục 4 - Chương 3 của Giáo trình). Trong những năm gần đây, số lượng các điều ước thương mại song phương tăng nhanh, đồng thời thể hiện vai trò rất quan trọng của chúng trong chính sách thương mại của nhiều nước trên thế giới, trong đó có Việt Nam (*xem* Chương 4 của Giáo trình để hiểu về các hiệp định song phương giữa Việt Nam với một số đối tác thương mại, như EU, Hoa Kỳ và Trung Quốc).

Từ trước đến nay, các điều ước về đầu tư quốc tế thường dưới dạng các hiệp định đầu tư song phương (viết tắt là 'BITs'). Tuy nhiên, trong thời gian gần đây, các quy định về đầu tư thường được đưa vào nhiều hiệp định thương mại song phương và khu vực, do đó cả hai vấn đề thương mại và đầu tư đều được điều chỉnh kết hợp trong cùng một hiệp định. *Ví dụ*, Hiệp định thương mại Việt Nam-Hoa Kỳ 2000 (viết tắt là 'BTA') (*xem* Mục 2 - Chương 4 của Giáo trình), Hiệp định NAFTA (*xem* Mục 3 - Chương 3 của Giáo trình), Hiệp định TPP, Hiệp định thương mại tự do Việt Nam - EU (viết tắt là 'EVFTA').

Ở tầm quốc gia, các quốc gia ban hành quy định điều chỉnh sự dịch chuyển qua biên giới của hàng hoá, dịch vụ, sức lao động, tư bản, tiền tệ… đồng thời kí kết các điều ước quốc tế với các quốc gia khác và các tổ chức quốc tế để tạo thuận lợi cho thương mại quốc tế. Nếu nhằm mục đích thúc đẩy thương mại quốc tế, thì quốc gia cần phải xây dựng môi trường pháp lí cho phép nâng cao sức cạnh tranh của hàng hoá, dịch vụ và sức lao động của mình so với quốc gia khác. Ngược lại, nếu mong muốn bảo hộ các ngành kinh tế trong nước, việc làm và công nghệ, hay ngăn ngừa 'sự chảy máu' về vốn, thì quốc gia đó cần phải xây dựng khuôn khổ pháp luật theo hướng 'phòng vệ'.

Vậy, vai trò của các quy định điều chỉnh thương mại quốc tế là gì? Làm thế nào để các quy định này mang lại lợi ích cho các quốc gia trong thương mại quốc tế? Theo Bossche, về cơ bản, có 4 lí do giải thích sự

cần thiết của các quy định pháp luật thương mại quốc tế.[10] *Thứ nhất*, các quy định pháp luật này sẽ *kiềm chế* các nước áp dụng các biện pháp hạn chế thương mại, và giúp các nước tránh leo thang trong việc áp dụng các biện pháp hạn chế thương mại. *Thứ hai*, các quy định về thương mại quốc tế sẽ đáp ứng nhu cầu của các thương nhân và nhà đầu tư về *sự an toàn và tính có thể dự đoán* trong thương mại quốc tế, từ đó khuyến khích thương mại và đầu tư. *Thứ ba*, nó giúp các quốc gia *đối phó được với những thách thức của quá trình toàn cầu hoá*, liên quan đến y tế, môi trường, bản sắc văn hoá và các tiêu chuẩn lao động cơ bản… *Thứ tư*, đó là nhu cầu đạt được một giải pháp công bằng hơn trong quan hệ kinh tế quốc tế.

B. *Thương mại quốc tế có sự tham gia chủ yếu của thương nhân (hay các giao dịch kinh doanh quốc tế - International Business Transactions)*

1. Vì sao doanh nghiệp phải mở rộng hoạt động kinh doanh ra nước ngoài?

Trên thực tế, việc mở rộng hoạt động kinh doanh ra nước ngoài thường nhằm mục đích tăng doanh số và lợi nhuận, tạo ra thị trường mới, nâng cao vị thế của doanh nghiệp ở phạm vi quốc tế hoặc bảo đảm nguồn nguyên liệu. Trong trường hợp doanh nghiệp quyết định tiến hành kinh doanh ở tầm quốc tế, các kiến thức về pháp luật kinh doanh quốc tế và pháp luật có liên quan sẽ là rất cần thiết đối với doanh nghiệp.

2. Luật thương mại quốc tế có sự tham gia chủ yếu của thương nhân (hay luật kinh doanh quốc tế - International Business Law) là gì?

Đó là pháp luật điều chỉnh các quan hệ thương mại quốc tế có sự tham gia chủ yếu của thương nhân (hay các giao dịch kinh doanh quốc tế). Cách hiểu về thuật ngữ 'International Business Law' không quá xa so với cách hiểu về thuật ngữ 'International Commercial Law'.

(a) Các giao dịch kinh doanh quốc tế (International Business Transactions) là gì?

Có nhiều hình thức giao dịch kinh doanh quốc tế. Cách đơn giản nhất để doanh nghiệp thực hiện hoạt động kinh doanh ở tầm quốc tế là thực hiện hoạt động *mua bán hàng hoá trực tiếp* với khách hàng ở nước ngoài, nghĩa là hoạt động xuất nhập khẩu (*xem* Chương 5 của Giáo trình). Tuy nhiên, trong một số trường hợp, việc tìm kiếm khách hàng và tìm hiểu thị trường nước ngoài có thể không dễ dàng. Do đó, doanh nghiệp có thể quyết định sử dụng *người trung gian* để giúp họ bán hàng hoá hoặc cung ứng dịch vụ của mình. Có hai loại trung gian thường gặp trong hoạt động kinh doanh quốc tế, đó là *đại lí* và *phân phối*.

Doanh nghiệp có thể quyết định sản xuất sản phẩm của mình ở nước ngoài thay vì sản xuất sản phẩm đó ở trong nước rồi xuất khẩu ra nước ngoài. Đây là trường hợp doanh nghiệp quyết định chuyển giao quyền sử dụng các đối tượng sở hữu trí tuệ (viết tắt là 'IP') cho doanh nghiệp khác ở nước ngoài và cho phép doanh nghiệp ở nước ngoài sản xuất và bán sản phẩm của mình. *Chuyển giao IPRs* ở tầm quốc tế là hoạt động kinh doanh hiệu quả để doanh nghiệp có cơ hội phổ biến IPRs của mình.

Các hoạt động chuyển giao IPRs tồn tại dưới nhiều hình thức, như chuyển giao các đối tượng sở hữu công nghiệp (license), chuyển giao quyền tác giả, chuyển giao công nghệ, nhượng quyền thương mại (franchising) (*xem* Mục 1 - Chương 6 của Giáo trình) v.v.. Một công ty dược của Hà Lan có thể chuyển giao sáng chế về loại thuốc nào đó cho một công ty sản xuất dược phẩm của Việt Nam, nghĩa là công ty dược phẩm của Việt Nam có thể sử dụng sáng chế của công ty dược phẩm Hà Lan để sản xuất ra loại thuốc đó và bán tại Việt Nam. Tương tự, một công ty điện ảnh của Hoa Kỳ có thể chuyển giao quyền tác giả bộ phim cho một công ty của Pháp, để công ty này có thể nhân bản và bán bộ phim đó trên thị trường EU. Ngoài ra, nhiều công ty như KFC, McDonald, Pizza Hut cũng rất thành công trong hoạt động nhượng quyền thương mại quốc tế.

Với tầm nhìn chiến lược đối với thị trường nước ngoài, doanh nghiệp có thể quyết định đầu tư trực tiếp vào thị trường đó. *Đầu tư trực tiếp nước ngoài* (viết tắt là 'FDI') có thể được thực hiện dưới hình thức thành lập chi nhánh (branch), công ty con (subsidiary), liên doanh (joint-venture), thành lập doanh nghiệp 100% vốn nước ngoài, sáp nhập và mua lại doanh nghiệp nước ngoài (viết tắt là 'M&A').

Ngoài ra, có nhiều loại giao dịch kinh doanh quốc tế khác và các giao dịch có liên quan như hoạt động *logistics quốc tế*, bao gồm vận tải quốc tế (*xem* Mục 2 - Chương 6 của Giáo trình); cho vay, cho thuê, giao dịch việc làm, đầu tư gián tiếp nước ngoài (viết tắt là 'FPI'), giao dịch tài chính quốc tế (thuế, bảo hiểm quốc tế) v.v..

(b) Chủ thể của các giao dịch kinh doanh quốc tế là ai?

Có nhiều loại chủ thể khác nhau tham gia các giao dịch kinh doanh quốc tế.

[10] Peter Van den Bossche, Sđd, tr. 33-35.

i) Chủ thể phổ biến của các giao dịch này là *các thương nhân* - người tiến hành hoạt động thương mại (*ví dụ*, mua bán hàng hoá, cung ứng dịch vụ, FDI), bao gồm cả *cá nhân* và *doanh nghiệp*. Khái niệm 'thương nhân' được định nghĩa không hoàn toàn giống nhau theo luật quốc gia của các nước. Theo khoản 1 Điều 6 Luật Thương mại Việt Nam 2005, 'Thương nhân bao gồm tổ chức kinh tế được thành lập hợp pháp, cá nhân hoạt động thương mại một cách độc lập, thường xuyên và có đăng ký kinh doanh'. Trong thời gian gần đây, các công ty đa quốc gia (viết tắt là 'MNCs') ngày càng chứng tỏ vai trò quan trọng của mình trong các giao dịch kinh doanh quốc tế. Các MNCs thể hiện vai trò trung gian dịch chuyển vốn trong quan hệ đầu tư quốc tế.

ii) Bên cạnh đó, *một số tổ chức quốc tế* cũng có vai trò đáng kể đối với sự phát triển của các giao dịch kinh doanh quốc tế, như: Ủy ban của Liên hợp quốc về Luật thương mại quốc tế (United Nations Commission on International Trade Law - viết tắt là 'UNCITRAL'), Ủy ban của Liên hợp quốc về Thương mại và phát triển (United Nations Conference on Trade and Development - viết tắt là 'UNCTAD'), Phòng thương mại quốc tế (International Chamber of Commerce - viết tắt là 'ICC').

UNCITRAL hướng tới việc soạn thảo các luật mẫu, nhằm cung cấp khung pháp lí cho các nước phê chuẩn và xây dựng pháp luật nước mình tương thích với luật mẫu, sao cho phù hợp với nhu cầu của các nước. *Ví dụ*, Luật mẫu về thương mại điện tử (*xem* Mục 3 - Chương 6 của Giáo trình). ICC cũng đóng vai trò chủ đạo trong việc bảo đảm một mức độ hài hoà hoá pháp luật giữa các nước, thông qua việc soạn thảo các quy định để các quốc gia có thể đưa chúng vào pháp luật kinh doanh quốc tế của nước mình (*xem* Mục 2 - Chương 1 dưới đây của Giáo trình). Liên đoàn hiệp hội các nhà vận chuyển hàng hoá quốc tế (International Federation of Freight Forwarders Association - viết tắt là 'FIATA') có vai trò quan trọng trong việc hài hoà hoá pháp luật thông qua việc khuyến khích và sử dụng các mẫu chứng từ chuẩn, như vận đơn vận tải đa phương thức của FIATA.

iii) *Các quốc gia* cũng tham gia vào các giao dịch kinh doanh quốc tế, nhưng với tư cách chủ thể 'đặc biệt' và đôi khi không ứng xử bình đẳng như các chủ thể khác, vì chủ thể này được hưởng quyền 'miễn trừ tư pháp'.

Vậy, thế nào là quyền 'miễn trừ tư pháp' của quốc gia? Tại sao quốc gia lại trở thành chủ thể 'đặc biệt' trong các giao dịch kinh doanh quốc tế?

Theo nguyên tắc bình đẳng chủ quyền quốc gia, thẩm phán của quốc gia không thể phán quyết chống lại quốc gia khác nếu không có sự chấp thuận của quốc gia đó. Sự giải thích này xuất phát từ nguyên tắc '*par in parem non habet juridictionem*' ('những người ngang nhau không thể phán xét lẫn nhau') được ghi nhận trong luật quốc tế từ thời cổ đại. Mặc dù đều công nhận quyền miễn trừ tư pháp của quốc gia, nhưng các nước lại có quan điểm không thống nhất về phạm vi của quyền miễn trừ là 'tuyệt đối' hay 'hạn chế'.

Về quyền miễn trừ tư pháp trong luật quốc tế, câu hỏi đặt ra là: Các quốc gia, cơ quan nhà nước, hoặc doanh nghiệp thuộc sở hữu nhà nước có thể bị kiện trước toà án dân sự của quốc gia khác hay không? và có thể thi hành án đối với tài sản của quốc gia nước ngoài ở phạm vi nào? Trong luật quốc tế thời kì ban đầu, học thuyết về quyền miễn trừ 'tuyệt đối' chiếm ưu thế, tuy nhiên thực tiễn cho thấy rằng rất khó áp dụng học thuyết này nếu không được sự chấp thuận của quốc gia nước ngoài. Trên thực tế, học thuyết về quyền miễn trừ 'hạn chế' (hay miễn trừ 'tương đối') được áp dụng về cơ bản.

Học thuyết về quyền miễn trừ 'tuyệt đối' được ủng hộ bởi nguyên tắc bình đẳng chủ quyền quốc gia và học thuyết 'Hành vi quốc gia' ('Act of State' Doctrine). Học thuyết 'Hành vi quốc gia' xuất phát từ thực tiễn của toà án Hoa Kỳ. Học thuyết này cho rằng mỗi quốc gia có chủ quyền trong phạm vi lãnh thổ của mình và những hành vi mà một quốc gia thực hiện trong lãnh thổ của mình phải được coi là hợp pháp và không thể bị toà án nước ngoài xem xét lại. Học thuyết 'Hành vi quốc gia' được tuyên bố trong vụ *Underhill v. Hernandez* [1897], trong đó Toà án New York lập luận: '… [M]ỗi quốc gia có chủ quyền phải tôn trọng sự độc lập của các quốc gia có chủ quyền khác và toà án của một quốc gia sẽ không xét xử hành vi của chính phủ của một quốc gia khác được thực hiện trong phạm vi lãnh thổ của quốc gia đó.'[11]

Năm 1964, Toà án tối cao Hoa Kỳ đã áp dụng học thuyết 'Hành vi quốc gia' trong một vụ nổi tiếng - *Banco Nacional de Cuba v. Sabbatino* [1964]. Vụ việc này xảy ra khi Cuba tiến hành quốc hữu hoá ngành công nghiệp sản xuất đường, nắm quyền kiểm soát các nhà máy tinh chế đường và các nhà máy khác trong cuộc Cách mạng Cuba. Rất nhiều nhà đầu tư Hoa Kỳ đã bị thiệt hại do đầu tư vào các nhà máy này mà không được bồi

[11] Vụ *Underhill v. Hernandez*, 168 U.S. 250 [1897].

thường sau khi Chính phủ Cuba lên nắm quyền. Mặc dù trong hoàn cảnh có rất nhiều công dân Hoa Kỳ bị thiệt hại, Toà án tối cao Hoa Kỳ vẫn bảo vệ học thuyết 'Hành vi quốc gia', coi hành vi của Chính phủ Cuba là hợp pháp và bác yêu cầu của các công dân Hoa Kỳ chống lại Cuba do phải chịu những thiệt hại về đầu tư.[12]

Bên cạnh đó, lí lẽ ủng hộ quyền miễn trừ 'hạn chế' cũng đã xuất hiện từ lâu trong các án lệ của toà án Bỉ, theo đó quyền miễn trừ tư pháp thường được áp dụng trong trường hợp quốc gia thực hiện hành vi mang tính chủ quyền ('*acta jure imperii*'), không áp dụng trong trường hợp quốc gia thực hiện hành vi mang tính chất tư ('*acta jure gestionis*'). Vào ngày 17/7/1878, lần đầu tiên toà án Bỉ từ chối quyền miễn trừ tư pháp của Chính phủ Peru trong xét xử vụ việc liên quan đến hợp đồng mua bán phân chim, với lí do đây là hợp đồng thương mại, do đó Chính phủ Peru phải chấp nhận quyền tài phán của toà thương mại Bỉ.[13]

Quyền miễn trừ tư pháp chỉ được áp dụng đối với cơ quan tài phán trong nước, không áp dụng đối với cơ quan tài phán quốc tế. '… [S]ự phân biệt giữa '*acta jure imperii*' và '*acta jure gestionis*'… [c]ủa một quốc gia hay một chủ thể luật quốc tế khác không có ý nghĩa đối với cơ quan tài phán quốc tế công có thẩm quyền'.[14]

Có nhiều cách giải thích khác nhau về quyền miễn trừ 'hạn chế'. Trong bối cảnh các quan hệ thương mại quốc tế hiện nay, việc duy trì quyền miễn trừ 'tuyệt đối' sẽ khiến quốc gia trở thành chủ thể có ưu thế hơn so với các chủ thể khác trong các giao dịch thương mại quốc tế. Điều này khó chấp nhận, bởi vì nó ảnh hưởng đến sự cạnh tranh công bằng trong thương mại quốc tế.

Theo quan điểm về quyền miễn trừ 'hạn chế', quốc gia có thể tự hạn chế quyền miễn trừ tư pháp của mình để ứng xử như các chủ thể khác. Quan điểm này được thể hiện trong quy định pháp luật của một số quốc gia, nhất là Hoa Kỳ, và trong một số điều ước quốc tế. Đạo luật của Hoa Kỳ về quyền miễn trừ của quốc gia nước ngoài năm 1976 (Foreign Sovereign Immunities Act 1976 - viết tắt là 'FSIA') đã được pháp điển hoá trong Chương 97, bộ pháp điển USC 28, sửa đổi năm 2008. Quan điểm của Hoa Kỳ trong đạo luật này là:

> Việc toà án Hoa Kỳ xác định yêu cầu của quốc gia nước ngoài về miễn trừ thẩm quyền của toà án Hoa Kỳ là nhằm phục vụ công lí và bảo vệ các quyền của quốc gia nước ngoài cũng như của các đương sự trước toà án Hoa Kỳ. Theo pháp luật quốc tế, các quốc gia không được hưởng miễn trừ thẩm quyền xét xử của toà án nước ngoài trong phạm vi các hoạt động thương mại có liên quan của họ, và các tài sản thương mại của các quốc gia nước ngoài có thể bị cưỡng chế theo bản án được tuyên chống lại họ liên quan đến các hoạt động thương mại của họ. Các yêu cầu hưởng miễn trừ của các quốc gia nước ngoài từ nay trở đi sẽ do toà án Hoa Kỳ và toà án các tiểu bang quyết định, phù hợp với các nguyên tắc quy định trong chương này.[15]

Chính phủ nước ngoài có thể bị kiện trước toà án Hoa Kỳ nếu mặc nhiên hoặc rõ ràng từ bỏ quyền miễn trừ tư pháp; hoặc vụ kiện được tiến hành trên cơ sở hoạt động thương mại hoặc hành vi thương mại của chính phủ nước ngoài thực hiện trên lãnh thổ Hoa Kỳ hay trên cơ sở hành vi thương mại thực hiện ngoài lãnh thổ Hoa Kỳ nhưng có ảnh hưởng trực tiếp đến Hoa Kỳ; hoặc liên quan đến các quyền tài sản do vi phạm pháp luật quốc tế, và tài sản đó hoặc tài sản để trao đổi với tài sản đó đang tồn tại ở Hoa Kỳ, và có liên quan đến hoạt động thương mại do chính phủ nước ngoài đó thực hiện tại Hoa Kỳ; hoặc tranh chấp liên quan đến quyền tài sản ở Hoa Kỳ có được do được kế thừa hoặc được tặng cho hoặc quyền đối với bất động sản ở Hoa Kỳ; hoặc liên quan đến các khoản bồi thường thiệt hại mà chính phủ nước ngoài đó phải chịu do thiệt hại gây ra ở Hoa Kỳ, do hành vi vi phạm pháp luật hoặc do sự cẩu thả mà chính phủ nước ngoài hoặc các nhân viên của chính phủ nước ngoài gây ra khi thực hiện công vụ…

Bên cạnh đó, quan điểm về quyền miễn trừ 'hạn chế' còn được ghi nhận trong Công ước Washington về Trung tâm giải quyết tranh chấp đầu tư quốc tế 1965 (viết tắt là 'ICSID'), Đạo luật về miễn trừ quốc gia của Vương quốc Anh 1978 (United Kingdom State Immunities Act 1978), và các văn bản khác.

Quốc gia được hưởng quyền miễn trừ tư pháp, cho dù là 'tuyệt đối' hay 'hạn chế', cũng tạo nên tính 'đặc biệt' của chủ thể này trong các giao dịch kinh doanh quốc tế với các chủ thể khác.

(c) Các quy định điều chỉnh các giao dịch kinh doanh quốc tế là gì?

Các quy định liên quan đến quyền và nghĩa vụ của các chủ thể tham gia các giao dịch kinh doanh quốc tế cần phải được làm rõ và phải có tính

12 Vụ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 [1964].

13 Vụ *Rau, Vanden Abeele et Cie c/ Duruty, Pas.*, [1879], II, 175; BJ, 1880, 222.

14 Sent. Arb. Reineccius *et al.* v/ BIS, Partial Award, 22/11/2002, # 123, www.pca-cpa.org.

15 2008 - Pub. L. 110-181, div. A, title X, Sec. 1083(a)(2), Jan. 28, 2008, 122 Stat. 341, added item 1605A; http://uscode.house.gov; http://us-code.vlex.com.

chắc chắn. Sự thiếu tính chắc chắn về mặt pháp luật sẽ tạo cơ hội phát sinh rào cản cho hoạt động kinh doanh quốc tế.

Các quy định pháp luật này có nhiệm vụ điều chỉnh các giao dịch kinh doanh quốc tế đa dạng, *ví dụ*, hợp đồng mua bán hàng hoá quốc tế, vận chuyển hàng hoá, hợp đồng đại lí, hợp đồng phân phối, chuyển giao IPRs quốc tế, logistics quốc tế (bao gồm cả vận tải quốc tế), thanh toán quốc tế, giao dịch liên quan đến FDI, bảo hiểm quốc tế, thương mại điện tử, giải quyết tranh chấp thương mại quốc tế... (*xem* Phần 2 của Giáo trình).

Do có quá nhiều hệ thống pháp luật và sự khác biệt giữa chúng, nên hoạt động hài hoà hoá pháp luật, thông qua việc soạn thảo các điều ước quốc tế, được thừa nhận rộng rãi là một giải pháp lựa chọn tốt nhất.

(d) Góc nhìn đa văn hoá về pháp luật kinh doanh quốc tế

Ngày nay, các công ty phân đoạn các hoạt động kinh doanh của mình ở khắp nơi trên thế giới, từ thiết kế sản phẩm, sản xuất linh kiện cho tới lắp ráp và tiếp thị, hình thành nên những chuỗi sản xuất ở phạm vi quốc tế. Ngày càng có nhiều sản phẩm thực chất cần phải gắn mác 'Sản xuất ở toàn thế giới' ('Made in the World'), thay vì 'Sản xuất ở Anh' ('Made in England') hay 'Sản xuất ở Hoa Kỳ' ('Made in the USA').

Các đối tác thương mại, khách hàng, nhà cung cấp và các đồng nghiệp trong quan hệ thương mại quốc tế có thể đến từ nhiều xã hội khác nhau, với những quan niệm khác nhau về thương mại và các giá trị xã hội. Do đó, khi vận dụng pháp luật thương mại quốc tế cần tính đến sự hài hoà giữa các quan niệm khác nhau về thương mại quốc tế, thậm chí đôi khi phải đề cao sự khác biệt, vận dụng sự khác biệt để cạnh tranh hiệu quả trên thị trường quốc tế.

Mục 2. NGUỒN LUẬT THƯƠNG MẠI QUỐC TẾ

Có một số tình huống xảy ra như sau:

Tình huống 1:

Một thương nhân Việt Nam kinh doanh quần áo thời trang có trụ sở công ty tại Hà Nội, tháng 11/2011 đến Italia và đặt mua 1.000 bộ quần áo thời trang đàn ông. Thương nhân Việt Nam này trở về Hà Nội và nhận được hàng do người bán người Italia gửi bằng đường tàu biển đến cảng Hải Phòng sau một tháng. Trong vụ kinh doanh này, các thương nhân có thể phải quan tâm đến những vấn đề pháp luật nào?

- Để đến Italia, thương nhân Việt Nam cần có hộ chiếu do cơ quan có thẩm quyền cấp và cần có thị thực nhập cảnh EU.
- Liệu hợp đồng mua bán quần áo của các thương nhân có thể chịu sự điều chỉnh của Công ước Viên năm 1980 của Liên hợp quốc về hợp đồng mua bán hàng hoá quốc tế (viết tắt là 'CISG') hay không?
- Pháp luật hải quan của Việt Nam và Italia có liên quan gì đến các hiệp định trong khuôn khổ WTO hay không?
- Trong trường hợp thương nhân Việt Nam cho rằng lô hàng mà đối tác Italia gửi là quần áo 'lỗi mốt', không phải hàng thời trang, thì các thương nhân có thể áp dụng luật nào, và đến toà án nào để giải quyết tranh chấp?
- Luật Italia, luật Việt Nam hay luật nào có thể áp dụng trong vụ kinh doanh quốc tế này?
- Các bên có được chọn luật áp dụng không? Chọn theo tiêu chí nào?
- Nếu bản án của toà án Italia xử thua cho thương nhân Italia, liệu bản án này có hiệu lực và có được thi hành tại Việt Nam hay không?

Việc áp dụng pháp luật thương mại quốc tế sẽ lại càng trở nên không đơn giản, nếu giả thiết vụ kinh doanh không phải là mua bán hàng hoá quốc tế, mà là hoạt động đầu tư trực tiếp nước ngoài (FDI), đầu tư gián tiếp nước ngoài (FPI), hoặc các giao dịch kinh doanh quốc tế phức tạp khác.

Tình huống 2:

Quốc gia A áp dụng thuế chống bán phá giá (viết tắt là 'AD') đối với cà phê nhập khẩu từ quốc gia B kể từ năm 2005. Bộ Thương mại của quốc gia A (viết tắt là 'DOC') khởi xướng điều tra lần đầu vào tháng 01/2004 và ban hành quyết định áp thuế AD vào tháng 02/2005, sau đó đã tiến hành nhiều lần rà soát định kì và một lần rà soát cuối kì ('Sunset Review' - 'Rà soát hoàng hôn'). DOC tính toán biên độ bán phá giá dựa trên sự so sánh 'giá trị thông thường' (viết tắt là 'NV') và 'giá xuất khẩu' tại quốc gia A (viết tắt là 'EP'), hay 'giá xuất khẩu áp đặt' ('Constructed Export Price').

Trong trường hợp này, NV được tính toán trong điều kiện 'nền kinh tế phi thị trường' (viết tắt là 'NME') của quốc gia B, dựa trên các yếu tố sản xuất của nhà sản xuất, bao gồm các khoản chi phí đầu vào cho nguyên liệu thô, lao động và năng lượng phù hợp với trình độ sản xuất thực tế của từng bị đơn. Các chi phí này được DOC tính toán dựa trên đơn giá 'thay thế' của một nước xuất khẩu khác, theo đó mức giá thay thế là mức mà tại đó các yếu tố của sản xuất tương tự có thể đạt được trong cùng điều kiện thị trường. Trong trường hợp của quốc gia B, nước 'thay thế' được chọn là quốc gia C. Sau đó, DOC áp dụng các tỉ lệ về chi phí gián tiếp, chi phí bán hàng, chi phí hành chính và lợi nhuận để tính toán NV của cà phê nhập khẩu từ quốc gia B. NV này được so sánh với EP là giá bán cho người mua độc lập đầu tiên.

Khi tiến hành điều tra, DOC sử dụng phương pháp 'quy về không' ('zeroing'), theo đó tất cả các giao dịch có biên độ phá giá âm đều được 'quy về không' (0), thay vì được bù trừ cho các giao dịch có biên độ phá giá dương.

Tình huống này đặt ra nhiều câu hỏi cho các chuyên gia pháp luật.

- Liệu phương pháp 'quy về không' mà DOC áp dụng có phù hợp với các nghĩa vụ của quốc gia A trong khuôn khổ WTO và Hiệp định của WTO về chống bán phá giá (viết tắt là 'ADA') hay không?
- Liệu phương pháp 'quy về không' có ảnh hưởng gì đến việc DOC xác định biên độ phá giá hay không?
- Liệu quốc gia B có thể khiếu kiện việc quốc gia A áp dụng phương pháp này hay không?
- Trong vụ việc này, các bên có thể căn cứ vào những cơ sở pháp lí nào? ADA hay các án lệ của WTO?
- Án lệ nào sau đây có liên quan: án lệ *US-Zeroing (Japan)* [2009], án lệ *US-Zeroing (EC)* [2009], hay án lệ nào khác?
- Nghĩa vụ chứng minh thuộc về bên nào?
- Hậu quả pháp lí trong trường hợp có sự vi phạm nghĩa vụ theo các hiệp định của WTO là gì?...

Quan hệ thương mại quốc tế, dù là có sự tham gia của các quốc gia hay các thương nhân hay bất kì chủ thể nào khác, đều có thể được

điều chỉnh đồng thời bằng nhiều loại nguồn luật như pháp luật quốc gia, pháp luật quốc tế (bao gồm các điều ước, tập quán thương mại quốc tế, án lệ quốc tế), và những nguồn luật khác.

1. Pháp luật quốc gia

A. *Các loại nguồn luật liên quan đến pháp luật quốc gia*

Pháp luật quốc gia có vị trí rất quan trọng trong thực tiễn thương mại quốc tế. Pháp luật quốc gia - nguồn luật đang đề cập, phân biệt với luật quốc tế, được hiểu là bao gồm cả pháp luật của quốc gia nước ngoài. Trên thực tế, việc tìm hiểu và áp dụng pháp luật nước ngoài luôn là 'cơn ác mộng' đối với các thương nhân và luật sư quốc tế.

Nguồn luật này rất đa dạng, có thể tập trung vào một số loại dưới đây.

1. Văn bản pháp luật

Từ thời cổ xưa, các quy tắc thương mại quốc tế đã được thiết lập nhằm bảo vệ các thương nhân nước ngoài và điều chỉnh hoạt động vận tải hàng hoá quốc tế. Các quy định pháp luật thành văn đầu tiên đã tồn tại trong Bộ luật Hammurabi (năm 2.500 trước Công nguyên), theo đó quy định việc bảo vệ các thương nhân nước ngoài và điều chỉnh hành vi vi phạm hợp đồng.

Về cơ bản, những quy định nào của pháp luật quốc gia được áp dụng cho giao dịch thương mại trong nước thì cũng được áp dụng cho giao dịch thương mại quốc tế. Ngoài ra, do các nước đều cần bảo vệ lợi ích quốc gia trong các giao dịch thương mại quốc tế, nên sẽ quy định về chính sách thương mại hàng hoá, chính sách về bạn hàng v.v.. Cụ thể, hàng hoá, công nghệ nào thuộc diện bị cấm hoặc hạn chế xuất, nhập khẩu? Các đối tác thương mại nào không được hưởng đối xử ưu đãi? Có cần quy định kiểm soát việc chuyển ngoại tệ mạnh ra nước ngoài hay không? Cần hạn chế FDI vào lĩnh vực nào? v.v..

Một nguồn quan trọng của pháp luật quốc gia về thương mại quốc tế nằm ở các đạo luật hay các văn bản dưới luật về thương mại và thương mại quốc tế. *Ví dụ*, trong hệ thống pháp luật Hoa Kỳ, Đạo luật thuế quan 1930, Đạo luật thương mại 1974, Đạo luật về các hiệp định thương mại 1979, Bộ luật thương mại thống nhất (US UCC), v.v.. là những nguồn quan trọng của pháp luật thương mại quốc tế. Bên cạnh

đó, các văn bản pháp luật trong lĩnh vực luật hợp đồng, luật dân sự, luật tố tụng dân sự, v.v. trong hệ thống pháp luật của các quốc gia cũng là những nguồn luật thương mại quốc tế quan trọng. Trong các lĩnh vực này, phải kể đến các quy định pháp luật quốc gia điều chỉnh các biện pháp 'khắc phục thương mại' và hoạt động hải quan. Pháp luật về các biện pháp 'khắc phục thương mại' (chủ yếu là AD, chống trợ cấp và tự vệ thương mại) thực chất là các rào cản thương mại 'hợp pháp', nhằm chống lại cả thương mại công bằng và cạnh tranh không lành mạnh. Pháp luật hải quan cũng có tầm quan trọng tương tự, bởi vì đây là các quy định mà chính phủ phải dựa vào để thu thuế xuất nhập khẩu và điều chỉnh hoạt động xuất nhập khẩu.

Trong hệ thống pháp luật Việt Nam hiện hành, cần kể đến các văn bản pháp luật quan trọng là nguồn của pháp luật thương mại quốc tế như: Bộ luật Dân sự 2015; Luật Thương mại 2005; Bộ luật Tố tụng dân sự 2015; Luật Doanh nghiệp 2014, Luật Đầu tư 2014; Luật Sở hữu trí tuệ 2005 (sửa đổi bổ sung năm 2009); Luật Trọng tài thương mại 2010; Luật Quản lý ngoại thương 2017;… và các văn bản dưới luật.

2. Án lệ của toà án trong nước

Một nguồn khác của pháp luật quốc gia về thương mại quốc tế là án lệ. Có rất nhiều án lệ có ý nghĩa đối với các chuyên gia pháp luật, *ví dụ*, án lệ năm 1878 của toà án Bỉ về quyền miễn trừ tư pháp 'hạn chế' (*xem* Mục 1 - Chương 1 của Giáo trình); hay án lệ *United City Merchants (Investments) Ltd v. Royal Bank of Canada,* trong đó toà án của Anh Quốc làm rõ ngoại lệ về hành vi gian dối (fraud exception) của nguyên tắc về tính độc lập của thư tín dụng (principles of the autonomy of the credit) trong lĩnh vực thanh toán quốc tế, trong khi UCP 600 không quy định về ngoại lệ này (*xem* Mục 4 - Chương 5 của Giáo trình);[16] hoặc án lệ *Banco National de Cuba v. Manhattan Bank* liên quan đến áp dụng học thuyết 'hành vi quốc gia' của toà án Hoa Kỳ.[17]

3. Các nguồn luật khác của pháp luật quốc gia

Pháp luật quốc gia còn bao gồm *các tập quán thương mại của quốc gia* và *các nguyên tắc chung trong xét xử của toà án quốc gia (general principles 'in foro domestico')*. Đây là những nguyên tắc được tất cả các hệ thống pháp luật trên thế giới công nhận. Chúng thường có nguồn gốc từ pháp luật La Mã và được thể hiện bằng ngôn ngữ La-tinh, *ví dụ*, '*non bis in idem*' (không xét xử hai lần đối với cùng một tội phạm), '*nemo judex in propria causa*' (không được xét xử vụ việc của chính mình hoặc liên quan đến lợi ích của mình), '*ex injuria jus non oritur*' (quyền không sinh ra từ một hành vi bất hợp pháp) v.v.. Bên cạnh đó, các nguyên tắc như tuân thủ đúng các thủ tục ('due process'), nguyên tắc tương xứng, nguyên tắc không áp dụng pháp luật hồi tố v.v. cũng được hầu hết các hệ thống pháp luật trên thế giới ghi nhận. Những nguyên tắc này chỉ được áp dụng như là nguồn luật bổ trợ, trong trường hợp không áp dụng được các nguồn luật khác.

[16] Vụ *United City Merchants (Investments) Ltd v. Royal Bank of Canada*, The American Accord, [1983], 1 AC 168, House of Lords.

[17] Vụ *Banco National de Cuba v Manhattan Bank*, 658 F. 2d 875 (2nd Cir. [1981]).

B. *Các giới hạn của pháp luật quốc gia trong việc điều chỉnh giao dịch thương mại quốc tế*

Về cơ bản, pháp luật của quốc gia chỉ có hiệu lực điều chỉnh đối với hành vi của chủ thể mang quốc tịch quốc gia đó, hoặc hành vi được thực hiện trong phạm vi lãnh thổ quốc gia đó. Việc xác định quốc tịch của MNC rất phức tạp nhưng cũng rất quan trọng để chính phủ có thể bảo vệ lợi ích của doanh nghiệp nước mình trong các hoạt động kinh doanh quốc tế.[18]

Giới hạn điều chỉnh của pháp luật quốc gia đối với các giao dịch thương mại quốc tế đôi khi 'va chạm' với vấn đề quyền tài phán ngoài lãnh thổ. Quyền tài phán ngoài lãnh thổ của quốc gia là quyền điều chỉnh bằng pháp luật của quốc gia đó đối với:

- Hành vi vi phạm pháp luật của chủ thể mang quốc tịch nước mình, trong trường hợp hành vi vi phạm pháp luật xảy ra bên ngoài lãnh thổ. *Ví dụ*, một Tổng giám đốc điều hành (viết tắt là 'CEO') là công dân Nhật Bản thực hiện hành vi hối lộ ở Việt Nam có thể bị toà án Nhật Bản xét xử.
- Hành vi của người nước ngoài thực hiện ở nước ngoài làm phương hại đến an ninh quốc gia hoặc các lợi ích khác của quốc gia.
- Hành vi vi phạm pháp luật ở nước ngoài mà nạn nhân của hành vi đó mang quốc tịch nước mình.
- Các tội phạm quốc tế như cướp biển, không tặc, buôn bán nô lệ, tội diệt chủng v.v..

Việc thực hiện quyền tài phán ngoài lãnh thổ thường kéo theo các sự cố trong quan hệ ngoại giao.

[18] Toà án quốc tế (ICJ), *Barcelona Traction, Belgium v. Spain* [1970], http://www.icj-cij.org.

2. Pháp luật quốc tế

A. *Tập quán thương mại quốc tế*

1. Khái niệm tập quán thương mại quốc tế

Tập quán thương mại quốc tế là nguồn quan trọng của pháp luật thương mại quốc tế. Các thương nhân, những người cùng theo đuổi các mục tiêu kinh tế, luôn luôn nói ngôn ngữ chung, đó là các tập quán thương mại quốc tế.

Tập quán thương mại quốc tế có thể hiểu là tập hợp những quy tắc ứng xử bất thành văn hình thành từ các hành vi, cách ứng xử của thương nhân, và được các thương nhân coi là 'luật' của mình. *Ví dụ*, các điều kiện cơ sở giao hàng trong mua bán hàng hoá quốc tế (viết tắt là 'INCOTERMS') (*xem* Mục 2 - Chương 5 của Giáo trình); Quy tắc thực hành thống nhất về tín dụng chứng từ (viết tắt là 'UCP') (*xem* Mục 4 - Chương 5 của Giáo trình); Tập quán ngân hàng theo tiêu chuẩn quốc tế (viết tắt là 'ISBP') (*xem* Mục 4 - Chương 5 của Giáo trình).

2. Lex mercatoria ('thương nhân luật')

Pháp luật thương mại quốc tế thực sự phát triển kể từ thời kì Trung cổ, khi mà các tập quán thương mại quốc tế xuất hiện và phát triển tại các hội chợ thương mại ở châu Âu vào cuối thế kỉ VII. Các thương nhân từ các nước, các khu vực khác nhau đến mua bán hàng hoá ở các hội chợ mang theo các tập quán thương mại của mình. Qua thời gian, các vị vua chúa chấp nhận cho các thương nhân đến từ các nước, các vùng khác nhau được giải quyết tranh chấp thương mại theo tập quán riêng của họ, do đó các tập quán thương mại này trở nên có hiệu lực pháp luật. Ngay từ ban đầu, *lex mercatoria* ('thương nhân luật') đã có tính 'quốc tế', bởi vì nó tồn tại độc lập với pháp luật của vua chúa. Nó dựa trên những tập quán thương mại chung của thương nhân vốn phổ biến khắp châu Âu lúc bấy giờ và được áp dụng thống nhất bởi các toà án thương nhân ở các nước khác nhau.

Trong suốt thời kì Trung cổ, *lex mercatoria* là tập quán thương mại quốc tế rất mạnh, quy định các quyền và nghĩa vụ của thương nhân. Phạm vi của *lex mercatoria* rất rộng, điều chỉnh rất nhiều vấn đề thương mại như giá trị và hiệu lực của hợp đồng, vi phạm hợp đồng, thư tín dụng, sổ sách kế toán, hối phiếu, vận đơn, thành lập công ty và hợp danh, phá sản, sáp nhập, nhãn hiệu hàng hoá, môn bài v.v.. *Lex mercatoria* nhấn mạnh quyền tự do thoả thuận trong hợp đồng và quyền tự do chuyển nhượng các động sản.

> ... [T]ranh chấp giữa các thương nhân được giải quyết bởi các toà án địa phương đặc biệt, như các toà án của hội chợ và đô thị, thẩm phán và hội thẩm chính là các thương nhân. Các toà án thương nhân này giải quyết tranh chấp rất nhanh chóng và áp dụng *lex mercatoria* chứ không áp dụng luật địa phương.[19]

Điều quan trọng nhất của *lex mercatoria* là các toà án thương nhân giải quyết vụ việc rất nhanh, tránh sử dụng những yếu tố chuyên môn phức tạp, và thường quyết định vụ việc theo nguyên tắc công bằng ('ex aequo et bono'). *Lex mercatoria* có hiệu lực nhờ sự chấp nhận tự nguyện của các thương nhân. *Lex mercatoria* thực sự phù hợp với nhu cầu của thương nhân trong suốt thời kì đó.

Là trung tâm thương mại của châu Âu một thời, Italia tự hào về vị trí của mình trong quá trình phát triển của *lex mercatoria* thời kì Trung cổ. Các thương nhân và luật sư ở đây đã rất sáng tạo trong việc phát triển nhiều loại quy tắc về hàng hải và thương mại, như vận đơn và hối phiếu, góp phần hình thành các quy định pháp luật nội dung dựa trên tập quán thương mại. Ảnh hưởng của các thương nhân Italia lan toả khắp châu Âu, ngay cả những hội chợ lớn ở Champagne (Pháp) cũng bị chiếm lĩnh bởi thương nhân Italia.[20]

Sau này, do các vua chúa ngày càng có nhiều quyền lực, cùng với sự hình thành các quốc gia-dân tộc vào cuối thời kì Trung cổ ở châu Âu, *lex mercatoria* có xu hướng hoà nhập vào các hệ thống pháp luật quốc gia. *Ví dụ*: Ở Anh Quốc, *lex mercatoria* là một bộ phận của pháp luật được các toà thương mại áp dụng. *Lex mercatoria* đã hoàn toàn được đưa vào common law bằng công sức của thẩm phán John Holt - Chánh án Toà án tối cao (Chief Justice) trong thời kỳ 1689-1710, và thẩm phán Mansfield - Chánh án Toà án tối cao (Chief Justice) trong thời kỳ 1756-1788.[21] Tuy nhiên, phần lớn *lex mercatoria* bị thay đổi khi áp dụng ở các toà án tại các nước khác nhau.

Từ thế kỉ XIX, các quốc gia bắt đầu kí kết với nhau các điều ước về thương mại quốc tế. Kết quả là *lex mercatoria* dường như chỉ còn mang ý nghĩa lịch sử. Tuy nhiên, *lex mercatoria*, trong một số trường hợp

[19] L. S. Sealy và R. J. A. Hooley, *Commercial Law, Text, Cases, and Materials*, Oxford University Press, 4th edn., (2009), tr. 14.

[20] *Good on Commercial Law*, do Ewan McKendrick biên tập và chỉnh sửa toàn bộ, Penguin B, tr. 5.

[21] L. S. Sealy và R. J. A Hooley, Sđd, tr. 15.

được bổ sung bởi *lex maritima* ('luật thương nhân trên biển'),[22] vẫn còn ảnh hưởng tới sự phát triển của luật thương mại quốc tế hiện đại trong những lĩnh vực như mua bán hàng hoá quốc tế, thanh toán quốc tế, vận tải hàng hoá quốc tế.

3. Phòng thương mại quốc tế ('ICC') và việc tập hợp các tập quán thương mại quốc tế

ICC là tổ chức quốc tế phi chính phủ hoạt động nhằm phục vụ hoạt động thương mại trên toàn thế giới. ICC đóng vai trò chủ đạo trong việc đảm bảo sự hài hoà trong thương mại quốc tế thông qua việc tập hợp hoá các tập quán thương mại quốc tế để các thương nhân có thể áp dụng khi thực hiện các giao dịch kinh doanh quốc tế. Nhiều quy tắc áp dụng thống nhất do ICC ban hành đã được sử dụng để điều chỉnh quan hệ hợp đồng. Có ba nhóm quy tắc: Ngân hàng và bảo hiểm, thương mại quốc tế và vận tải quốc tế.[23]

Rất nhiều trong số các quy tắc này được lựa chọn từ các tập quán thương mại của các thương nhân được hình thành qua thời gian. *Ví dụ*, các điều kiện cơ sở giao hàng trong mua bán hàng hoá quốc tế ('INCOTERMS') (*xem* Mục 2 - Chương 5 của Giáo trình); Quy tắc thực hành thống nhất về tín dụng chứng từ ('UCP') (*xem* Mục 4 - Chương 5 của Giáo trình); Tập quán ngân hàng theo tiêu chuẩn quốc tế ('ISBP') (*xem* Mục 4 - Chương 5 của Giáo trình); Các quy tắc thực hành về tín dụng dự phòng quốc tế ('ISP') (*xem* Mục 4 - Chương 5 của Giáo trình); hoặc các quy tắc của UNCTAD / ICC về chứng từ trong vận tải đa phương thức. Các ngân hàng trên khắp thế giới đã áp dụng UCP - bộ quy tắc mà ngày nay được sử dụng trong hầu như tất cả các giao dịch tín dụng chứng từ.

B. *Điều ước*

Các điều ước là nguồn chủ yếu của pháp luật thương mại quốc tế. Có nhiều cách khác nhau để phân loại các điều ước. Các điều ước về thương mại quốc tế có thể là điều ước song phương hoặc đa phương, ở cấp độ khu vực và toàn cầu.

Ở cấp độ toàn cầu, các *ví dụ* điển hình về điều ước thương mại quốc tế cần nói đến là: Các hiệp định của WTO (*xem* Chương 2 của Giáo trình); Công ước của Liên hợp quốc về hợp đồng mua bán hàng hoá quốc tế 1980 ('CISG') (*xem* Mục 3 - Chương 5 của Giáo trình); Công ước của Liên hợp quốc về công nhận và thi hành các phán quyết trọng tài nước ngoài 1958 (gọi tắt là 'Công ước New York') (*xem* Mục 3 và Mục 4 - Chương 7 của Giáo trình); Quy tắc La Haye - Visby và Quy tắc Hambourg (*xem* Mục 2 - Chương 6 của Giáo trình); v.v..

Trong khuôn khổ WTO có các hiệp định 'nhiều bên' (hay 'đa biên') ('Plurilateral' Trade Agreements). Đây là các hiệp định do một số thành viên của WTO tự nguyện kí kết và chỉ có hiệu lực đối với các thành viên kí kết, không có hiệu lực ràng buộc đối với các thành viên khác của WTO. Vào thời điểm WTO bắt đầu đi vào hoạt động (ngày 01/01/1995), có bốn hiệp định nhiều bên, bao gồm: Hiệp định về buôn bán sản phẩm sữa, Hiệp định về buôn bán sản phẩm thịt bò, Hiệp định về mua sắm của Chính phủ (viết tắt là 'GPA') và Hiệp định về buôn bán máy bay dân dụng. Hiệp định công nghệ thông tin 1996 (viết tắt là 'ITA') là hiệp định nhiều bên xuất hiện sau khi Vòng đàm phán Uruguay kết thúc. Đến cuối năm 1997, Hiệp định về buôn bán sản phẩm sữa và Hiệp định về buôn bán sản phẩm thịt bò hết hiệu lực. Việc kí kết các hiệp định nhiều bên nhằm cho phép một số nhóm thành viên WTO cam kết những vấn đề mà các thành viên này cho là quan trọng đối với họ - những vấn đề nằm ngoài cam kết gia nhập WTO.[24]

Ở cấp độ khu vực, các nước thường kí kết các hiệp định thương mại tự do (viết tắt là 'FTAs'), *ví dụ*, NAFTA (*xem* Mục 3 - Chương 3 của Giáo trình), AFTA (*xem* Mục 4 - Chương 3 của Giáo trình), EVFTA, TPP; các hiệp định thương mại song phương (viết tắt là 'BTAs') v.v.. Các nước châu Âu đã kí kết Công ước về quyền tài phán và thi hành các bản án dân sự và thương mại EEC 1968 (Công ước Brussels), Quy định của Hội đồng châu Âu (EC) No 593/2008 ngày 17/6/2008 về luật điều chỉnh các nghĩa vụ theo hợp đồng (còn gọi là Quy định Rome I) v.v..

Các điều ước về thương mại quốc tế có thể được áp dụng trực tiếp hoặc phải theo quy trình 'nội luật hoá' vào hệ thống pháp luật quốc gia.

C. *Án lệ quốc tế*

Án lệ của các cơ quan tài phán quốc tế (toà án quốc tế, trọng tài quốc tế), các báo cáo của Cơ quan giải quyết tranh chấp của WTO (viết tắt là 'DSB') là nguồn quan trọng trong hệ thống nguồn luật thương mại quốc tế. *Ví dụ*, 'án lệ' của WTO *Japan-Alcoholic Bevarage* [1996] đã làm rõ khái niệm 'sản phẩm tương tự' ('like product') trong quá trình giải quyết vụ việc liên quan đến việc áp dụng nguyên tắc đối xử quốc gia (nguyên tắc

[22] http://en.wikipedia.org/wiki/International_trade_law

[23] *Good on Commercial Law*, Sđd, tr. 15.

[24] WTO, http://www.wto.org.

'NT'), nguyên tắc nền tảng của pháp luật thương mại quốc tế, trong khi các quy định trong các hiệp định của WTO không đủ và không thể làm rõ được khái niệm này (*xem* Mục 2 - Chương 2 của Giáo trình).[25]

Bên cạnh đó, các án lệ quốc tế trong lĩnh vực FDI cũng có ý nghĩa rất quan trọng. Trong vụ *Factory at Chorzow* [1927], vấn đề về quốc hữu hoá, trưng thu tài sản và các tiêu chuẩn bồi thường đã được Toà án quốc tế thường trực (viết tắt là 'PCIJ') giải thích rất rõ ràng.[26] Tương tự, vụ *Barcelona Traction* [1970] do Toà án quốc tế (viết tắt là 'ICJ') giải quyết đã chỉ ra nguyên tắc xác định quốc tịch của MNC.[27]

Các án lệ của Toà án công lí châu Âu (nay là Toà án công lí - một bộ phận của Toà án công lí EU, *xem* Mục 2 - Chương 3 của Giáo trình) cũng là nguồn luật quan trọng có tính ràng buộc đối với các thiết chế của EU và các nước thành viên. Án lệ nổi tiếng *Van Gend en Loos* [1963][28] là một ví dụ.

Những quyết định cuối cùng của cơ quan giải quyết tranh chấp của NAFTA (Panel) đã đóng góp quan trọng cho nguồn án lệ của luật thương mại quốc tế, và nhất là tạo nguồn cho luật trọng tài liên quan đến giải quyết tranh chấp giữa nhà đầu tư nước ngoài và chính phủ nước tiếp nhận đầu tư. *Ví dụ*, hai án lệ *Metalclad v. Mexico*[29] và *Thunderbird v. Mexico*[30] trong khuôn khổ NAFTA (*xem* Mục 3 - Chương 3 của Giáo trình).

D. *Các nguồn luật khác*

Các nguyên tắc chung của pháp luật quốc tế rất có ý nghĩa đối với các vấn đề liên quan đến trách nhiệm của Nhà nước, hay nguyên tắc bồi thường công bằng và thoả đáng trong lĩnh vực FDI, v.v.. Một trong những nguyên tắc đó là nguyên tắc thiện chí, áp dụng trong việc kiểm soát các quốc gia thực thi các quyền của mình. Về cơ bản, các nguyên tắc chung của pháp luật quốc tế có tính ràng buộc đối với mọi quốc gia.

25 WTO, http://www.wto.org.

26 Toà án quốc tế thường trực (PCIJ), Vụ *Factory at Chorzow* (Germ. v. Pol.), [1927] P.C.I.J. (ser. A) No 9 (July 26), http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow.htm

27 Toà án quốc tế (ICJ), Vụ *Barcelona Traction, Belgium v. Spain*, [1970], http://www.icj-cij.org

28 Toà án công lí châu Âu (ECJ), Case 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen*.

29 NAFTA, vụ *Metalclad Corporation v. The United Mexican States,* Phán quyết ngày 30/8/2000; Án lệ số ARB(AF)/97/1 được giới thiệu lại năm 2001, 16 *ICSID Review - Foreign Investment Law Journal* 168.

30 NAFTA, vụ *International Thunderbird Gaming Corp. v. Mexico*, Phán quyết ngày 26/1/2006 (UNCITRAL/NAFTA), www.italaw.com/documents/ThunderbirdAward.pdf.

Theo khoản 1 Điều 38 Quy chế Toà án quốc tế (ICJ), '*các học thuyết của các học giả nổi tiếng*' là nguồn bổ trợ được sử dụng để tìm ra các quy phạm luật quốc tế.

'*Luật mềm*' là khái niệm thường được giới học giả nhắc tới. Đây là những quy tắc không có giá trị ràng buộc về mặt pháp lí, tuy nhiên trong thực tiễn lại thường được các chủ thể tuân thủ chặt chẽ, *ví dụ*, phần lớn các nghị quyết và tuyên bố của Đại hội đồng Liên hợp quốc, các học thuyết pháp lí, các luật mẫu, các bộ quy tắc ứng xử, kế hoạch hành động v.v.. Có thể kể ra một số 'luật mềm' đáng chú ý như: Nghị quyết của Đại hội đồng Liên hợp quốc số 3201 năm 1974 về trật tự kinh tế thế giới mới (ngày 1/5/1974, UNGA, Res. 3201 (S-VI), UN Doc. A/9559); Nghị quyết số 1803 (XVII) năm 1962 của Đại hội đồng Liên hợp quốc về chủ quyền vĩnh viễn đối với nguồn tài nguyên thiên nhiên (17 UN GAOR Supp. (No.17), 115, UN Doc.5217 (1962)); Tuyên bố năm 1976 của OECD về đầu tư quốc tế và các MNCs; Học thuyết 'hành vi quốc gia' (*xem* Mục 1 - Chương 1 của Giáo trình); Học thuyết Calvo; Học thuyết Drago v.v..

Học thuyết Calvo là học thuyết về chính sách đối ngoại, cho rằng quyền tài phán đối với các tranh chấp về đầu tư quốc tế phải thuộc về quốc gia nơi tiến hành hoạt động đầu tư. Do đó, học thuyết này cho rằng các nhà đầu tư cần phải chọn toà án của quốc gia sở tại để giải quyết các tranh chấp về đầu tư thay vì chọn toà án của quốc gia mình, và các chính phủ không được tiến hành 'bảo hộ ngoại giao' hoặc can thiệp quân sự để bảo vệ nhà đầu tư của mình. Học thuyết mang tên luật gia người Argentina, Carlos Calvo, được tuyên bố từ thế kỉ XIX và được áp dụng rộng rãi ở các nước châu Mỹ La-tinh và một số khu vực khác trên thế giới. 'Học thuyết Drago' được xây dựng dựa trên nguyên tắc của học thuyết Calvo nhưng có phạm vi áp dụng hẹp hơn.[31]

Những 'luật mềm' khác trong pháp luật thương mại quốc tế cũng cần nhắc đến, đó là Bộ nguyên tắc về hợp đồng thương mại quốc tế của UNIDROIT (viết tắt là 'PICC') (*xem* Mục 3 - Chương 5 của Giáo trình); Bộ nguyên tắc về luật hợp đồng châu Âu của Ủy ban về luật hợp đồng châu Âu (viết tắt là 'PECL') (*xem* Mục 3 - Chương 5 của Giáo trình); Luật mẫu về thương mại điện tử của UNCITRAL (*xem* Mục 3 - Chương 6 Giáo trình) v.v..

Mặc dù 'luật mềm' không mang tính ràng buộc pháp lí nhưng có tính khuyến nghị và định hướng rất cao đối với hoạt động lập pháp của các quốc gia, cũng như hoạt động đàm phán các điều ước quốc tế.

31 http://en.wikipedia.org

Không phải là không có lí khi các DCs cho rằng pháp luật thương mại quốc tế chủ yếu phản ánh lợi ích của các nước phát triển. *Lex mercatoria* ra đời từ trung tâm thương mại Địa Trung Hải và các hội chợ thương mại châu Âu thời Trung cổ. Pháp luật thương mại quốc tế hiện đại mặc dù đã cố gắng hài hoà 'luật chơi' thương mại khắp nơi trên thế giới nhưng cũng chưa quan tâm hoặc ít quan tâm đến kinh nghiệm và trình độ thương mại của các DCs. Câu hỏi đặt ra hiện nay là làm thế nào để điều hành một thế giới toàn cầu hoá với mức độ hội nhập sâu sắc và ngày càng nhiều các 'cường quốc'?

TÓM TẮT CHƯƠNG 1

Thương mại quốc tế và pháp luật thương mại quốc tế đã trải qua lịch sử phát triển lâu dài và phong phú từ buổi ban đầu của nền văn minh nhân loại. Các cuộc cách mạng khoa học-công nghệ qua các thời đại đã tác động mạnh mẽ đến sự phát triển thương mại toàn cầu.

Các quan hệ thương mại quốc tế, cho dù có sự tham gia của quốc gia và các thực thể công hay các thương nhân, đều chịu sự điều chỉnh phức tạp của cả pháp luật quốc gia lẫn pháp luật quốc tế.

Vị trí của pháp luật thương mại quốc tế nằm trong vùng giao thoa giữa luật quốc tế và luật quốc gia. Pháp luật thương mại quốc tế là một trong những sản phẩm được sinh ra từ mối quan hệ phức tạp giữa luật quốc tế và luật quốc gia.

Giới hàn lâm trên thế giới và Việt Nam có quan niệm rất đa dạng về lĩnh vực pháp luật này. Các học giả diễn đạt toàn bộ hoặc một phần nội dung của lĩnh vực pháp luật này bằng các tên gọi đa dạng như: International Trade Law ('Luật thương mại quốc tế'); World Trade Law ('Luật thương mại thế giới'); Global Trade Law ('Luật thương mại toàn cầu'); International Trade Regulations (cũng được dịch ra tiếng Việt là 'Luật thương mại quốc tế'); International Commercial Law (cũng được dịch ra tiếng Việt là 'Luật thương mại quốc tế'); International Business Law ('Luật kinh doanh quốc tế'); International Economic Law ('Luật kinh tế quốc tế'); Droit Economic International ('Luật kinh tế quốc tế'); Droit de Commerce International (cũng được dịch ra tiếng Việt là 'Luật thương mại quốc tế') và rất nhiều tên gọi khác. Tuy nhiên, điều quan trọng là lĩnh vực pháp luật này điều chỉnh cả hai vấn đề, bao gồm: (i) vấn đề liên quan đến *chính sách* đối ngoại của nhà nước trong lĩnh vực thương mại quốc tế (như thuế quan và các hàng rào phi thuế quan, định giá hải quan, bán phá giá, trợ cấp xuất khẩu...); và (ii) vấn đề liên quan đến *hành vi* của các chủ thể (bao gồm cả nhà nước, các thực thể công và tư nhân) trong các giao dịch kinh doanh quốc tế (như hợp đồng mua bán hàng hoá quốc tế, thanh toán quốc tế, vận tải hàng hoá quốc tế...). Pháp luật thương mại quốc tế nên được xem như là tổng thể những câu trả lời của pháp luật đối với nhu cầu và thực tiễn của các quan hệ thương mại giữa các nhà nước với cộng đồng thương nhân.

Một hệ thống các quy định nhằm thúc đẩy thương mại tự do dường như chưa đủ để đẩy nhanh tốc độ phát triển thương mại. Để đạt được mục đích này, cần có khuôn khổ pháp lí phù hợp điều chỉnh toàn diện các lĩnh vực tác động đến thương mại quốc tế như vận tải, ngân hàng, tiếp thị, truyền thông v.v..

Do pháp luật thương mại quốc tế là sự thể hiện chính sách thương mại, nên nếu so với bất cứ lĩnh vực pháp luật nào khác, thì lĩnh vực pháp luật này có mối quan hệ chặt chẽ nhất với lĩnh vực kinh tế. Thêm vào đó, quan hệ thương mại quốc tế và pháp luật thương mại quốc tế sẽ không thể phát triển, nếu các chính khách chưa nhìn thấy những lợi ích mà thương mại quốc tế có thể mang lại. Một vấn đề có vẻ đơn giản về mặt pháp lí cũng có thể trở thành nan giải về ngoại giao và đòi hỏi phải thương lượng lâu dài. Lợi ích thương mại của các thương nhân có thể phải phụ thuộc vào lợi ích chính trị của các quốc gia có liên quan. *Ví dụ*, trong vụ *Barcelona Traction* [1970], khi các chính khách mất lợi ích, thì các nhà đầu tư có thể mất tiền. Do vậy, trước khi quyết định tiến hành kinh doanh quốc tế, một doanh nghiệp cần đánh giá đầy đủ tác động của các điều ước thương mại quốc tế và pháp luật của các quốc gia liên quan đến giao dịch mình sẽ thực hiện, *ví dụ*, pháp luật về bảo vệ quyền sở hữu của doanh nghiệp (bao gồm cả IPRs), sự thiếu hiệu quả của điều ước quốc tế nào đó, hay tính phức tạp của các hệ thống pháp luật khác nhau… Như vậy, cần phải tiếp cận pháp luật thương mại quốc tế như là một lĩnh vực đa ngành, bao gồm kinh tế, chính trị, ngoại giao, giao tiếp giữa các nền văn hoá, và tất nhiên và chủ yếu là lĩnh vực pháp luật, bao gồm cả công pháp quốc tế và luật quốc gia, trong đó có tư pháp quốc tế.

Không có pháp luật nào hoàn hảo, mà nó có thể có những mâu thuẫn, sự thiếu rõ ràng và đôi khi cả sự không công bằng. Pháp luật thương mại quốc tế cũng còn nhiều vấn đề rất khó giải quyết. Giữa các nước vẫn tồn tại những khoảng cách về quan điểm trong một số lĩnh vực của pháp luật thương mại quốc tế.

Trong bối cảnh của Việt Nam - một nước nông nghiệp đang phát triển trong giai đoạn đầu của tiến trình hội nhập kinh tế quốc tế, việc học hỏi những kiến thức phức tạp về pháp luật thương mại quốc tế cũng giống như người bình dân thưởng thức nhạc giao hưởng quý phái. Điều này quả thật không dễ dàng nhưng lại rất cần thiết cho sự phát triển và hội nhập với thế giới của Việt Nam.

CÂU HỎI/BÀI TẬP

1. Tại sao các quốc gia tiến hành hoạt động thương mại với nhau?
2. Tại sao tiến trình hội nhập kinh tế ngày càng gia tăng?
3. Người ta buôn bán cái gì và ai tiến hành hoạt động thương mại quốc tế?
4. Thương mại đã, đang và vẫn tiếp tục đóng vai trò quan trọng trong nền kinh tế toàn cầu như thế nào?
5. Thương mại tự do là gì? Thương mại tự do có đem lại lợi ích cho tất cả mọi người hay không? Cái gì sẽ gây tác động cho cả người thắng và người thua trong thương mại quốc tế?
6. Ai được hưởng lợi từ pháp luật thương mại quốc tế và tại sao?

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PHẦN 1.
LUẬT THƯƠNG MẠI QUỐC TẾ CÓ SỰ THAM GIA CỦA NHÀ NƯỚC VÀ CÁC THỰC THỂ CÔNG

LUẬT THƯƠNG MẠI QUỐC TẾ CÓ SỰ THAM GIA CỦA NHÀ NƯỚC VÀ CÁC THỰC THỂ CÔNG

Hội nhập quốc tế trở thành chính sách đối ngoại lớn của Việt Nam trong thời kỳ hiện nay, trong đó hội nhập kinh tế quốc tế là trọng tâm và ở mọi cấp độ (toàn cầu, khu vực, và song phương). Việc trở thành thành viên chính thức của WTO ngày 11/01/2007 không phải là điểm bắt đầu, cũng không phải là điểm kết thúc của quá trình đổi mới và hội nhập kinh tế quốc tế của Việt Nam. Các hiệp định thương mại tự do khu vực và song phương còn có mức độ mở cửa cao hơn so với các cam kết trong WTO. Những khác biệt trong các cam kết giữa các hiệp định thương mại ở mọi cấp độ nêu trên có thể tạo ra các tác động khác nhau về thương mại và đầu tư. Để hiểu biết toàn diện và khái quát về nền tảng pháp luật thương mại quốc tế ở cả ba cấp độ nêu trên, Phần 1 này của Giáo trình giới thiệu ba chương, cụ thể là: Luật WTO - điều chỉnh quan hệ thương mại quốc tế ở tầm toàn cầu (*xem* Chương 2 của Giáo trình); Pháp luật hội nhập kinh tế khu vực (*xem* Chương 3 của Giáo trình); và các hiệp định hợp tác thương mại song phương giữa Việt Nam và một số đối tác (*xem* Chương 4 của Giáo trình).

CHƯƠNG 2. LUẬT WTO

Mục 1. GIỚI THIỆU

Tổ chức thương mại thế giới ('WTO') là một trong những tổ chức quốc tế quan trọng nhất trên thế giới hiện nay. Dù là tổ chức còn tương đối non trẻ, chỉ chính thức được thành lập từ ngày 01/01/1995, nhưng hệ thống thương mại nguyên gốc của WTO đã có trước chính bản thân tổ chức này đến gần nửa thế kỉ. Do đó, để hiểu về WTO, cần hiểu về lịch sử của tổ chức và đặc biệt là GATT - nền tảng của hệ thống thương mại thế giới. Mục này xem xét sự phát triển của WTO và điểm qua những khía cạnh của WTO với tư cách là một tổ chức quốc tế.

1. Tiền đề lịch sử

Nguồn gốc của WTO bắt đầu từ những năm cuối của Chiến tranh thế giới thứ II, khi các nước đàm phán về kế hoạch hậu chiến. Các nhà hoạch định chính sách cho giai đoạn hậu chiến, đứng đầu là Churchill (Thủ tướng Anh) và Roosevelt (Tổng thống Hoa Kỳ), đều muốn tránh lặp lại thảm họa kinh tế và chính trị giai đoạn giữa hai cuộc Chiến tranh thế giới,[1] mà một trong những nguyên nhân của nó chính là chính sách bảo hộ mậu dịch của các nước. Ngay từ giai đoạn ban đầu cho đến nay, ngoài lí do kinh tế như trình bày tại Chương 1, cơ sở lí luận cơ bản về luật thương mại quốc tế là khá đơn giản: Nếu muốn thúc đẩy thương mại xuyên biên giới thì cần phải hạn chế sự can thiệp của chính phủ vào việc việc buôn bán hàng hoá của các công ty tư nhân - chủ thể chủ yếu tiến hành hoạt động thương mại này. Chính từ suy nghĩ đó mà cuộc thảo luận giữa Anh Quốc và Hoa Kỳ về thương mại đã được tiến hành từ năm 1943 để từ đó cho ra đời tài liệu có tên gọi 'Các đề xuất để mở rộng thương mại và việc làm trên thế giới' (sau đây gọi là '*Bản đề xuất*') vào cuối năm 1945.[2] *Bản đề xuất* này dự kiến xây dựng bộ quy tắc điều chỉnh việc các chính phủ hạn chế thương mại quốc tế cũng như thành lập Tổ chức thương mại quốc tế (International Trade Organization - viết tắt là 'ITO') để giám sát việc thực hiện bộ quy tắc đó.

[1] Đồng thời cũng phải nói thêm rằng vào giai đoạn này, Hoa Kỳ đã sẵn sàng gánh vác vai trò lãnh đạo thế giới, và không chỉ hạn chế ảnh hưởng của mình ở Mỹ La-tinh.

[2] Tài liệu này được đưa ra tại cuộc họp báo của Bộ ngoại giao Hoa Kỳ ngày 06/12/1945, tái bản trong tài liệu *13 US Dept of State Bulletin* 912-29, (1945). Trước khi chính thức được đưa ra công khai, tài liệu này đã được gửi cho chính phủ của một số nước.

Đến đầu tháng 12/1945, sau khi công khai *Bản đề xuất*, Hoa Kỳ gửi thư mời 15 nước tham gia đàm phán về giảm thuế quan. Trừ Liên Xô, đến tháng 01/1946, tất cả các nước được mời đều nhận lời tham gia đàm phán. Tuy nhiên, cuộc đàm phán đã không được tổ chức sớm mà phải đợi đến đầu năm 1947.[3]

Hoa Kỳ cũng tận dụng kênh khác để thúc đẩy thực hiện *Bản đề xuất*, đó là thông qua Liên hợp quốc - tổ chức cũng được thành lập năm 1945. Tại cuộc họp đầu tiên vào tháng 02/1946, theo đề nghị của Hoa Kỳ, Uỷ ban kinh tế và xã hội của Liên hợp quốc đã thông qua nghị quyết về việc triệu tập Hội nghị quốc tế về thương mại và việc làm, đồng thời chỉ định một uỷ ban trù bị để dự thảo tài liệu thảo luận tại Hội nghị. Mục đích của Hội nghị không chỉ giới hạn ở việc đàm phán về giảm thuế quan mà còn để chuẩn bị một hiến chương với nội dung rộng hơn cho ITO. Đáng chú ý là vào thời điểm đó, Hoa Kỳ đã sửa đổi *Bản đề xuất* năm 1945 thành Dự thảo Hiến chương[4] để làm cơ sở cho việc đàm phán Hiến chương ITO.

Tổng cộng đã diễn ra bốn cuộc gặp để đàm phán Hiến chương ITO. Cuộc họp của Uỷ ban trù bị diễn ra tại London vào các tháng 11 và 12/1946 đã đưa ra được dự thảo đầu tiên của Hiến chương ITO và sau đó được sửa đổi lại sau cuộc họp thứ hai của Nhóm kỹ thuật (phụ trách soạn thảo văn bản) tại Lake Success, New York, vào đầu năm 1947. Cuộc họp chủ chốt cho việc chuẩn bị Hiến chương ITO là cuộc họp thứ ba diễn ra tại Geneva từ tháng tư đến tháng 10/1947 và sau đó được tiếp nối bằng Hội nghị toàn thể về thương mại và việc làm do Liên hợp quốc tổ chức tại La Havane từ tháng 11/1947 đến tháng 3/1948 để hoàn thành Hiến chương ITO. Tuy nhiên, Nghị viện Hoa Kỳ không ủng hộ Hiến chương ITO và Hoa Kỳ - nền kinh tế và quốc gia thương mại hàng đầu của thế giới, không thể trở thành thành viên của ITO. Điều này dẫn đến hệ quả là các nước khác cũng không còn mặn mà với việc thành lập ITO nữa và Hiến chương ITO không bao giờ có hiệu lực.

Tuy ITO không được thành lập, nhưng văn kiện tự do hoá thương mại quan trọng nhất của tổ chức này, Hiệp định chung về thuế quan và thương mại (General Agreement on Tariff and Trade - viết tắt là GATT 1947) lại vẫn tồn tại. GATT 1947 dự kiến ban đầu là Chương IV trong Dự

[3] 14 nước nhận lời là: Australia, Bỉ, Brazil, Canada, Trung Quốc, Cuba, Tiệp Khắc, Pháp, Ấn Độ, Luxembourg, Hà Lan, New Zealand, Nam Phi và Anh Quốc.

[4] Dự thảo Hiến chương bao gồm bảy chương có tiêu đề là: I - Mục đích; II - Thành viên; III - Các điều khoản về việc làm; IV - Chính sách thương mại chung; V - Các phương thức kinh doanh hạn chế; VI - Các dàn xếp về hàng hoá liên chính phủ; và VII - Tổ chức. Các quy định tại Chương IV sau đó là cơ sở để đàm phán về GATT.

thảo Hiến chương gồm bảy chương về ITO của Hoa Kỳ.[5] Do đó, nội dung của GATT 1947 được xây dựng trong một loạt các cuộc đàm phán của Uỷ ban trù bị thành lập ITO nói trên. Cuộc họp đầu tiên của Uỷ ban trù bị tại London thảo luận các điều khoản của GATT 1947 trong khuôn khổ của cuộc thảo luận rộng hơn về các điều khoản của 'Hiến chương hoặc các điều khoản của Thoả thuận về Tổ chức thương mại quốc tế.'[6] Tuy nhiên, phải đến cuộc họp tại New York thì các điều khoản của GATT 1947 mới được tách riêng khỏi dự thảo Hiến chương ITO.[7] Cũng tại cuộc họp ở New York, các đoàn đàm phán thấy rằng nhiều khả năng là GATT 1947 sẽ có hiệu lực trước ITO.[8] Cuộc họp tại Geneva đưa ra rất ít sửa đổi thực chất đối với dự thảo GATT 1947 có từ cuộc họp tại New York. Tuy nhiên, tầm quan trọng của cuộc họp ở Geneva là tại đó cuộc đàm phán đa phương đầu tiên về giảm thuế quan đã được tiến hành giữa Hoa Kỳ với 14 nước đồng ý tham gia đàm phán theo lời mời của Hoa Kỳ vào tháng 12/1945[9] và 8 nước khác được Hoa Kỳ mời sau đó.[10] Tại cuộc đàm phán đầu tiên này, trong thời gian từ tháng tư đến tháng 12/1947, 23 nước (sau này cũng là các thành viên sáng lập GATT 1947), đã tiến hành không ít hơn 123 cuộc gặp song phương để giải quyết 45.000 dòng thuế quan, có tác động đến khối lượng hàng hoá thương mại trị giá khoảng 10 tỉ USD[11] hay tương đương 1/2 giá trị thương mại thế giới.[12] Sau khi kết thúc cả đàm phán về dự thảo văn bản GATT 1947 lẫn về giảm thuế quan, GATT 1947 đã được mở kí ngày 30/10/1947[13] và sau đó tạm thời có hiệu lực từ ngày 01/01/1948 thông qua Nghị định thư về việc áp dụng tạm thời.[14] Cần giải thích ở đây lí do tại sao GATT 1947 chỉ được áp dụng tạm thời. Theo quy định tại Hiến pháp của một số nước, để GATT 1947 chính thức có hiệu lực thì văn bản này phải được trình lên nghị viện để phê chuẩn. Nhưng vì những nước này cũng dự kiến sẽ trình phê chuẩn Hiến chương ITO sau khi được thông qua, họ sợ rằng 'việc sử dụng các nỗ lực chính trị để được cơ quan lập pháp phê chuẩn GATT sẽ làm ảnh hưởng đến nỗ lực thông qua ITO sau đó',[15] do vậy dự kiến sẽ trình đồng thời cả GATT 1947 và Hiến chương ITO.

Dù ITO không được thành lập, nhưng GATT 1947 đã được áp dụng 'tạm thời' trong gần 50 năm và chứng minh giá trị của nó qua thời gian.[16] Dần dần, GATT 1947 đã trở thành 'định chế' quốc tế trên thực tế ('*de facto*'), tạo diễn đàn cho các thành viên gặp gỡ và đàm phán giảm thuế quan cũng như các rào cản phi thuế quan. Trong thời gian từ năm 1947 đến 1979 đã diễn ra tổng cộng bảy vòng đàm phán. Nếu như năm vòng đàm phán đầu tiên chỉ tập trung vào vấn đề giảm thuế quan và tỏ ra khá thành công,[17] thì các cuộc đàm phán từ vòng thứ sáu, còn gọi là Vòng Kennedy (1964-1967) lại tỏ ra ít thành công hơn khi mà chủ đề đàm phán được mở rộng ra cả vấn đề rào cản thương mại phi thuế quan (viết tắt là 'NTBs') - vấn đề đang ngày càng trở nên nghiêm trọng hơn so với rào cản thuế quan.[18] Vòng Tokyo (1973-1979), dù đạt được thành quả tốt hơn so với Vòng Kennedy, nhưng lại có tác động hạn chế đối với thương mại toàn cầu, do các thoả thuận tại Vòng Tokyo chỉ có số lượng các thành viên tham gia hạn chế.[19] Sau Vòng Tokyo, Hoa Kỳ và một số nước muốn tổ chức vòng đàm phán mới với chương trình nghị sự rộng lớn, bao gồm cả những chủ đề như thương mại dịch vụ và việc bảo hộ IPRs, trong khi đó các nước khác hoặc là không muốn tổ chức cuộc

5 Như trên.

6 Xem tài liệu số E/PC/T/33, tr. 4.

7 Hai dự thảo có nhiều điều khoản giống nhau và phần lớn với lời văn giống nhau. Ngoại lệ đáng chú ý đó là về các biện pháp liên quan đến trợ cấp. Điều 30 trong Dự thảo New York về Hiến chương ITO bao gồm các biện pháp đối với cả trợ cấp xuất khẩu và nội địa, trong khi Điều XIV của dự thảo GATT 1947 sau cuộc họp ở New York chỉ điều chỉnh trợ cấp nội địa.

8 Lí do cho việc cần kết thúc đàm phán và thực hiện GATT 1947 sớm là vì đoàn đàm phán của Hoa Kỳ đàm phán theo thẩm quyền được quy định trong Luật thương mại Hoa Kỳ, theo đó họ sẽ không phải đệ trình GATT 1947 lên Nghị viện nhưng Luật đó sẽ hết hạn vào giữa năm 1948. *Xem*: J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd edn., (1997), tr. 40.

9 Như trên.

10 Các nước này gồm Myanmar, Ceylon, Chile, Lebanon, Norway, Pakistan, South Rodesia và Syria.

11 WTO, Information and External Relations Division, *Understanding the WTO*, 5th edn., (2011), tr. 15, http://www.wto.org (truy cập ngày 14/12/2011).

12 D. A. Irwin và các tác giả khác, *The Genesis of GATT,* (2008), tr. 118.

13 55 *United Nations Treaties Series* 187. GATT 1947 được kí kết sau tổng cộng 626 cuộc họp (453 cuộc tại Geneva, 58 cuộc tại Lake Success và 150 cuộc tại London).

14 55 *United Nations Treaties Series* 308. Tuy nhiên, khi mà rõ ràng là Hiến chương ITO sẽ không có hiệu lực, hình thức áp dụng tạm thời GATT 1947 vẫn cần phải duy trì để tránh có sự phân biệt giữa các nước đã thông qua GATT 1947 tạm thời và các nước thông qua GATT 1947 chính thức. *Xem*: Jackson, *World Trade and the Law of the* GATT, Bobbs-Merrill, Indianapolis, (1969), 60 ff, trích trong Irwin và các tác giả khác, *The Genesis of GATT*, tr. 119.

15 J. H. Jackson, Sđd, tr. 40.

16 Sau khi có hiệu lực vào ngày 01/01/1948, GATT đã được chỉnh sửa ngay sau Hội nghị La Havane, sửa đổi tại Kì họp kiểm điểm năm 1955 và bổ sung Phần IV 'Thương mại và phát triển' vào năm 1965. Sau đó không có bất kì sửa đổi nào nữa.

17 Ngoài vòng thứ nhất tại Geneva (1947) nói trên, bốn vòng khác là tại Annecy (1949), Torquay (1951), Geneva (1956) và Dilon (1960-1961).

18 Vòng Kennedy thực chất không đạt được mấy kết quả về NTBs, và một trong những lí do đó là việc thiếu khuôn khổ thể chế 'hiện đại' đáp ứng yêu cầu của cuộc đàm phán về phi thuế quan.

19 Thực chất cũng có thể lập luận rằng số lượng hạn chế các nước thành viên cho thấy việc thiếu đồng thuận giữa các đoàn đàm phán.

đàm phán có chương trình nghị sự rộng lớn, hoặc là không muốn tổ chức thêm cuộc đàm phán nào khác nữa. Tuy nhiên, cuối cùng thì Vòng Uruguay vẫn được tổ chức, dẫn đến việc thành lập WTO.

2. Vòng đàm phán Uruguay và sự ra đời của WTO

Tháng 9/1986, các bộ trưởng thương mại của thành viên GATT 1947 đã gặp nhau tại Punta del Este, Uruguay, và sau vài ngày tranh luận đã thống nhất tiến hành Vòng đàm phán thương mại đa phương lần thứ 8, còn được gọi là Vòng Uruguay, muộn nhất là vào ngày 31/10/1986. Tuyên bố Punta del Este cũng nêu rõ: 'Việc tiến hành, tổ chức và thực hiện kết quả của việc đàm phán sẽ là một phần trong một cam kết đơn nhất.' Tuyên bố vạch ra khoảng 15 chủ đề thảo luận, bao gồm từ những vấn đề như thương mại hàng hoá (nông sản và hàng dệt may), các NTBs, và đặc biệt là lần đầu tiên trong lịch sử, vấn đề thương mại dịch vụ được thảo luận. Phần lớn các cuộc đàm phán kết thúc tại Geneva vào tháng 12/1993[20] (dù một số cuộc thảo luận về tiếp cận thị trường vẫn diễn ra) và thoả thuận được kí ngày 15/4/1994 tại Hội nghị bộ trưởng Marrakesh, Marrocco.[21] Vòng Uruguay đã được bình luận như sau:

> Vòng đàm phán đã diễn ra bảy năm rưỡi, gần như gấp đôi so với dự kiến. Đến cuối vòng đàm phán đã có 123 nước tham gia. Vòng đàm phán đã thảo luận hầu như tất cả các vấn đề về thương mại, từ bản chải đánh răng đến du thuyền, từ ngân hàng đến viễn thông, từ gien lúa đến biện pháp chữa AIDS. Nói đơn giản, đây là vòng đàm phán thương mại lớn nhất từ trước đến nay và có lẽ là vòng đàm phán lớn nhất trong lịch sử tất cả các cuộc đàm phán.[22]

Thực vậy, Vòng Uruguay là vòng đàm phán thương mại đa phương 'tham vọng' nhất từ trước đến nay, tại đó thảo luận 'gần như tất cả những vấn đề chính sách thương mại nổi bật.'[23] Đáng ngạc nhiên là Vòng Uruguay đã hoàn thành được phần lớn tham vọng nêu trong Tuyên bố Punta del Este. Hơn nữa, Vòng Uruguay còn vượt ra ngoài cả mục tiêu khiêm tốn được đặt ra ban đầu liên quan đến cải tổ thể chế của GATT 1947 bằng việc thành lập tổ chức quốc tế mới về thương mại, lấy tên là Tổ chức thương mại thế giới ('WTO').[24]

Hiệp định Marrakesh thành lập WTO (Hiệp định WTO) nằm trong Định ước cuối cùng kí tại Hội nghị bộ trưởng Marrakesh nói trên[25] chính là hiến chương của tổ chức. Hiệp định này bao trùm lên tất cả các hiệp định cụ thể và kĩ thuật khác (kể cả các biểu cam kết). Tất cả các thoả thuận đạt được tại Vòng Uruguay được ghi trong bốn phụ lục của Hiệp định WTO. Ba phụ lục đầu tiên có tính bắt buộc (nghĩa là tất cả các thành viên đều phải chấp nhận), trong khi Phụ lục 4 chỉ có các 'thoả thuận nhiều bên' (plurilateral agreements) có tính tuỳ chọn.[26] Phụ lục 2 là 'Hiệp định về quy tắc và thủ tục giải quyết tranh chấp', và Phụ lục 3 là 'Hiệp định về rà soát chính sách thương mại'. Phụ lục 1 là nền tảng của hệ thống thương mại thế giới, được chia thành ba phần tương ứng với ba nhóm thoả thuận cơ bản về hàng hoá (GATT 1994[27] cùng các thoả thuận liên quan và các văn bản khác), về dịch vụ (GATS và các phụ lục) và các khía cạnh liên quan đến thương mại của quyền sở hữu trí tuệ (TRIPS).

Như dự kiến trong Định ước cuối cùng, Hiệp định WTO có hiệu lực chính thức từ ngày 01/01/1995. WTO giờ đây trở thành tổ chức quốc tế quan trọng thứ hai trên thế giới, chỉ sau Liên hợp quốc. Để tạo cơ sở cho các thảo luận về nội dung các quy tắc thương mại của WTO, phần tiếp theo ngay sau đây sẽ xem xét một số khía cạnh về tổ chức của WTO với tư cách là tổ chức quốc tế.

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20 Ngày 15/12/1993 trở thành hạn chót cho Hoa Kỳ, do ngày 16/4/1994 là ngày hết hạn thẩm quyền đàm phán 'tắt' của Tổng thống theo đó Tổng thống Hoa Kỳ có thể đệ trình các thoả thuận lên Nghị viện trước 120 ngày và Nghị viện chỉ có thể bỏ phiếu thông qua hoặc không thông qua chứ không có quyền sửa đổi. *Xem*: A. F. Lowenfeld, *International Economic Law*, 2nd edn., (2008), tr. 69, chú thích 59.

21 Các mốc quan trọng khác trong Vòng Uruguay là: tháng 12/1988 (Montreal: kiểm điểm giữa kì cấp bộ trưởng); tháng 4/1989 (Geneva: kiểm điểm giữa kì kết thúc); tháng 12/1990 (Brussels: cuộc họp cấp bộ trưởng kết thúc bế tắc); tháng 12/1991 (Geneva: dự thảo đầu tiên của Định ước cuối cùng hoàn thành); tháng 11/1992 (Washington: Hoa Kỳ và EU đạt được đột phá trong lĩnh vực nông sản); tháng 7/1993 (Tokyo: Bộ tứ - Hoa Kỳ, EU, Nhật Bản và Canada - đạt được đột phá về tiếp cận thị trường tại hội nghị thượng đỉnh G7).

22 WTO, *Understanding the WTO*, tr. 18.

23 Như trên.

24 Ý tưởng về việc thành lập một tổ chức mới được cho là do Bộ trưởng thương mại Italia Renato Ruggiero nêu lên vào tháng 02/1990. Tuy nhiên, Canada là nước đề xuất chính thức về việc này vào tháng 5/1990 và lấy tên Tổ chức thương mại thế giới để đặt cho tổ chức quốc tế được thành lập nhằm giám sát các văn kiện khác nhau liên quan đến thương mại. Tương tự, Cộng đồng châu Âu cũng đưa đề nghị vào tháng 7/1990, đề nghị thành lập một Tổ chức thương mại đa phương. Tuy nhiên, phải đến tháng 12/1993, Hoa Kỳ, sau khi bị cô lập trong vấn đề này, mới đồng ý về việc thành lập một tổ chức quốc tế mới với điều kiện là tên gọi do Canada đề xuất được sử dụng.

25 1867 *United Nations Treaties Series 3*.

26 Điều này ở mức độ nào đó đi ngược lại với ý tưởng về 'cam kết cả gói' trong Tuyên bố Punta del Este. Bốn thoả thuận nhiều bên được liệt kê trong Phụ lục 4, trong đó hai thoả thuận liên quan đến sản phẩm nông nghiệp (sữa và thịt bò) kết thúc vào năm 1997 còn hai thoả thuận khác về máy bay dân dụng và mua sắm chính phủ, được coi là được các nước công nghiệp phát triển quan tâm nhiều hơn là các DCs.

27 GATT 1994 bao gồm GATT 1947 như được sửa đổi trước năm 1994, các nghị định thư liên quan đến giảm thuế quan, các nghị định thư gia nhập, các quyết định của thành viên GATT 1947 và một số các bản diễn giải.

3. WTO với tư cách là một tổ chức quốc tế

A. *Mục đích của WTO*

Lí do cho việc hình thành và các mục tiêu về chính sách của WTO được nêu ra trong hai đoạn đầu tiên của Lời nói đầu Hiệp định WTO. Hai đoạn này quy định rằng:

> *Thừa nhận* rằng tất cả những mối quan hệ của [các thành viên] trong lĩnh vực kinh tế và thương mại phải được thực hiện với mục tiêu nâng cao mức sống, bảo đảm đầy đủ việc làm và một khối lượng thu nhập và nhu cầu thực tế lớn và phát triển ổn định; mở rộng sản xuất, thương mại hàng hoá và dịch vụ, trong khi đó vẫn bảo đảm việc sử dụng tối ưu nguồn lực của thế giới theo đúng mục tiêu phát triển bền vững, bảo vệ và duy trì môi trường và nâng cao các biện pháp để thực hiện điều đó theo cách thức phù hợp với những nhu cầu và mối quan tâm riêng rẽ của mỗi bên ở các cấp độ phát triển kinh tế khác nhau;
>
> *Thừa nhận* thêm rằng cần phải có nỗ lực tích cực để bảo đảm rằng các nước đang phát triển, đặc biệt là những nước kém phát triển nhất, duy trì được tỉ phần tăng trưởng trong thương mại quốc tế tương xứng với nhu cầu phát triển kinh tế của các quốc gia đó….

Peter Van den Bossche rút ra từ hai đoạn nêu trên bốn mục tiêu tối hậu của WTO là:

- Nâng cao mức sống;
- Tạo công ăn việc làm đầy đủ;
- Tăng thu nhập và nhu cầu thực tế;
- Mở rộng sản xuất và thương mại trong lĩnh vực hàng hoá và dịch vụ.[28]

Tuy nhiên, như Bossche cũng đã chỉ ra, hai đoạn nói trên cũng nhấn mạnh rằng việc thực hiện những mục tiêu này không được làm phương hại đến môi trường cũng như nhu cầu của các DCs.[29] Cơ quan phúc thẩm của WTO, trong vụ *US-Shrimp* cũng chỉ ra rằng các nhà đàm phán Hiệp định WTO thừa nhận tầm quan trọng của phát triển kinh tế bền vững.[30]

[28] Peter Van den Bossche, Sđd, tr. 85.

[29] Như trên.

[30] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Shrimp*, đoạn 153.

B. *Chức năng của WTO*

Khoản 1 Điều 2 Hiệp định WTO quy định rằng chức năng chủ yếu của WTO là tạo ra: 'Một khuôn khổ chung có tính định chế để triển khai các mối quan hệ thương mại giữa các thành viên của tổ chức về những vấn đề liên quan đến các thoả thuận và các văn bản pháp luật liên quan được nêu trong các phụ lục của Hiệp định này'.

Để đạt được mục tiêu này, Điều III, với tiêu đề là 'Chức năng', quy định 5 chức năng bao quát của WTO như sau:

1. WTO tạo điều kiện thuận lợi cho việc thực thi, quản lí và điều hành, những mục tiêu khác của Hiệp định này và các hiệp định thương mại đa phương và cũng là một khuôn khổ cho việc thực thi, quản lí và điều hành các hiệp định thương mại nhiều bên.
2. WTO là một diễn đàn cho các cuộc đàm phán giữa các thành viên về những mối quan hệ thương mại đa phương trong những vấn đề được điều chỉnh theo các thoả thuận quy định trong các phụ lục của Hiệp định này. WTO có thể là một diễn đàn cho các cuộc đàm phán tiếp theo giữa các thành viên về những mối quan hệ thương mại đa phương của họ và cũng là một cơ chế cho việc thực thi các kết quả của các cuộc đàm phán đó hay do Hội nghị bộ trưởng quyết định.
3. WTO sẽ giám sát Hiệp định về quy tắc và thủ tục giải quyết tranh chấp (dưới đây được gọi là 'DSU') trong Phụ lục 2 của Hiệp định này.
4. WTO sẽ giám sát cơ chế rà soát chính sách thương mại (dưới đây được gọi là 'TPRM') tại Phụ lục 3 của Hiệp định này.
5. Nhằm đạt được sự nhất quán cao hơn trong quá trình hoạch định chính sách kinh tế toàn cầu, WTO, khi cần thiết, sẽ hợp tác với Quỹ tiền tệ quốc tế, Ngân hàng quốc tế về tái thiết và phát triển và các cơ quan trực thuộc của nó.

Bên cạnh các chức năng được quy định rõ ràng tại Điều III, cũng có quan điểm cho rằng việc trợ giúp kĩ thuật cho các thành viên DCs rõ ràng là chức năng quan trọng của WTO, vì nó cho phép các thành viên này hội nhập vào hệ thống thương mại thế giới.[31]

[31] Peter Van den Bossche, Sđd, tr. 88.

C. *Thành viên của WTO*

Không chỉ các quốc gia mới có thể trở thành thành viên của WTO. Các lãnh thổ hải quan có quyền độc lập hoàn toàn trong việc điều hành các mối quan hệ ngoại thương và các vấn đề khác quy định trong Hiệp định này đều có thể gia nhập WTO.[32] *Ví dụ,* Hong Kong (Trung Quốc) (gọi tắt là Hong Kong), Ma Cao (Trung Quốc) (gọi tắt là Ma Cao). Cộng đồng châu Âu cũng là thành viên của WTO, nhưng đây là trường hợp duy nhất và đặc biệt theo quy định tại khoản 1 Điều XI của Hiệp định WTO.[33]

Đến hết năm 2016, WTO đã có 164 thành viên,[34] bao gồm tất cả các nền kinh tế chủ chốt trên thế giới[35] và chiếm 98% tổng giá trị thương mại thế giới.[36] Đáng chú ý là năm 2007, Việt Nam gia nhập WTO và trở thành thành viên thứ 150 của tổ chức này.

D. *Cơ cấu tổ chức của WTO*

Cơ cấu tổ chức cơ bản của WTO được quy định tại Điều IV của Hiệp định WTO, tuy nhiên tuỳ theo nhu cầu, các tiểu ban và các nhóm làm việc cũng có thể được thành lập. Theo báo cáo của Phó tổng giám đốc WTO, hiện nay có tổng cộng khoảng 70 cơ quan thuộc WTO, trong đó có 34 cơ quan thường trực.[37] Ở cấp cao nhất trong cấu trúc của WTO là Hội nghị bộ trưởng, đây là cơ quan tối cao của WTO bao gồm các đại diện cấp bộ trưởng của tất cả các thành viên và có thẩm quyền ra quyết định đối với tất cả các vấn đề về bất kì thoả thuận đa phương nào của WTO.

[32] Điều XII Hiệp định WTO.

[33] Cần lưu ý rằng cả các Cộng đồng châu Âu và các nước thành viên của Liên minh châu Âu đều là thành viên WTO. Điều này thể hiện sự phân quyền giữa các Cộng đồng châu Âu và các nước thành viên trong các lĩnh vực khác nhau thuộc phạm vi điều chỉnh của Hiệp định WTO. Cũng lưu ý thêm rằng các Cộng đồng châu Âu chứ không phải là một Cộng đồng châu Âu cụ thể được liệt kê là thành viên WTO. Lí do cho đến tận ngày 15/11/1994 (sau khi Vòng Uruguay kết thúc), Toà án công lí châu Âu (ECJ), trong Ý kiến số 1/94, mới xác định rõ rằng trong số ba Cộng đồng châu Âu lúc đó là Cộng đồng châu Âu, Cộng đồng than thép châu Âu, và Cộng đồng năng lượng nguyên tử châu Âu, chỉ có Cộng đồng châu Âu cần tham gia WTO.

[34] Liberia và Afghanistan lần lượt trở thành thành viên 163 và 164 của WTO năm 20016. *Xem WTO Annual Report 2016*, tr. 24, tại https://www.wto.org/english/res_e/publications_e/anrep17_e.htm.

[35] Nga là nền kinh tế đáng kể nhất cuối cùng gia nhập WTO năm 2012 và trở thành thành viên thứ 156 sau 18 năm đàm phán, phá vỡ kỉ lục của Trung Quốc về đàm phán 15 năm để gia nhập WTO.

[36] *WTO Annual Report 2016*, tr. 28, https://www.wto.org/english/res_e/publications_e/anrep17_e.htm.

[37] Phát biểu của Miguel Rodriguez Mendoza trước Đại hội đồng ngày 13/02/2002, *Minutes of Meeting*, WT/GC/M/73, ngày 11/3/2002.

Ở cấp thứ hai là Đại hội đồng, Cơ quan giải quyết tranh chấp (viết tắt là 'DSB') và Cơ quan rà soát chính sách thương mại (viết tắt là 'TPRB'). Ba cơ quan này thực chất là một. Đại hội đồng, bao gồm các nhà ngoại giao ở cấp đại sứ, chịu trách nhiệm về việc quản lí thường nhật WTO cũng như các hoạt động của tổ chức. Giữa các kì họp của Hội nghị bộ trưởng, Đại hội đồng thực hiện toàn bộ thẩm quyền của Hội nghị bộ trưởng. Khi Đại hội đồng giám sát hệ thống giải quyết tranh chấp của WTO thì nó sẽ hoạt động với tư cách DSB, còn khi Đại hội đồng giám sát cơ chế rà soát chính sách thương mại của WTO thì nó hoạt động với tư cách TPRB.

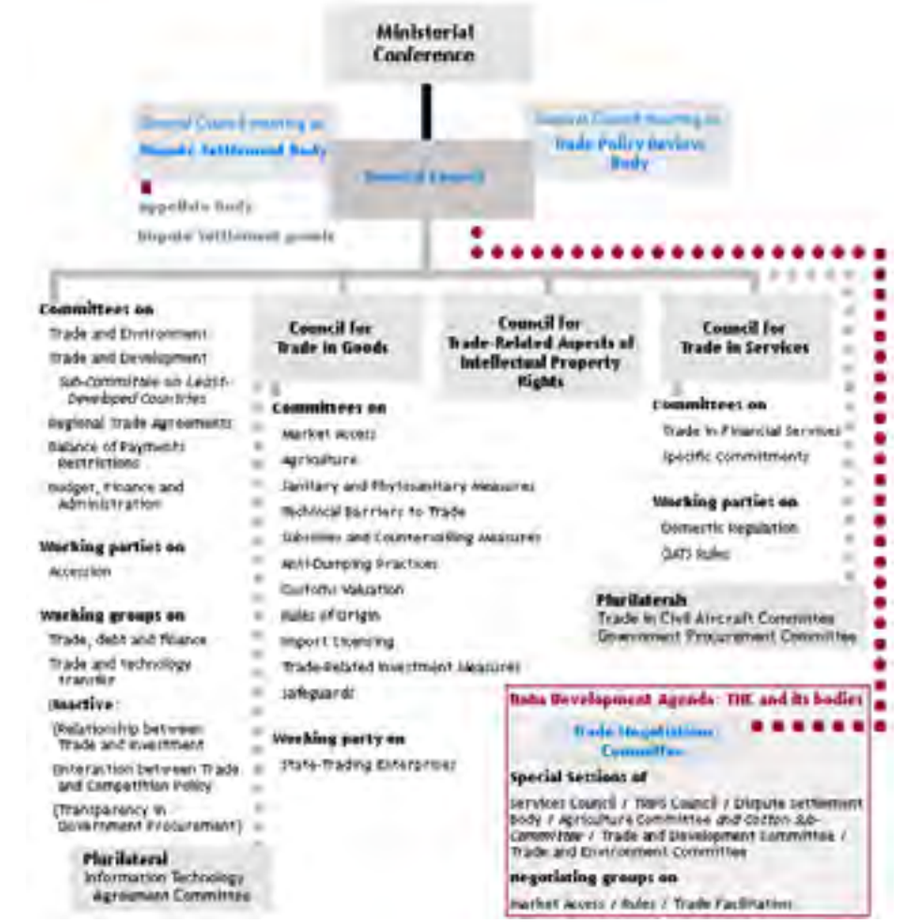
Bên dưới Đại hội đồng, DSB và TPRB - là ba hội đồng chuyên môn về thương mại hàng hoá (CTG), thương mại dịch vụ (CTS), quyền sở hữu trí tuệ liên quan đến thương mại (Hội đồng TRIPS). Điều này được trù định theo khoản 5 Điều IV của Hiệp định WTO. Theo khoản 2 Điều IX của Hiệp định WTO, chức năng rõ ràng nhất của những hội đồng chuyên môn này là đưa ra các khuyến nghị để Hội nghị bộ trưởng và Đại hội đồng thông qua việc giải thích thoả thuận thương mại nêu tại Phụ lục I của Hiệp định WTO mà các hội đồng chuyên môn này chịu trách nhiệm giám sát. Theo khoản 3 Điều IX và khoản 1 Điều X của Hiệp định WTO, các hội đồng chuyên môn cũng có vai trò trong việc thông qua các quyết định về tạm dừng nghĩa vụ hoặc sửa đổi quy định của WTO. GATS và Hiệp định TRIPS cũng trao cho các Hội đồng chuyên môn một số chức năng riêng.[38] Tuy nhiên, các hội đồng chuyên môn này không được trao nhiều thẩm quyền cụ thể, và khó có thể suy từ những chức năng giám sát chung một thẩm quyền nào của các hội đồng này trong việc đưa ra các quyết định, dù là quyết định mang tính chính trị hay pháp lí.[39] Bên cạnh các hội đồng chuyên môn, có một số uỷ ban và nhóm làm việc được thành lập để hỗ trợ Hội nghị bộ trưởng và Đại hội đồng.

Tháng 11/2001, Hội nghị bộ trưởng tại phiên họp Doha đã quyết định thành lập Uỷ ban đàm phán thương mại (viết tắt là 'TNC') có nhiệm vụ cùng với các bộ phận đàm phán khác tổ chức các cuộc đàm phán trong Vòng đàm phán Doha về phát triển. TNC báo cáo về tiến trình đàm phán cho các cuộc họp thường kì của Đại hội đồng.

[38] Khoản 4 Điều VI GATS và khoản 1 Điều 66 Hiệp định TRIPS.

[39] P. J. Kuijper, 'Some Institutional Issues Presently Before the WTO' trong sách D. L. M. Kennedy và J. D. Southwick (chủ biên), *The Political Economy of International Trade Law: Essays in Honor of Robert E Hudec,* (2002) , tr. 84.

Biểu đồ 2.1.1: *Cơ cấu tổ chức của WTO*[40]



Báo cáo lên Đại hội đồng (hoặc một cơ quan bổ trợ)

Báo cáo lên Cơ quan giải quyết tranh chấp (DSB)

Các uỷ ban theo thoả thuận nhiều bên thông báo cho Đại hội đồng hoặc Hội đồng về hàng hoá về hoạt động của họ, dù rằng các thoả thuận nhiều bên không được tất cả các thành viên WTO kí.

Uỷ ban đàm phán thương mại báo cáo lên Đại hội đồng.

Cuối cùng, cũng giống như các tổ chức quốc tế khác, WTO có một Ban thư kí. Điều IV Hiệp định WTO quy định rằng WTO sẽ có một Ban thư kí do Tổng giám đốc lãnh đạo và Tổng giám đốc sẽ do Hội nghị bộ trưởng bầu ra. Ban thư kí WTO được đặt tại Geneva với hơn 600 nhân viên.[41] Giống như các tổ chức quốc tế khác, Ban thư kí WTO là cơ quan

[40] WTO, http://www.wto.org.

[41] WTO, *Overview of the WTO Secretariat*, http://www.wto.org/english/thewto_e/secre_ e/intro_e.htm

hành chính và Tổng giám đốc của nó không có bất kì thẩm quyền riêng biệt nào trong vấn đề ra quyết định. Thay vào đó, Tổng giám đốc và Ban thư kí hoạt động để 'tạo thuận lợi' cho tiến trình ra quyết định trong khuôn khổ WTO.[42] Ban thư kí WTO có các nhiệm vụ sau:

- Cung cấp các hỗ trợ về kĩ thuật và nghiệp vụ cho các hội đồng và uỷ ban khác nhau;
- Cung cấp hỗ trợ kĩ thuật cho các DCs;
- Giám sát và phân tích biến động thương mại thế giới;
- Cung cấp thông tin cho công chúng và giới báo chí, đồng thời tổ chức các Hội nghị bộ trưởng;
- Cung cấp một số các hình thức hỗ trợ pháp lí trong quá trình giải quyết tranh chấp;
- Hướng dẫn các chính phủ về thủ tục để trở thành thành viên WTO.[43]

E. *Việc ra quyết định trong WTO*

Thủ tục ra quyết định thông thường trong các cơ quan của WTO được quy định tại khoản 1 Điều IX của Hiệp định WTO như sau:

> WTO sẽ tiếp tục thông lệ ra quyết định trên cơ sở *đồng thuận* như quy định trong GATT 1947. Trừ khi có quy định khác, nếu không thể đạt được một quyết định trên cơ sở *đồng thuận*, thì vấn đề cần giải quyết sẽ được quyết định bằng hình thức *bỏ phiếu*. Tại các cuộc họp của Hội nghị bộ trưởng và Đại hội đồng, mỗi thành viên của WTO có một phiếu... [T]rừ khi có quy định khác trong Hiệp định này hoặc trong Hiệp định thương mại đa phương có liên quan, các quyết định của Hội nghị bộ trưởng và Đại hội đồng được thông qua trên cơ sở *đa số phiếu*.

Như vậy, thủ tục ra quyết định của WTO được tiến hành theo hai bước. Trước hết các thành viên phải cố gắng đưa ra quyết định bằng

[42] WTO, *Overview of the WTO Secretariat*; 'Build Up: The Road to Mexico', Phát biểu của Supachai Panitchpakdi, Tổng giám đốc WTO, ngày 08/01/2003, tại phiên họp toàn thể lần thứ XI của Hội nghị thượng đỉnh về quan hệ đối tác năm 2003, tại Hyderabad, http://www.wto.org/english/news_ e/spsp_e/spsp09_e.htm (ngày 14/12/2011).

[43] WTO, *Overview of the WTO Secretariat*, http://www.wto.org/english/thewto_e/secre_e/intro_e.htm

đồng thuận. Thủ tục này được định nghĩa tại chú thích 1 của Điều IX như sau: 'Cơ quan liên quan sẽ được coi là quyết định bằng đồng thuận đối với một vấn đề được đưa ra trước cơ quan đó để xem xét, nếu không có thành viên nào có mặt tại cuộc họp để đưa ra quyết định chính thức phản đối quyết định được thông qua'.

Nói cách khác, theo thủ tục đồng thuận, sẽ không diễn ra việc bỏ phiếu và quyết định sẽ được thông qua trừ phi có một thành viên công khai phản đối.

Khi thủ tục đồng thuận không đạt được, việc bỏ phiếu trên cơ sở mỗi thành viên một phiếu[44] sẽ được tiến hành. Trong trường hợp này, một quyết định sẽ được thông qua theo đa số phiếu.

Tuy nhiên, Hiệp định WTO cũng quy định một số ngoại lệ, được coi là luật riêng ('*lex specialis*') đối với quy tắc chung (thủ tục thông thường) về vấn đề ra quyết định. Các ngoại lệ đáng chú ý bao gồm việc ra quyết định trong DSB, việc giải thích chính thức, gia nhập, tạm dừng nghĩa vụ, sửa đổi quy định và các quy định liên quan đến vấn đề ngân sách hàng năm và tài chính. Đối với những vấn đề này, thủ tục ra quyết định riêng biệt là rất khác nhau, như quyết định chỉ được thông qua bằng đồng thuận (quyết định của DSB[45] hay tạm ngừng nghĩa vụ thành viên[46]), theo đa số 3/4 (giải thích chính thức[47]), đồng thuận sau đó theo đa số 2/3 (đối với thủ tục gia nhập,[48] sửa đổi[49]), hoặc thậm chí là đa số 2/3 của hơn một nửa số thành viên WTO (quy định về tài chính và ngân sách hàng năm[50]).

[44] Vì cả Cộng đồng châu Âu và các thành viên của Cộng đồng đều là thành viên WTO, khoản 1 Điều IX của Hiệp định WTO và chú thích của Điều này quy định rằng trong mọi trường hợp, số phiếu của Cộng đồng châu Âu và các thành viên của nó cũng không được vượt quá tổng số phiếu của tất cả các thành viên. Nói cách khác, hoặc là Cộng đồng châu Âu bỏ phiếu hoặc là các thành viên của nó bỏ phiếu.

[45] Chú thích 3 của Điều IX, Hiệp định WTO, tại đó dẫn chiếu đến khoản 4 Điều 2 của Hiệp định về quy tắc và thủ tục giải quyết tranh chấp (Phụ lục 2).

[46] Dù khoản 3 Điều IX của Hiệp định WTO dự trù khả năng bỏ phiếu theo đa số 3/4, các thành viên WTO vào năm 1995 đã quyết định sẽ không áp dụng điều khoản này mà sẽ tiếp tục theo đuổi cơ chế đồng thuận.

[47] Khoản 2 Điều IX của Hiệp định WTO.

[48] Khoản 2 Điều XII của Hiệp định WTO quy định rằng một quyết định gia nhập sẽ được thông qua theo đa số 2/3. Tuy nhiên, Đại hội đồng đã thoả thuận vào ngày 15/11/1995 rằng đối với các quyết định gia nhập, trước hết cần nỗ lực đạt được đồng thuận.

[49] Khoản 1 Điều X Hiệp định WTO.

[50] Khoản 3 Điều VII Hiệp định WTO.

Dù vậy, cần nhấn mạnh rằng tuy Hiệp định WTO quy định về khả năng thông qua bằng bỏ phiếu, nhưng việc bỏ phiếu tại các cơ quan của WTO là rất hãn hữu. Lí do cho việc ưu tiên thông qua các quyết định bằng đồng thuận so với bỏ phiếu không phải là khó hiểu. Thủ tục đồng thuận - thủ tục có tính chất tập thể - được coi là có tính chất 'dân chủ hơn' so với thủ tục bỏ phiếu.[51] Tất nhiên, việc khăng khăng gắn với thủ tục đồng thuận cũng có rủi ro, đó là việc cơ chế ra quyết định của WTO có thể đôi lúc bị tê liệt.

Mục 2. MỘT SỐ NGUYÊN TẮC CƠ BẢN CỦA WTO VÀ NGOẠI LỆ

Cũng giống như GATT 1947 trước đây, bản thân WTO ngày nay không quy định trực tiếp về tự do hoá thương mại. Thay vào đó, GATT 1994 cũng như các hiệp định trong các phụ lục của Hiệp định WTO đặt ra một số nguyên tắc và quy tắc nhằm thúc đẩy và đảm bảo cho tự do hóa thương mại. Mục này sẽ thảo luận một số nguyên tắc và quy tắc cơ bản của WTO cũng như việc hạn chế áp dụng chúng (thông qua các ngoại lệ).

1. Một số nguyên tắc cơ bản của WTO

Ba hiệp định chủ chốt trong Phụ lục 1 của Hiệp định WTO bao gồm những quy tắc phức tạp về thương mại hàng hoá, dịch vụ cũng như việc bảo hộ IPRs. Những quy tắc này bao trùm phạm vi rộng lớn các vấn đề khác nhau, từ thuế quan, hạn ngạch (quota) nhập khẩu, thủ tục hải quan đến các biện pháp về an ninh quốc gia. Tuy nhiên, cũng có thể nhận thấy: xuyên suốt các hiệp định này là một số nguyên tắc cơ bản. Có thể nhận biết 5 nguyên tắc chính trong các hiệp định của WTO, đó là: (A) Thương mại không phân biệt đối xử; (B) Thương mại tự do hơn (dần dần và thông qua đàm phán); (C) Tính có thể dự đoán (thông qua các cam kết ràng buộc và minh bạch); (D) Thúc đẩy cạnh tranh lành mạnh; và (E) Khuyến khích phát triển và cải cách kinh tế.[52] Nguyên tắc (A) được thể hiện trong hai nguyên tắc hay nghĩa vụ cơ bản về không phân biệt đối xử, đó là đối xử tối huệ quốc (viết tắt là 'MFN') và đối xử quốc gia (viết tắt là 'NT'), trong khi các nguyên tắc (B) và (C) thực tế chứa đựng một số các quy tắc về tiếp cận thị trường và có thể gộp lại với nhau. Phần này trước

[51] Như Mike Moore, Tổng giám đốc WTO, bình luận: 'Nguyên tắc đồng thuận nằm ở trung tâm của hệ thống WTO, và là sự bảo đảm quan trọng về mặt dân chủ, không cần đàm phán nữa'. *Xem* Mike Moore, 'Back on Track for Trade and Development', bài diễn văn chính tại UNCTAD X, Bangkok, ngày 16/02/2000, http://www.wto.org/english/news_e/spmm_e/spmm24_e.htm (ngày 14/12/2011).

[52] WTO, *Understanding the WTO,* tr. 10-13.

tiên tập trung vào các nguyên tắc không phân biệt đối xử và các quy tắc về tiếp cận thị trường - những nguyên tắc và quy tắc được nêu trong Lời nói đầu của Hiệp định WTO - như là hai biện pháp để đạt được mục tiêu của WTO.

Bên cạnh các nghĩa vụ về không phân biệt đối xử mà bản thân chúng cũng bảo đảm các điều kiện công bằng hơn về thương mại, luật WTO còn có nhiều quy tắc để thực hiện nguyên tắc (D) về thúc đẩy cạnh tranh lành mạnh. Những quy tắc này được quy định không chỉ trong GATT 1994 mà còn trong các hiệp định về những lĩnh vực cụ thể như nông nghiệp, IPRs và dịch vụ.[53] Tất cả những thoả thuận này sẽ được xem xét ở các mục tiếp theo của chương này, do đó mục này chỉ tập trung vào hai loại thực tiễn phổ biến nhất về thương mại không công bằng về hàng hoá, đó là bán phá giá[54] và trợ cấp.

Nguyên tắc (E) về khuyến khích phát triển và cải cách kinh tế nhằm cân nhắc một thực tế là các thành viên DCs của WTO cần nhiều thời gian hơn để có thể thực hiện các hiệp định của WTO so với các thành viên khác giàu có hơn. Luật WTO quy định một số quy tắc, dưới hình thức các ngoại lệ có lợi cho các thành viên DCs, để thực hiện được nguyên tắc (E) này. Những quy tắc này sẽ được xem xét ngắn gọn khi thảo luận về các ngoại lệ trong luật WTO.[55]

A. *Thương mại không phân biệt đối xử hay nguyên tắc không phân biệt đối xử*

Nguyên tắc không phân biệt đối xử là cốt lõi của luật WTO và được thể hiện trong tất cả các văn kiện chính của WTO (như GATT 1994, GATS, Hiệp định TRIPS, …). Thực vậy, như nêu tại đoạn ba Lời nói đầu của Hiệp định WTO, 'việc loại bỏ sự phân biệt đối xử trong các mối quan hệ thương mại quốc tế' là một trong những biện pháp để đạt được các mục tiêu của WTO. Trong luật WTO có hai nguyên tắc về chống phân biệt đối xử, đó là MFN và NT. Nhìn chung, hai nguyên tắc này áp dụng trên cơ sở 'xuất xứ quốc gia hoặc nơi đến' của một hàng hóa hay dịch vụ, hoặc trên cơ sở 'quốc tịch' của người cung cấp dịch vụ.[56]

Nghĩa vụ đối xử MFN, hay còn gọi là nguyên tắc MFN, là quy tắc quan trọng nhất trong luật WTO và nếu thiếu nó thì hệ thống thương mại đa phương không thể tồn tại.[57] Việc nguyên tắc MFN được ghi nhận ngay tại Điều I của GATT 1994 (sau đây gọi là 'GATT') và tại Điều II (nhưng vẫn là quy định đầu tiên về nghĩa vụ chung) của GATS là minh chứng cho tầm quan trọng của nguyên tắc này.

Về bản chất, nghĩa vụ đối xử MFN cấm việc một thành viên WTO phân biệt đối xử giữa các nhà xuất khẩu hay nhà cung ứng dịch vụ nước ngoài khác nhau, trong khi nghĩa vụ NT ngăn cản thành viên WTO thực hiện việc phân biệt đối xử chống lại sản phẩm nước ngoài theo hướng có lợi cho sản phẩm, dịch vụ hay nhà cung ứng dịch vụ 'tương tự trong nước. Tuy nhiên, do những nguyên tắc không phân biệt đối xử này có ý nghĩa khác nhau và được áp dụng khác nhau đối với thương mại hàng hoá và dịch vụ, nên cần thảo luận riêng rẽ việc áp dụng các nguyên tắc này trong từng lĩnh vực.

1. Đối xử MFN theo GATT

Nguyên tắc MFN trong thương mại hàng hoá được quy định trong khoản 1 Điều 1 của GATT như sau:

> Với mọi khoản thuế quan và khoản thu thuộc bất cứ loại nào nhằm vào hay có liên hệ tới nhập khẩu và xuất khẩu hoặc đánh vào các khoản chuyển khoản để thanh toán hàng xuất nhập khẩu, hay phương thức đánh thuế hoặc áp dụng phụ thu nêu trên, hay với mọi luật lệ hay thủ tục trong xuất nhập khẩu và liên quan tới mọi nội dung đã được nêu tại khoản 2 và khoản 4 của Điều III, mọi lợi thế, ưu đãi, đặc quyền hay quyền miễn trừ được bất kì bên kí kết nào dành cho bất cứ một sản phẩm có xuất xứ từ hay được giao tới bất kì một nước nào khác sẽ được áp dụng cho sản phẩm tương tự có xuất xứ từ hay giao tới mọi bên kí kết khác ngay lập tức và vô điều kiện.

[53] Ngoài ra, Hiệp định nhiều bên về mua sắm chính phủ cũng có thể coi là có cùng mục đích, dù chỉ có hiệu lực đối với một số lượng hạn chế các thành viên WTO. biện pháp chống bán phá giá được thông báo với Uỷ ban về hoạt động chống bán phá giá của WTO.

[54] M. J. Trebilcock và R. Howse, *The Regulation of International Trade*, (2005), tr. 232, cho rằng trong thời gian 1995-2002, có 2.160 đề xuất về việc áp dụng biện pháp AD được thông báo với Uỷ ban về hoạt động chống bán phá giá của WTO.

[55] *Xem* '2. Một số ngoại lệ chung và ngoại lệ về an ninh' dưới đây.

[56] Tuy các nghĩa vụ về không phân biệt đối xử MFN và NT cũng áp dụng trong bối cảnh Hiệp định TRIPS, nhưng do tính chất đặc thù của IPRs, các nghĩa vụ này được áp dụng một cách hạn chế hơn và khác với nghĩa vụ trong GATT và GATS. Mục này chỉ làm rõ các nghĩa vụ đối xử MFN và NT quy định trong GATT và GATS.

[57] Như Cơ quan phúc thẩm của WTO từng nhận xét: nghĩa vụ đối xử MFN nêu trong khoản 1 Điều 1 của GATT là 'nền tảng của GATT' và là 'một trong những trụ cột của hệ thống thương mại WTO'. *Xem*: Báo cáo của Cơ quan phúc thẩm, vụ *EC-Tariff Preferences*, đoạn 101. Cũng *xem* Báo cáo của Cơ quan phúc thẩm, vụ *US-Section 211 Appropriations Act*, đoạn 297.

Cũng giống như các nghĩa vụ không phân biệt đối xử nói chung, mục đích chính của nghĩa vụ đối xử MFN là bảo đảm *sự bình đẳng về cơ hội* trong việc nhập khẩu hay xuất khẩu hàng hoá đến và đi từ các thành viên WTO.[58]

Dù không có các từ 'về mặt pháp luật' ('*de jure*') và 'trên thực tế' ('*de facto*') trong lời văn, nhưng khoản 1 Điều I GATT được coi là áp dụng cả đối với phân biệt đối xử 'về mặt pháp luật' và 'trên thực tế'. Nói cách khác, điều khoản này không chỉ cấm các biện pháp có tính chất phân biệt đối xử ngay khi nhìn vào văn bản luật, quy định hay chính sách, mà còn cấm cả các biện pháp nhìn bề ngoài thì là trung lập (không phân biệt đối xử), nhưng khi áp dụng trên thực tế thì lại dẫn đến sự phân biệt đối xử.[59]

Để xác định xem liệu một biện pháp cụ thể có là phân biệt đối xử hay không, khoản 1 Điều I GATT đưa ra một quy trình kiểm tra gồm ba bước, đó là ba câu hỏi: (i) Liệu biện pháp gây tranh cãi có tạo ra một 'lợi thế, biệt đãi, đặc quyền hay quyền miễn trừ' gì về mặt thương mại không? (ii) Liệu sản phẩm liên quan có phải là 'sản phẩm tương tự' không? và (iii) Liệu lợi thế được tạo ra có được trao cho 'tất cả các sản phẩm tương tự ngay lập tức và vô điều kiện' hay không?

Đối với câu hỏi thứ nhất, khoản 1 Điều I được thừa nhận là có phạm vi áp dụng rộng. Thực tế, nhiều biện pháp không được nêu tên cụ thể tại khoản 1 Điều I có thể được coi là nằm trong biện pháp này hay biện pháp khác nêu tại khoản 1 Điều I.[60] Mặt khác, dù khoản 1 Điều I có phạm vi áp dụng rộng, điều đó không có nghĩa là phạm vi đó là không có hạn chế. *Ví dụ*, Ban hội thẩm (Panel) trong vụ *EC-Commercial Vessels* lưu ý rằng do các biện pháp theo khoản 8(b) Điều III (về trợ cấp cho sản phẩm nội địa) không thuộc phạm vi áp dụng của khoản 2 và khoản 4 Điều III, mà lại được nêu tại khoản 1 Điều I, các biện pháp này cũng sẽ không thuộc phạm vi áp dụng của khoản 1 Điều I.[61]

Thuật ngữ 'sản phẩm tương tự' xuất hiện trong một số điều khoản của GATT, trong đó có khoản 1 Điều I. Việc hai sản phẩm có là 'tương tự' hay không là một vấn đề cốt yếu cho việc xác định xem có sự phân biệt đối xử theo khoản 1 Điều I hay không. Tuy nhiên, GATT không định nghĩa 'sản phẩm tương tự' là gì. Có ít án lệ về 'sản phẩm tương tự' nêu tại khoản 1 Điều I GATT hơn so với số lượng các án lệ về 'sản phẩm tương tự' nêu tại Điều III (xem nội dung tiếp theo dưới đây).[62] Việc sử dụng từ điển để định nghĩa tính từ 'tương tự' cũng không có tác dụng gì,[63] vì 'nghĩa trong từ điển để ngỏ, không trả lời nhiều câu hỏi cần phải được giải thích'.[64] Nhìn chung, khái niệm 'sản phẩm tương tự' được hiểu không giống nhau trong những bối cảnh khác nhau mà nó được sử dụng. Trong vụ *Japan-Alcoholic Beverages II*, Cơ quan phúc thẩm nhận xét về khái niệm này bằng việc so sánh nó như chiếc đàn accordion như sau:

> Chiếc đàn accordion của 'tính tương tự' dãn ra và co lại tại những vị trí khác nhau khi các điều khoản khác nhau của Hiệp định WTO được áp dụng. Độ rộng của đàn accordion tại một vị trí cụ thể phải được xác định theo điều khoản cụ thể mà thuật ngữ 'tương tự' được viện dẫn, cũng như theo bối cảnh và hoàn cảnh của vụ việc cụ thể mà điều khoản đó được áp dụng.[65]

Như vậy hai sản phẩm có thể là 'tương tự' theo điều khoản này nhưng lại 'khác nhau' theo điều khoản khác của GATT. Kinh nghiệm cho thấy, Ban hội thẩm của WTO khi xem xét liệu các sản phẩm có là 'tương tự' hay không thì cần xem xét: (i) Đặc điểm của sản phẩm; (ii) Người sử dụng cuối cùng; (iii) Quy định thuế quan của các thành viên khác.[66] Có đề xuất rằng Ban hội thẩm của WTO cũng có thể cân nhắc đến thị hiếu và thói quen của người tiêu dùng khi quyết định tính 'tương tự' của các sản phẩm.[67]

58 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Banana III*, đoạn 190:
Cốt lõi của các nghĩa vụ về không phân biệt đối xử đó là các sản phẩm giống nhau cần được đối xử bình đẳng, bất kể xuất xứ của chúng là gì. Vì các bên tranh chấp không có bất đồng gì về việc tất cả chuối đều là sản phẩm giống nhau, nên nghĩa vụ không phân biệt đối xử phải được áp dụng đối với tất cả các sản phẩm chuối nhập khẩu, bất kể việc một thành viên phân loại hay chia nhỏ các sản phẩm nhập khẩu để quản lí hay vì lí do nào khác.

59 WTO, Báo cáo của Ban hội thẩm, vụ *Canada-Autos*, đoạn 10.40; WTO, Báo cáo của Cơ quan phúc thẩm, đoạn 78, theo đó cả Ban hội thẩm lẫn Cơ quan phúc thẩm đều bác bỏ lập luận của Ca-na-đa rằng khoản 1 Điều I không áp dụng đối với những biện pháp mà nhìn bề ngoài thì là trung lập. Cũng xem các vụ việc trích dẫn tại WTO, Báo cáo của Cơ quan phúc thẩm.

60 *Xem* Decision of the Contracting Parties của GATT 1947 tháng 8/1948 ('thuế lãnh sự' nằm trong cụm từ 'các khoản thu khác'). WTO, Báo cáo của Ban hội thẩm, *US-MFN Footwear*, đoạn 6.8 (các quy tắc và quy định áp dụng đối với thuế đối kháng là 'các quy tắc và quy định áp dụng liên quan đến nhập khẩu'); WTO, Báo cáo của Ban hội thẩm, vụ *US-Customs User Fee*, đoạn 122 ('phí xử lí hàng hoá' là khoản thu áp dụng đối với hay liên quan đến nhập khẩu).

61 WTO, Báo cáo của Ban hội thẩm, *EC-Commercial Vessels*, đoạn 7.83.

62 Do phạm vi của hai điều này khác nhau, nên cần rất thận trọng khi đánh giá về sự tương đồng của khái niệm 'tương tự'.

63 Cơ quan phúc thẩm trong vụ *EC-Asbestos*, đoạn 91, cho rằng nghĩa trong từ điển của từ 'like' cho thấy rằng 'các sản phẩm tương tự là sản phẩm có một số đặc điểm giống hoặc tương tự nhau. Nhưng Cơ quan phúc thẩm ngay lập tức khẳng định rằng giải thích theo từ điển không có tính rõ ràng. *Xem*: vụ *EC-Asbestos*, đoạn 92.

64 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada-Aircraft*, đoạn 153, trích lại trong WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Asbestos*, đoạn 92.

65 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 114.

66 Những tiêu chuẩn này được Ban hội thẩm GATT 1947 sử dụng trong vụ *Spain-Unroasted Coffee*.

67 Peter Van den Bossche, Sđd, tr. 331.

Cuối cùng, khoản 1 Điều I GATT đòi hỏi rằng thành viên WTO, nếu đã dành bất kì ưu đãi nào cho sản phẩm nhập khẩu từ thành viên khác, thì cũng sẽ phải dành ưu đãi đó 'ngay lập tức và vô điều kiện' cho sản phẩm nhập khẩu từ các thành viên khác nữa của WTO. Điều này có nghĩa là khi một thành viên WTO đã dành ưu đãi cho sản phẩm nhập khẩu từ một thành viên khác, thì thành viên đó không thể sử dụng ưu đãi đó để mặc cả và đòi hỏi ưu đãi hay nhượng bộ từ các thành viên WTO khác thì mới cho các thành viên WTO khác đó hưởng ưu đãi.[68] Án lệ điển hình liên quan đến vấn đề này là vụ *Belgium-Family Allowances*, khi Ban hội thẩm cho rằng luật của Bỉ quy định về việc miễn thuế cho các sản phẩm được mua từ những nước có hệ thống trợ cấp gia đình giống như Bỉ: '… [D]ẫn đến một sự phân biệt đối xử giữa các nước có hệ thống trợ cấp gia đình này và các nước có hệ thống trợ cấp gia đình khác, hay thậm chí không có hệ thống trợ cấp tương tự và đặt ra điều kiện cho việc miễn thuế.'[69]

Mặt khác, việc thuật ngữ 'vô điều kiện' có cho phép phân biệt đối xử giữa các sản phẩm dựa trên xuất xứ của sản phẩm hay không, vẫn là vấn đề đang được Cơ quan phúc thẩm xem xét. Trong vụ *Canada-Autos* [2000], Ban hội thẩm cho rằng thuật ngữ 'vô điều kiện' loại trừ việc áp đặt các điều kiện, nếu các điều kiện này không phân biệt đối xử giữa các sản phẩm trên cơ sở xuất xứ của chúng,[70] trong khi đó Ban hội thẩm trong vụ *EC-Tariff Preferences* lại ủng hộ cách tiếp cận hẹp hơn đối với nghĩa của thuật ngữ 'vô điều kiện'. Ban hội thẩm trong vụ *EC-Tariff Preferences* tuyên bố rằng họ không thấy có lí do gì để không giải thích thuật ngữ này theo nghĩa thông thường của nó - được hiểu theo khoản 1 Điều I, nghĩa là 'không bị hạn chế hay chịu bất kì một điều kiện gì'.[71] Tuy nhiên, Ban hội thẩm trong vụ *Colombia-Ports of Entry* [2009] lại ủng hộ cách tiếp cận của vụ *Canada-Autos*[72] và điều này tiếp tục được Ban hội thẩm tái khẳng định trong vụ *US-Poultry from China* [2010].[73]

[68] Báo cáo của Nhóm công tác về vấn đề Hungary, L/3899, thông qua ngày 30/71973, BISD 20S/34, đoạn 12: 'Điều kiện tiên quyết để có hợp đồng hợp tác nhằm hưởng mức thuế quan nhất định, dường như đặt ra điều kiện cho việc hưởng đối xử tối huệ quốc, do đó dường như không phù hợp với Hiệp định chung'.

[69] WTO, Báo cáo của Ban hội thẩm GATT, vụ *Belgium-Family Allowances,* đoạn 3. Báo cáo này được Ban hội thẩm viện dẫn trong vụ *Indonesia-Autos* khi xem xét vấn đề giống như vậy. *Xem* WTO, Báo cáo của Ban hội thẩm, vụ *Indonesia-Autos*, đoạn 14.144.

[70] WTO, Báo cáo của Ban hội thẩm, vụ *Canada-Autos*, đoạn 10.29.

[71] WTO, Báo cáo của Ban hội thẩm, vụ *EC-Tariff Preferences*, đoạn 7.59.

[72] WTO, Báo cáo của Ban hội thẩm, vụ *Colombia-Ports of Entry*, đoạn 7.361.

[73] WTO, Báo cáo của Ban hội thẩm, vụ *US-Poultry from China*, đoạn 7.437.

2. Đối xử MFN theo GATS

Khoản 1 Điều II GATS nghiêm cấm việc phân biệt đối xử giữa các dịch vụ tương tự hay nhà cung ứng dịch vụ tương tự từ những thành viên khác nhau như sau:

> Đối với bất kì biện pháp nào thuộc phạm vi điều chỉnh của Hiệp định này, mỗi thành viên phải dành ngay lập tức và vô điều kiện cho dịch vụ và các nhà cung ứng dịch vụ của bất kì thành viên nào khác, sự đối xử không kém thuận lợi hơn sự đối xử mà thành viên đó dành cho dịch vụ và các nhà cung ứng dịch vụ tương tự của bất kì thành viên nào khác.

Cũng giống như khoản 1 Điều I GATT, mục đích cơ bản của khoản 1 Điều II GATS là bảo đảm *sự bình đẳng về cơ hội* cho các dịch vụ và nhà cung ứng dịch vụ của *tất cả* các thành viên WTO. Khoản 1 Điều II của GATS được bổ sung bằng một số quy định khác về MFN hoặc tương tự như MFN trong GATS, bao gồm Điều VII (về công nhận); Điều VIII (về độc quyền và nhà cung ứng dịch vụ độc quyền); Điều X (về các quy tắc tương lai liên quan đến các biện pháp tự vệ khẩn cấp); Điều XII (về các biện pháp liên quan đến cán cân thanh toán); Điều XVI (về tiếp cận thị trường); và Điều XXI về (sửa đổi biểu cam kết).

Tương tự khoản 1 Điều I GATT, khoản 1 Điều II GATS áp dụng đối với cả hành vi phân biệt đối xử 'theo pháp luật' ('*de jure*') và 'trên thực tế' ('*de facto*') như Cơ quan phúc thẩm đã khẳng định trong vụ *EC-Bananas III*.[74]

Phép thử về việc tuân thủ nghĩa vụ đối xử MFN quy định tại khoản 1 Điều II GATS, cũng giống như khoản 1 Điều I GATT, bao gồm ba bước. Cụ thể hơn, đó là cần phải trả lời ba câu hỏi sau: (i) Liệu biện pháp được nói đến có chịu sự điều chỉnh của GATS không? (ii) Liệu các dịch vụ hay nhà cung ứng dịch vụ có 'tương tự không? và (iii) Liệu một sự đối xử kém thuận lợi hơn có xảy ra đối với các dịch vụ hay nhà cung ứng dịch vụ của của một thành viên hay không?

Như được chỉ ra tại khoản 1 Điều I GATS, để trả lời câu hỏi thứ nhất, cần xác định: Liệu biện pháp đang xem xét có phải (i) Là một biện pháp của một thành viên hay không? và (ii) Là biện pháp tác động đến thương mại dịch vụ hay không?

[74] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Bananas III*, đoạn 233.

'Một biện pháp của một thành viên' là một khái niệm rộng và theo khoản 3 Điều I GATS, bao trùm tất cả các biện pháp: (i) Do các chính quyền và cơ quan ở trung ương, cấp vùng và địa phương thực hiện; và (ii) Thậm chí do cả các cơ quan phi chính phủ thực hiện những thẩm quyền do chính quyền hay cơ quan ở trung ương, cấp vùng và địa phương trao.

Để xác định xem liệu một biện pháp có phải là biện pháp 'tác động đến thương mại dịch vụ' hay không, Cơ quan phúc thẩm trong vụ *Canada-Autos* đã tuyên bố rằng cần xem xét hai vấn đề,[75] đó là: (i) Liệu có tồn tại 'thương mại dịch vụ' theo nghĩa của khoản 2 Điều I hay không? và (ii) Liệu biện pháp gây tranh cãi có 'tác động' đến hoạt động thương mại dịch vụ đó như quy định của khoản 1 Điều I hay không?

Khoản 2 Điều I GATS sẽ được thảo luận cụ thể hơn ở Mục 4 của chương này. Ở đây, chỉ cần nói ngắn gọn là khái niệm 'thương mại dịch vụ' là rất rộng. Như vậy, câu hỏi còn lại là biện pháp nào gây tác động đến thương mại dịch vụ? Cơ quan phúc thẩm trong vụ *EC-Bananas III* đã giải thích thuật ngữ 'gây tác động' như sau: '… [V]iệc sử dụng thuật ngữ 'gây tác động' ('affecting') thể hiện ý định của người soạn thảo là dành cho GATS một phạm vi áp dụng rộng. Theo nghĩa thông thường, từ 'gây tác động' ngụ ý rằng một biện pháp có 'một tác động đối với', điều này cho thấy một phạm vi áp dụng rất rộng'.

Việc giải thích như vậy được củng cố bằng kết luận của các Ban hội thẩm trước đây, theo đó 'gây tác động' trong bối cảnh Điều III GATT là rộng hơn so với phạm vi áp dụng của thuật ngữ 'điều chỉnh' ('regulating' hay 'governing').[76]

Để một biện pháp có thể gây tác động đến thương mại dịch vụ, không cần thiết là biện pháp đó phải điều chỉnh việc cung ứng dịch vụ. Như Ban hội thẩm trong vụ *EC-Bananas III* đã chỉ ra, một biện pháp quy định một vấn đề khác vẫn có thể gây tác động đến thương mại dịch vụ, do đó chịu sự điều chỉnh của GATS.[77]

Về câu hỏi liên quan đến 'dịch vụ hoặc nhà cung ứng dịch vụ tương tự', lưu ý là chỉ có định nghĩa về 'nhà cung ứng dịch vụ' được nêu ra tại Điều XXVIII(g), theo đó 'nhà cung ứng dịch vụ' là 'bất kì người nào cung ứng dịch vụ', kể cả thể nhân hay pháp nhân cũng như các nhà cung ứng dịch vụ thông qua các hình thức hiện diện thương mại. Trong khi

[75] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada-Autos*, đoạn 155.

[76] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Bananas III*, đoạn 220.

[77] WTO, Báo cáo của Ban hội thẩm, vụ *EC-Bananas III*, đoạn 7.285.

GATS không đưa ra định nghĩa nào về 'dịch vụ', khoản 3(b) Điều I tuyên bố rằng: 'dịch vụ' bao gồm 'bất kì loại dịch vụ nào ở trong bất kì lĩnh vực nào, trừ các dịch vụ được cung ứng để thực hiện quyền lực của chính phủ.' GATS, cũng giống như GATT, không định nghĩa về tính 'tương tự' liên quan đến 'dịch vụ' và 'nhà cung ứng dịch vụ'. Nhưng khác với GATT, cho đến nay vẫn chưa có án lệ nào liên quan đến GATS giúp làm sáng tỏ khái niệm khó xác định này. Tuy nhiên, Bossche đề xuất ba tiêu chí sau đây nên được áp dụng để xác định 'tính tương tự của 'dịch vụ' và 'nhà cung ứng dịch vụ':[78]

- các đặc điểm của dịch vụ hay nhà cung ứng dịch vụ;
- việc phân loại hay mô tả dịch vụ trong hệ thống Phân loại các sản phẩm trung tâm ('CPC') của Liên hợp quốc; và
- thói quen và thị hiếu của người tiêu dùng đối với dịch vụ hay nhà cung ứng dịch vụ.

Bossche cũng nhận định rất đúng rằng hai nhà cung ứng dịch vụ, khi cùng đưa ra một dịch vụ tương tự, không nhất thiết là 'nhà cung ứng dịch vụ tương tự', vì các yếu tố như quy mô, tài sản, việc sử dụng công nghệ cũng như kinh nghiệm … cần phải được tính đến.[79]

Câu hỏi cuối cùng liên quan đến đối xử MFN theo khoản 1 Điều II GATS là: Liệu các dịch vụ hay nhà cung ứng dịch vụ của các thành viên khác có chịu 'sự đối xử kém thuận lợi hơn' sự đối xử đã dành cho 'dịch vụ tương tự' hay 'nhà cung ứng dịch vụ tương tự' của một thành viên hay không? GATS không định nghĩa 'sự đối xử kém thuận lợi hơn' trong bối cảnh của điều khoản liên quan đến MFN nhưng lại có nêu trong bối cảnh của NT (Điều XVII - sẽ được trình bày dưới đây). Tuy nhiên, Cơ quan phúc thẩm trong vụ *EC-Bananas III* lưu ý rằng khi giải thích khoản 1 Điều II, đặc biệt là khái niệm 'đối xử không kém thuận lợi hơn', không nên mặc định rằng những chỉ dẫn của Điều XVII cũng áp dụng đối với Điều II.[80] Mặc khác, dù không có những ngôn từ tương đương trong khoản 1 Điều II, Cơ quan phúc thẩm trong chính vụ việc đó cũng cho rằng khái niệm 'đối xử không kém thuận lợi hơn' trong khoản 1 Điều II và Điều XVII GATS cần được giải thích là áp dụng đối với cả việc phân biệt đối xử 'theo pháp luật' ('*de jure*') và 'trên thực tế' ('*de facto*').[81]

[78] Peter Van den Bossche, Sđd, tr. 340.

[79] *Như trên.*

[80] *WTO, Báo cáo của Cơ quan phúc thẩm, vụ EC-Bananas III, đoạn 231.*

[81] *WTO, Báo cáo của Cơ quan phúc thẩm, vụ EC-Bananas III, đoạn 234.*

3. NT trong GATT

NT được quy định tại Điều III GATT và điều này có phạm vi áp dụng chung. Nhìn chung, nghĩa vụ NT cấm một thành viên WTO hành động sự phân biệt đối xử đối với các sản phẩm nước ngoài để tạo thuận lợi cho sản phẩm nội địa. Ngoài ra NT còn có hai đặc điểm có tính chất chung khác nữa. *Thứ nhất*, giống như Điều I, Điều III cũng áp dụng đối với cả phân biệt đối xử 'theo pháp luật' lẫn phân biệt đối xử 'trên thực tế'. *Thứ hai*, Điều III chỉ áp dụng đối với những biện pháp trong nội địa, không phải là các biện pháp tại cửa khẩu.[82]

> Khoản 1 Điều III quy định mục đích chung của NT như sau:
>
> Các bên kí kết thừa nhận rằng không được phép áp dụng các khoản thuế và khoản thu nội địa, cũng như pháp luật, hay quy tắc hay yêu cầu gây tác động tới việc bán hàng, chào hàng, mua hàng, vận tải, phân phối hay sử dụng sản phẩm trong nội địa, cùng với các quy tắc định lượng trong nước theo đó yêu cầu phải pha trộn, chế biến hay sử dụng sản phẩm với một khối lượng hoặc tỉ trọng xác định, đối với các sản phẩm nội địa hoặc nhập khẩu nhằm bảo hộ sản xuất nội địa.

Điều khoản nói trên chỉ ra mục tiêu đầu tiên và quan trọng của nghĩa vụ NT,[83] mục tiêu này cũng được thừa nhận rõ ràng trong nhiều báo cáo của Ban hội thẩm và Cơ quan phúc thẩm, đó là chống chủ nghĩa bảo hộ.[84] Bên cạnh khoản 1, các khoản 2 và 4 quy định thêm về nghĩa vụ chung (khác với các khoản khác chỉ quy định về các biện pháp cụ thể) và sẽ được thảo luận tiếp theo.

Khoản 2 về NT liên quan đến 'thuế nội địa' điều chỉnh hai loại sản phẩm, đó là 'sản phẩm tương tự' và 'sản phẩm có thể thay thế hoặc cạnh tranh trực tiếp'. Loại sản phẩm đầu tiên được quy định tại câu đầu tiên của khoản 2 sẽ được xem xét trước. Câu đầu tiên của khoản 2 Điều III GATT có nội dung sau: 'Hàng nhập khẩu từ lãnh thổ của bất cứ một bên kí kết nào sẽ không phải chịu, dù trực tiếp hay gián tiếp, các khoản thuế hay các khoản thu nội địa thuộc bất cứ loại nào vượt quá mức chúng được áp dụng, dù trực tiếp hay gián tiếp, với sản phẩm nội địa tương tự'.

Điều khoản trên đặt ra phép thử hai bước về việc tuân thủ NT đối với việc áp thuế nội địa đối với các sản phẩm 'tương tự'. Như Cơ quan phúc thẩm trong vụ *Canada-Periodicals* đã chỉ ra:

> Có hai câu hỏi cần được trả lời để có thể xác định xem khoản 2 Điều III của GATT có bị vi phạm hay không: (a) Liệu sản phẩm nhập khẩu và sản phẩm nội địa có phải là các sản phẩm tương tự hay không? và (b) Liệu sản phẩm tương tự có bị đánh thuế vượt quá so với sản phẩm nội địa không? Nếu câu trả lời cho cả hai câu hỏi trên là khẳng định, thì khoản 2 Điều III, câu đầu tiên, đã bị vi phạm.[85]

Cũng giống như khái niệm 'sản phẩm tương tự' trong MFN, khái niệm 'sản phẩm tương tự' trong NT không được định nghĩa trong GATT. Tuy nhiên, khác với MFN, NT có số lượng các án lệ phong phú hơn nhiều. Rất nhiều báo cáo của Ban hội thẩm (từ thời GATT 1947) và của Cơ quan phúc thẩm đã làm sáng tỏ khái niệm 'sản phẩm tương tự được ghi trong câu đầu tiên của khoản 2 Điều III.

Án lệ đầu tiên mà khoản 2 Điều III được xác định là bị vi phạm chính là vụ *Japan-Alcoholic Beverages* [1987], một vụ việc từ thời GATT 1947. Vụ này liên quan đến biện pháp thuế nội địa, theo đó các sản phẩm đồ uống có cồn được phân loại theo nồng độ cồn và các đặc tính khác. Khi xem xét 'tính tương tự' của sản phẩm, Ban hội thẩm đã trích dẫn Báo cáo của Nhóm công tác về 'Điều chỉnh thuế tại biên giới',[86] trong đó có kết luận rằng vấn đề nảy sinh từ việc giải thích thuật ngữ sản phẩm 'tương tự hay 'giống nhau' cần được xem xét trên cơ sở từng vụ việc cụ thể, thông qua việc sử dụng ba tiêu chí, đó là: (i) Người sử dụng cuối cùng của sản phẩm tại thị trường; (ii) Thị hiếu và thói quen của người tiêu dùng - tiêu chí có thể được đánh giá không giống nhau ở từng nước; (iii) Đặc tính, bản chất và chất lượng của sản phẩm.

Điều thú vị là gần 10 năm sau, trong vụ *Japan-Alcoholic Beverages II*, Cơ quan phúc thẩm khẳng định tính đúng đắn của cách tiếp cận trong Báo cáo năm 1970 về điều chỉnh thuế tại biên giới trong việc xác định

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82 So sánh với Điều II (Nhượng bộ thuế quan) và Điều XI (Hạn chế số lượng), được áp dụng đối với các biện pháp tại cửa khẩu.

83 So sánh với Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, 16, nhấn mạnh rằng Điều III của GATT có mục đích rộng hơn.

84 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Korea-Alcoholic Beverages*, đoạn 120; WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, 109. Cũng *xem* WTO, Báo cáo của Ban hội thẩm GATT, vụ *US-Section 337*, đoạn 5.10 (cũng được Cơ quan phúc thẩm trong vụ *Japan-Alcoholic Beverages II* dẫn chiếu đến). Các Ban hội thẩm và các học giả cũng chỉ ra mục đích khác của nghĩa vụ NT, đó là bảo đảm các biện pháp nội bộ của các thành viên WTO không làm giảm các giá trị cam kết liên quan đến thuế quan theo Điều II. *Xem* WTO, Báo cáo của Ban hội thẩm, vụ *Japan-Alcoholic Beverages II*, đoạn 6.13.

85 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada-Periodicals*, tr. 468.

86 Báo cáo của Nhóm công tác, 'Điều chỉnh thuế tại biên giới', thông qua ngày 02/12/1970, BISD 18S/102.

'tính tương tự'.[87] Cách tiếp cận này - được hầu hết các Ban hội thẩm áp dụng trong các vụ việc có liên quan đến khái niệm 'sản phẩm tương tự' từ sau năm 1970, tiếp tục là cách tiếp cận chủ chốt trong việc xác định 'tính tương tự' được quy định tại câu đầu tiên, khoản 2 Điều III.[88] Tuy nhiên, có hai điểm nữa cần lưu ý. *Thứ nhất*, Cơ quan phúc thẩm trong vụ *Japan-Alcoholic Beverages II*, khi ủng hộ cách tiếp cận trong Báo cáo năm 1970, lưu ý rằng phạm vi của 'sản phẩm tương tự' được quy định trong câu đầu tiên của khoản 2 Điều III GATT 1947 cần được duy trì ở phạm vi hẹp. *Thứ hai*, ba tiêu chí được liệt kê trong Báo cáo của Nhóm công tác về 'Điều chỉnh thuế tại biên giới' không bao gồm việc phân loại thuế quan của sản phẩm liên quan. Tuy nhiên, như Cơ quan phúc thẩm thừa nhận trong vụ *Japan-Alcoholic Beverages II*, việc phân loại thống nhất tên gọi thuế quan, do dựa trên hệ thống hài hoà hóa thuế quan, chứ không phải dựa trên cam kết ràng buộc thuế quan, nên có thể giúp ích cho việc xác định 'tính tương tự'.[89]

Đối với bước thứ hai trong phép thử về nghĩa vụ NT đối với thuế nội địa, cụ thể là về việc 'thuế được áp quá mức' so với thuế nội địa được áp đối với sản phẩm nội địa 'tương tự', Cơ quan phúc thẩm, trong vụ *Japan-Alcoholic Beverages II*, đã đặt ra tiêu chí chặt chẽ. Theo quan điểm của Cơ quan phúc thẩm, '… [t]hậm chí một sự "vượt quá" ở mức nhỏ nhất cũng là "quá mức", và việc cấm các loại thuế có tính chất phân biệt đối xử theo câu thứ nhất, khoản 2 Điều III GATT 1994 không phụ thuộc vào "phép thử tác động thương mại", cũng như không bị hạn chế bởi tiêu chuẩn về mức tối thiểu'.[90]

Như đã nêu ở trên, câu thứ hai của khoản 2 Điều III GATT quy định về NT trong trường hợp thuế nội địa áp vào 'sản phẩm có thể thay thế hay cạnh tranh trực tiếp'. Câu này có nội dung sau: 'Hơn nữa, không một bên kí kết nào sẽ áp các loại thuế hay khoản thu khác trong nội địa đối với hàng nội địa hoặc hàng nhập khẩu trái với các nguyên tắc đã nêu tại khoản 1'.

[87] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 113-114.

[88] Ngoài ra, có phương pháp khác, được gọi là phương pháp 'ý định điều chỉnh' ('regulatory intent'), hay được gọi phổ biến hơn là phương pháp 'mục đích và tác động' do Ban hội thẩm trong vụ *US-Malt Beverages* đưa ra. Tuy nhiên, Ban hội thẩm trong vụ *Japan-Alcoholic Beverages II* bác bỏ phương pháp này. *Xem*: WTO, Báo cáo của Ban hội thẩm, vụ *Japan-Alcoholic Beverages II*, các đoạn 6, tr. 16-17. Việc bác bỏ này được Cơ quan phúc thẩm ngầm đồng ý trong vụ *Japan-Alcoholic Beverages II*.

[89] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 114-115.

[90] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 115.

Cần nhắc lại rằng nguyên tắc nêu trong khoản 1 Điều III là để tránh bảo hộ.

Câu thứ hai, khoản 2 Điều III GATT được giải thích là điều chỉnh một 'loại sản phẩm rộng hơn' các sản phẩm được quy định trong câu đầu tiên.[91] Hơn nữa, câu này cũng có những phép thử khác liên quan đến việc tuân thủ nghĩa vụ nêu tại đó. Trong vụ *Japan-Alcoholic Beverages II*, Cơ quan phúc thẩm tuyên bố rằng:

> Không giống như câu thứ nhất của khoản 2 Điều III, ngôn ngữ của câu thứ hai khoản 2 Điều III viện dẫn cụ thể đến khoản 1 Điều III. Ý nghĩa của sự khác biệt là ở chỗ: trong khi khoản 1 Điều III có vai trò ngầm trong việc giải quyết hai vấn đề cần phải được xem xét khi áp dụng câu thứ nhất, thì nó có lại vai trò rõ ràng như là một vấn đề hoàn toàn riêng biệt cần phải được giải quyết cùng với hai vấn đề khác nổi lên khi áp dụng câu thứ hai. Cân nhắc đầy đủ đến nghĩa của lời văn cũng như bối cảnh của nó, có ba vấn đề riêng biệt cần được giải quyết để xác định xem liệu một biện pháp thuế nội địa có tuân thủ câu thứ hai khoản 2 Điều III hay không. Ba vấn đề này là:
>
> 1. Liệu sản phẩm nhập khẩu và sản phẩm nội địa có phải là 'các sản phẩm cạnh tranh trực tiếp hoặc có thể thay thế', và những sản phẩm này hiện có đang cạnh tranh với nhau hay không?
> 2. Liệu có phải sản phẩm nhập khẩu và sản phẩm nội địa trực tiếp cạnh tranh hoặc có thể thay thế nhau 'không được áp thuế tương tự nhau' hay không? và
> 3. Liệu việc áp thuế không tương tự nhau cho các sản phẩm nhập khẩu và sản phẩm nội địa trực tiếp cạnh tranh hoặc có thể thay thế nhau nhằm '… [t]ạo ra sự bảo hộ sản xuất nội địa' hay không?
>
> Một lần nữa, đây là ba vấn đề tách biệt. Nguyên đơn cần phải chứng minh riêng từng vấn đề cho Ban hội thẩm thấy rằng một thành viên của WTO đã áp dụng một biện pháp thuế không phù hợp với câu thứ hai của khoản 2 Điều III.[92]

Như vậy, bài kiểm tra việc tuân thủ NT đối với việc áp thuế nội địa theo câu thứ hai, khoản 2 Điều III GATT bao gồm ba bước. *Bước thứ nhất*,

[91] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 112; WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada-Periodicals*, tr. 470.

[92] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 116.

cần phải xác định xem liệu các sản phẩm nhập khẩu và sản phẩm nội địa có phải là các 'sản phẩm cạnh tranh trực tiếp hay có thể thay thế được' hay không? Cũng giống như 'sản phẩm tương tự, bản thân nó là một tập con của 'các sản phẩm cạnh tranh trực tiếp hoặc có thể thay thế',[93] việc xác định loại 'sản phẩm cạnh tranh trực tiếp hoặc có thể thay thế' theo câu thứ hai, khoản 2 Điều III cần được tiến hành 'trên cơ sở từng vụ việc cụ thể, có tính đến tất cả các yếu tố liên quan'.[94] Hơn nữa, việc nhìn vào sự cạnh tranh trên thị trường liên quan như là một trong những biện pháp để xác định các loại hình sản phẩm có thể được coi là 'sản phẩm cạnh tranh trực tiếp hay có thể thay thế' không phải là không phù hợp.[95] Cơ quan phúc thẩm giải thích rằng các sản phẩm được coi là 'cạnh tranh trực tiếp hoặc có thể thay thế', khi mà chúng có thể hoán đổi cho nhau hoặc khi chúng đưa ra được các cách thức khác để đáp ứng nhu cầu hay thị hiếu cụ thể.[96] Cuối cùng, trong vụ *Japan-Alcoholic Beverage II*, Cơ quan phúc thẩm cũng đồng ý với quan điểm của Ban hội thẩm rằng: 'Tiêu chí quyết định để xác định xem hai sản phẩm có phải là cạnh tranh trực tiếp hoặc có thể thay thế nhau hay không - là liệu chúng có cùng chung mục tiêu sử dụng hay không? và một trong những cách thức để xem xét việc này là xem xét mức độ linh hoạt của sản phẩm thay thế.'[97]

Sau khi xác định các sản phẩm cạnh tranh trực tiếp hoặc có thể thay thế, *bước thứ hai* là xác định xem các sản phẩm có được 'áp thuế tương tự hay không? Trong vụ *Japan-Alcoholic Beverage II*, Cơ quan phúc thẩm cho rằng cụm từ này không có nghĩa giống như cụm từ 'quá mức', nếu không thì 'sản phẩm tương tự và 'sản phẩm cạnh tranh trực tiếp hay có thể thay thế' sẽ chỉ là cùng một loại.[98] Cơ quan phúc thẩm cũng đồng ý với Ban hội thẩm rằng mức độ áp thuế chênh lệch phải lớn hơn mức tối thiểu ('*de minimis*') để được coi là 'không được áp thuế tương tự, và liệu mức độ áp thuế chênh lệch cụ thể đó có phải là tối thiểu ('*de minimis*') hay không, thì phải xác định trên cơ sở từng vụ việc cụ thể.[99]

93 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Korea-Alcoholic Beverages*, đoạn 118. Cũng *xem* WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II* và WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada-Periodicals*.

94 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Korea-Alcoholic Beverages*, đoạn 137.

95 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 117.

96 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Korea-Alcoholic Beverages*, đoạn 115.

97 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 117, trích WTO, Báo cáo của Ban hội thẩm đoạn 6.22.

98 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 118.

99 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II.*

Bước cuối cùng trong phép thử NT theo khoản 2 Điều III sẽ chỉ được tiến hành khi xác định được rằng 'sản phẩm cạnh tranh trực tiếp hay có thể thay thế' không được 'áp thuế tương tự'.[100] Trong trường hợp có sự áp thuế khác nhau, thì cần phải xác định xem liệu việc áp thuế có nhằm 'tạo ra sự bảo hộ' hay không? Theo Cơ quan phúc thẩm trong vụ *Japan-Alcoholic Beverages II*, đây là câu hỏi đòi hỏi phải có sự phân tích tổng thể và khách quan về cấu trúc cũng như việc áp dụng biện pháp gây tranh cãi liên quan đến sản phẩm nội địa và so sánh với sản phẩm nhập khẩu.[101] Cơ quan phúc thẩm cũng cho rằng: '… [C]ó thể xem xét một cách khách quan các tiêu chuẩn làm nền tảng cho một biện pháp thuế cụ thể, cơ cấu cũng như việc áp dụng nó để có thể xác định xem liệu biện pháp đó có được áp dụng theo cách tạo ra sự bảo hộ cho sản phẩm nội địa hay không.'[102]

Trong vụ *Chile-Alcohol*, việc xem xét như vậy rõ ràng là tương đồng với việc đặt câu hỏi xem liệu việc phân loại như vậy có thể được hiểu theo mục đích phi bảo hộ hay không, nếu nhìn một cách khách quan vào cơ cấu thuế. Như vậy, bằng việc từ bỏ việc tìm hiểu ý định chủ quan của cơ quan lập pháp, Cơ quan phúc thẩm trong vụ này đã ủng hộ việc xem xét vấn đề bảo hộ từ mục đích điều chỉnh, mục đích có thể được xác định từ những đặc điểm khách quan của cơ chế điều chỉnh đó.

Ba phép thử mà Cơ quan phúc thẩm nêu trong vụ *Japan-Alcoholic Beverages II* đã được các Ban hội thẩm tuân theo và cũng được hoàn chỉnh bởi Cơ quan phúc thẩm trong các án lệ khác có liên quan đến thuế nội địa hay các biện pháp điều chỉnh khác. Nhưng những phép thử này không dễ thực hiện. *Ví dụ*, trong vụ *Canada-Periodicals*, Ban hội thẩm cho rằng 'tạp chí định kì có quảng cáo tách rời' ('split-run periodicals') và 'tạp chí định kì nội địa không có quảng cáo tách rời' là các sản phẩm 'tương tự, nhưng Cơ quan phúc thẩm lại cho rằng đây không phải là các sản phẩm 'tương tự. mà là các sản phẩm 'cạnh tranh trực tiếp hay có thể thay thế'.

Bên cạnh nghĩa vụ NT đối với các biện pháp tài chính nêu tại khoản 2 Điều III nêu trên, GATT cũng quy định nghĩa vụ NT đối với các biện pháp phi tài chính tại khoản 4 Điều III. Khoản 4 Điều III GATT quy định:

> Sản phẩm nhập khẩu từ lãnh thổ của bất cứ một bên kí kết nào vào lãnh thổ của bất cứ một bên kí kết khác sẽ được hưởng đối

100 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 119.

101 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II*, tr. 120.

102 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Japan-Alcoholic Beverages II.*

xử không kém phần thuận lợi hơn sự đối xử dành cho sản phẩm tương tự có xuất xứ nội địa về mặt luật pháp, quy tắc và các quy định gây tác động đến bán hàng, chào hàng, mua hàng, vận tải, phân phối hoặc sử dụng hàng trên thị trường nội địa.

Theo ý kiến của Cơ quan phúc thẩm trong vụ *Korea-Various Measures*, để xác định xem có sự vi phạm điều khoản nói trên hay không, cần phải chứng minh được ba yếu tố: (i) Biện pháp bị khiếu kiện là 'luật, quy định hay yêu cầu' gây tác động đến việc bán hàng, chào hàng, mua hàng, vận tải, phân phối hay sử dụng sản phẩm nội địa và sản phẩm nhập khẩu trên thị trường nội địa; (ii) Sản phẩm nhập khẩu là 'tương tự với sản phẩm nội địa được bán trong thị trường nội địa; và (iii) Sản phẩm nhập khẩu chịu sự đối xử kém thuận lợi hơn sản phẩm tương tự nội địa.[103]

Yếu tố *thứ nhất* là phạm vi của nghĩa vụ. Trong những án lệ ban đầu, các Ban hội thẩm đã giải thích phạm vi nghĩa vụ này theo nghĩa rộng, cho rằng hành vi của chính phủ không nhất thiết phải dưới hình thức quy định mang tính bắt buộc để bị coi là nằm trong phạm vi của khoản 4 Điều III, mà chỉ cần là hành vi đó có tác động đến hành vi của đối tượng tư nhân bị điều chỉnh.[104] Tương tự, thuật ngữ 'gây tác động' ('affecting') cũng được giải thích theo nghĩa rộng.[105]

Yếu tố *thứ hai* lại tiếp tục là khái niệm 'tính tương tự'. Vụ việc đầu tiên mà Cơ quan phúc thẩm giải quyết một tranh chấp liên quan đến khoản 4 Điều III GATT là vụ *Asbestos*. Cho đến thời điểm đó, Cơ quan phúc thẩm đã hình thành cách tiếp cận với khái niệm 'tính tương tự' quy định trong câu thứ nhất của khoản 2 Điều III.[106] Nhưng trong báo cáo của mình, Cơ quan phúc thẩm trước hết lưu ý rằng khái niệm 'sản phẩm tương tự' trong câu đầu tiên của khoản 2 Điều III đã được giải thích theo nghĩa hẹp. Tuy nhiên, Cơ quan phúc thẩm giải thích rằng cách giải thích theo nghĩa hẹp này là do việc tồn tại câu thứ hai của khoản 2 Điều III, trong khi đó khoản 4 Điều III không có câu thứ hai tương ứng.[107] Xét từ sự khác nhau về ngôn ngữ giữa các khoản 2 và 4 Điều III, Cơ quan phúc thẩm kết luận rằng: '"chiếc đàn accordeon" của "tính tương tự" được kéo theo hướng khác trong khoản 4 Điều III'.[108] Cơ quan phúc thẩm cũng lưu ý thêm rằng nghĩa của 'sản phẩm tương tự' trong khoản 4 Điều III phải được xác định theo nguyên tắc chống bảo hộ nêu tại khoản 1 Điều III. Do việc bảo hộ chỉ tồn tại trong mối quan hệ cạnh tranh, nên Cơ quan phúc thẩm đi đến kết luận rằng việc xác định liệu các sản phẩm nhập khẩu và nội địa có phải là 'sản phẩm tương tự theo khoản 4 Điều III hay không, thực chất chính là việc xác định tính chất và mức độ của mối quan hệ cạnh tranh giữa các sản phẩm này.[109] Liên từ 'và' chỉ ra rằng việc phân tích kinh tế đơn thuần của độ co giãn của cầu theo giá chéo đối với sản phẩm được xem xét sẽ là không đủ để xác định 'tính tương tự'.[110] Thay vào đó, 'tính tương tự' cần được xem xét cả định tính lẫn định lượng. Dù khó có thể chỉ ra một cách trừu tượng tính chất và mức độ của mối quan hệ cạnh tranh cần phải đạt được để các sản phẩm được coi là 'tương tự', nhưng vẫn có thể nói rằng khái niệm 'sản phẩm tương tự' tại khoản 4 Điều III là tương đối rộng và chắc chắn rộng hơn khái niệm 'sản phẩm tương tự' được giải thích theo nghĩa hẹp tại khoản 2 Điều III.[111] Nhưng Cơ quan phúc thẩm cũng kết luận rằng dù phạm vi của khái niệm 'sản phẩm tương tự' tại khoản 4 Điều III là rộng, nó cũng không thể rộng hơn phạm vi tổng hợp của hai khái niệm 'sản phẩm tương tự' và 'sản phẩm cạnh tranh trực tiếp hoặc có thể thay thế' tại câu thứ nhất và câu thứ hai của khoản 2 Điều III gộp lại.[112] Việc xác định 'tính tương tự' tại khoản 4 Điều III cuối cùng vẫn phải được tiến hành trên cơ sở từng vụ việc cụ thể.[113] Cơ quan phúc thẩm trong vụ *EC-Asbestos* tiếp tục viện dẫn các tiêu chuẩn nêu trong Báo cáo của Nhóm công tác về 'Điều chỉnh thuế tại biên giới',[114] nhưng cũng bổ sung rằng đây chỉ 'đơn giản là những công cụ hỗ trợ cho việc thực hiện nhiệm vụ phân loại và xem xét các bằng chứng liên quan'.[115] Cơ quan phúc thẩm cũng nhấn mạnh rằng những tiêu chuẩn này 'không phải là tiêu chuẩn quy định trong văn bản điều ước và cũng không phải là tiêu chuẩn duy nhất để xác định tính chất pháp lí của sản phẩm'.[116]

Sau khi mối quan hệ cạnh tranh được xác lập với tính chất và mức độ có liên quan đến khoản 4 Điều III, yếu tố cuối cùng trong việc

103 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Korea-Various Measures,* đoạn 133.

104 WTO, Báo cáo của Ban hội thẩm, vụ *Japan-Film*, đoạn 10.376.

105 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-FSC (Điều 21.5-EC)*, các đoạn 208-210.

106 Như trên.

107 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Abestos,* đoạn 94.

108 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Abestos,* đoạn 96.

109 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Abestos,* đoạn 99.

110 So sánh với phương pháp của Ban hội thẩm trong vụ *Japan-Alcoholic Beverage* thảo luận ở trên.

111 Như trên.

112 Như trên.

113 Như trên, đoạn 101.

114 Như trên

115 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Abestos,* đoạn 102.

116 Như trên.

phân tích sẽ được tính đến. Chỉ khi việc đối xử khác nhau giữa những sản phẩm 'tương tự dẫn đến 'sự đối xử kém thuận lợi hơn' của nhóm các sản phẩm nhập khẩu trong quan hệ với nhóm sản phẩm nội địa tương tự, thì khoản 4 Điều III mới bị vi phạm. Trong vụ *EC-Asbestos*, Cơ quan phúc thẩm không đưa ra kết luận nào về việc 'đối xử kém thuận lợi hơn', vì nó đã bảo lưu kết luận của Ban hội thẩm theo đó sản phẩm là 'tương tự. Tuy nhiên, Cơ quan phúc thẩm đã tuyên bố về cách tiếp cận đối với khái niệm 'đối xử kém thuận lợi hơn' trong một đoạn rất quan trọng. Cơ quan phúc thẩm lưu ý rằng:

> Khái niệm 'đối xử kém thuận lợi hơn' thể hiện nguyên tắc chung, tại khoản 1 Điều III, theo đó quy tắc nội địa 'không được phép áp dụng… [t]heo hướng tạo ra sự bảo hộ sản xuất nội địa'. Nếu có sự 'đối xử kém thuận lợi hơn' đối với một nhóm các sản phẩm nhập khẩu 'tương tự, thì cũng có nghĩa là có 'sự bảo hộ' đối với nhóm các sản phẩm nội địa 'tương tự'.[117]

Cơ quan phúc thẩm thực chất tuyên bố rằng ngay cả khi các sản phẩm ở trong mối quan hệ cạnh tranh gần gũi đến mức được coi là 'tương tự', các thành viên của một nhóm các sản phẩm 'tương tự' có thể vẫn được phân biệt khi điều chỉnh, với điều kiện là việc này không dẫn đến sự đối xử kém thuận lợi hơn, một việc được hiểu là đồng nghĩa với việc bảo hộ sản xuất nội địa.

4. NT trong GATS

NT được quy định tại khoản 1 Điều XVII GATS với lời văn như sau:

> Trong những lĩnh vực được nêu trong Danh mục cam kết và tùy thuộc vào các điều kiện và tiêu chuẩn được quy định trong Danh mục đó, liên quan tới tất cả các biện pháp có tác động đến việc cung ứng dịch vụ, mỗi thành viên phải dành cho dịch vụ và nhà cung ứng dịch vụ của bất kì thành viên nào khác sự đối xử không kém thuận lợi hơn sự đối xử mà thành viên đó dành cho dịch vụ và nhà cung ứng dịch vụ của mình.

Như vậy, khác với nghĩa vụ NT trong GATT, một nghĩa vụ được áp dụng đối với tất cả hoạt động thương mại, nghĩa vụ NT đối với thương mại dịch vụ không có tính chất áp dụng chung mà chỉ áp dụng trong chừng mực mà thành viên WTO công khai cam kết trao 'NT' đối với lĩnh vực dịch vụ cụ thể. Những cam kết về NT như vậy được nêu ra trong Danh mục cam kết cụ thể về dịch vụ của thành viên và thường có đi kèm với một số điều kiện, hạn chế hoặc ngoại lệ. Ban thư kí WTO đã xác định 5 hạn chế phổ biến đối với việc áp dụng NT trong lĩnh vực dịch vụ như sau:[118]

- Quốc tịch hoặc yêu cầu về cư trú đối với ban điều hành công ty cung ứng dịch vụ;
- Yêu cầu về việc đầu tư một lượng nhất định bằng nội tệ;
- Hạn chế việc các nhà cung ứng dịch vụ nước ngoài được mua đất;
- Trợ cấp đặc biệt hoặc ưu đãi thuế chỉ dành cho các nhà cung ứng dịch vụ nội địa;
- Các yêu cầu về tài chính khác nhau cũng như giới hạn hoạt động đặc biệt áp dụng riêng đối với hoạt động của các nhà cung ứng dịch vụ nước ngoài.

Sau khi một thành viên WTO đã cam kết trao NT, thành viên đó phải trao cho dịch vụ và nhà cung ứng dịch vụ của bất kì thành viên nào khác sự đối xử không kém thuận lợi hơn sự đối xử mà họ đã dành cho dịch vụ hay nhà cung ứng dịch vụ của mình. Ban hội thẩm trong vụ *EC-Banana III* chỉ ra ba yếu tố cần chứng minh để xác định có sự vi phạm nghĩa vụ NT theo Điều XVII GATS. Những yếu tố này là: (i) Biện pháp mà thành viên áp dụng gây tác động đến thương mại dịch vụ; (ii) 'Dịch vụ tương tự hoặc 'nhà cung ứng dịch vụ tương tự'; và (iii) Việc đối xử không kém thuận lợi hơn. Do hai yếu tố đầu tiên, 'biện pháp gây tác động đến thương mại dịch vụ' và 'dịch vụ tương tự và 'nhà cung ứng dịch vụ tương tự đã được thảo luận ở trên trong mục về nghĩa vụ đối xử MFN theo Điều II GATS, ở đây chỉ tiếp tục xem xét yếu tố thứ ba và là yếu tố cuối cùng, đó là 'sự đối xử không kém thuận lợi hơn'.

Các khoản 2 và 3 Điều XVII GATS làm rõ yêu cầu về 'sự đối xử không kém thuận lợi hơn' như sau:

> …
>
> [2]. Một thành viên có thể đáp ứng những yêu cầu quy định tại khoản 1 bằng cách dành cho dịch vụ hoặc nhà cung ứng dịch vụ của bất kì một thành viên nào khác một sự đối xử tương tự về hình thức hoặc sự đối xử khác biệt về hình thức mà thành viên đó dành cho dịch vụ hoặc nhà cung ứng dịch vụ của mình.

[117] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Abestos,* đoạn 100.

[118] Ban thư kí của WTO, *Market Access: Unfinished Business,* (2001), tr. 103.

3. Sự đối xử tương tự hoặc khác biệt về hình thức được coi là kém thuận lợi hơn, nếu nó làm thay đổi điều kiện cạnh tranh có lợi cho dịch vụ hay nhà cung ứng dịch vụ của thành viên đó so với dịch vụ hoặc nhà cung ứng dịch vụ tương tự của bất kì thành viên nào khác.

Khoản 3 rõ ràng cho thấy rằng thậm chí ngay cả khi đưa ra sự đối xử về mặt hình thức là giống hoàn toàn nhau giữa một bên là dịch vụ hay nhà cung ứng dịch vụ nước ngoài và bên kia là dịch vụ hay nhà cung ứng dịch vụ nội địa, thì một thành viên vẫn có thể bị coi là vi phạm nghĩa vụ NT, nếu những điều kiện về cạnh tranh được thay đổi theo hướng có lợi hơn cho các dịch vụ hay nhà cung ứng dịch vụ nội địa. Mặt khác, nếu một thành viên dành cho dịch vụ hay nhà cung ứng dịch vụ nước ngoài và nội địa sự đối xử về hình thức là khác nhau, thì cũng không có nghĩa là đã chắc chắn vi phạm nghĩa vụ NT, nếu như thành viên đó không thay đổi điều kiện thị trường theo hướng có lợi cho dịch vụ hay nhà cung ứng dịch vụ nội địa. Trong vụ *EC-Bananas III (Điều 21.5-Ecuador)*, Ban hội thẩm thấy rằng một số biện pháp nhất định của EC trên thực tế dành cho nhà cung ứng dịch vụ của Ecuador điều kiện cạnh tranh kém thuận lợi hơn so với các nhà cung ứng dịch vụ tương tự của EC.[119]

Ở khía cạnh này, cần lưu ý là chú thích 10 của Điều XVII quy định: 'Các cam kết cụ thể được đưa ra theo Điều này sẽ không được giải thích theo hướng yêu cầu một thành viên phải bù đắp cho những bất lợi cạnh tranh vốn có, những bất lợi bắt nguồn từ tính chất quốc tế của những dịch vụ hay nhà cung ứng dịch vụ liên quan'.

Tuy nhiên, Ban hội thẩm, trong vụ *Canada-Autos,* nhấn mạnh phạm vi hạn chế của điều khoản nói trên như sau:

> Chú thích 10 của Điều XVII chỉ miễn trừ cho các thành viên khỏi nghĩa vụ bù đắp những bất lợi do tính chất quốc tế trong việc áp dụng quy định về đối xử quốc gia; nó không đưa ra bình phong cho các hành vi có thể thay đổi điều kiện cạnh tranh chống lại các dịch vụ hay nhà cung ứng dịch vụ vốn đã có những bất lợi do tính chất quốc tế của mình.[120]

B. *Nguyên tắc mở cửa thị trường (hay nguyên tắc tiếp cận thị trường)*

Nguyên tắc tiếp cận thị trường (viết tắt là 'MA') là nguyên tắc cốt lõi của

[119] WTO, Báo cáo của Ban hội thẩm, vụ *EC-Bananas III (Điều 21.5-Ecuador)*, đoạn 6.126.

[120] WTO, Báo cáo của Ban hội thẩm, vụ *Canada-Autos*, đoạn 10.300.

luật WTO. Thực vậy, như nêu tại đoạn 3 Lời nói đầu của Hiệp định WTO, 'việc giảm đáng kể thuế quan và các rào cản khác đối với thương mại' là một trong hai biện pháp để đạt được các mục tiêu của WTO về mức sống cao hơn, có đầy đủ việc làm, tăng trưởng và phát triển kinh tế bền vững.[121] Đoạn đó trong Lời nói đầu cũng xác định hai loại rào cản đối với thương mại quốc tế, đó là 'thuế quan' và 'rào cản phi thuế quan'('NTBs'). Thuế quan có liên quan đến thương mại hàng hoá và không có mấy ý nghĩa đối với thương mại dịch vụ. Trong khi đó, các NTBs áp dụng đối với cả thương mại hàng hoá lẫn thương mại dịch vụ. Phần này sẽ trình bày ngắn gọn về đàm phán để giảm thuế quan đối với hàng hoá, cũng như nêu một số quy tắc liên quan đến việc loại bỏ các NTBs.

1. Đàm phán giảm thuế quan đối với thương mại hàng hoá

Thuế hải quan, hay thuế quan, là rào cản được sử dụng phổ biến nhất đối với việc tiếp cận thị trường của hàng hoá. Về nguyên tắc, các thành viên WTO được tự do áp đặt thuế đối với sản phẩm nhập khẩu. GATT không ngăn cấm việc áp thuế nhập khẩu. Tuy nhiên, GATT thừa nhận rằng thuế nhập khẩu là rào cản đối với thương mại quốc tế và cũng thừa nhận tầm quan trọng của việc đàm phán giảm thuế quan. Điều XXVIIbis của GATT nêu rõ:

> Các bên kí kết thừa nhận rằng thuế quan thường tạo thành rào cản nghiêm trọng đối với thương mại; do đó việc đàm phán trên cơ sở có đi có lại và cùng có lợi để hướng tới việc giảm đáng kể mức độ thuế quan nói chung cũng như các khoản thu khác đối với hàng hoá nhập khẩu và xuất khẩu, và cụ thể là việc giảm những khoản thuế quan cao gây cản trở cho việc nhập khẩu, dù chỉ ở khối lượng tối thiểu và được thực hiện trên cơ sở cân nhắc đầy đủ các mục tiêu của Hiệp định này, cũng như nhu cầu khác nhau của từng bên kí kết, cũng sẽ có ý nghĩa rất quan trọng đối với việc mở rộng thương mại quốc tế. Các thành viên có thể bảo trợ cho các cuộc đàm phán như vậy vào từng giai đoạn một.

Thực vậy, trong lịch sử của GATT, cuộc đàm phán đầu tiên về giảm thuế quan đã được tiến hành đồng thời với việc đàm phán văn bản GATT.[122] Trong thời kì GATT 1947, việc giảm thuế quan luôn là một vấn đề quan trọng, nếu không nói là duy nhất, trong chương trình nghị sự của 8 vòng đàm phán.[123] Nhưng dù 8 vòng đàm phán có đạt được

[121] Mục tiêu khác là loại bỏ sự phân biệt đối xử, đã nêu ở trên.

[122] 'Mục 1. Giới thiệu'; WTO, Báo cáo của Ban hội thẩm, vụ *Canada-Autos*.

[123] Như trên.

thành công nhất định, thuế quan vẫn là một trong những rào cản quan trọng đối với thương mại quốc tế trong thời kì WTO,[124] và việc đàm phán để tiếp tục giảm thuế quan vẫn luôn cần thiết.

Cả đoạn thứ ba trong Lời nói đầu của Hiệp định WTO về việc giảm rào cản thương mại nói chung lẫn Điều XXVIIIbis của GATT về đàm phán thuế quan đều đề cập nguyên tắc 'có đi có lại và cùng có lợi'. Như vậy, nguyên tắc 'có đi có lại và cùng có lợi' là nguyên tắc cơ bản đầu tiên của việc đàm phán giảm thuế quan. Theo nguyên tắc này, khi một thành viên yêu cầu một thành viên khác giảm thuế quan đối với một số sản phẩm, thành viên đó cũng phải sẵn sàng giảm thuế quan của chính mình đối với một số sản phẩm theo yêu cầu của thành viên kia. Không có biện pháp cụ thể nào để xác định tính có đi có lại. Thay vào đó, mỗi thành viên tự xác định cho mình xem liệu giá trị kinh tế của việc giảm thuế quan nhận được, cũng như của việc giảm thuế quan cam kết cho thành viên khác, có tương đương nhau không.

Nghĩa vụ có đi có lại được bổ sung thêm bởi nghĩa vụ đối xử MFN như quy định tại khoản 1 Điều I của GATT - điều khoản áp dụng đối với cả 'thuế quan và các khoản thu thuộc bất kì loại nào được nhằm vào hay có liên quan tới nhập khẩu và xuất khẩu…' Theo nghĩa vụ về đối xử MFN, một khi việc giảm thuế quan được một thành viên trao cho một thành viên khác sau khi đàm phán về thuế quan, thì việc giảm thuế quan đó cũng sẽ được trao cho tất cả các thành viên khác ngay lập tức và vô điều kiện.

Kết quả của việc đàm phán thuế quan được thể hiện trong 'nhượng bộ thuế quan' hay 'ràng buộc thuế quan' - tức là cam kết không nâng mức thuế quan đối với một sản phẩm cao hơn mức đã thoả thuận. Nhượng bộ thuế quan của một thành viên được nêu ra trong Biểu nhượng bộ thuế quan của thành viên đó. Biểu này là kết quả của các cuộc đàm phán tại Vòng U-ru-goay và được đính kèm vào Nghị định thư Marrakesh của GATT và là một bộ phận không tách rời của GATT theo quy định tại khoản 7 Điều II.

Như đã nêu ở trên, 'có đi có lại và cùng có lợi' là nguyên tắc đầu tiên và cơ bản của việc đàm phán giảm thuế quan. Tuy nhiên, có ngoại lệ cho nguyên tắc 'có đi có lại này'. Ngoại lệ nảy sinh trong trường hợp đàm phán

[124] Peter Van den Bossche, Sđd, tr. 409, liệt kê ba lí do giải thích việc này: (i) Phần lớn các thành viên DCs vẫn đang duy trì mức thuế quan cao; (ii) Các thành viên phát triển vẫn duy trì thuế quan cao đối với một nhóm đối tượng các sản phẩm công nghiệp hoặc nông nghiệp nhạy cảm; (iii) Trong những thị trường cạnh tranh và trong thương mại giữa các nước láng giềng, thuế quan dù thấp vẫn tạo thành một rào cản.

về thuế quan giữa một bên là thành viên DCs và bên kia là thành viên phát triển. Khoản 8 Điều XXXVI của Phần IV (Thương mại và phát triển) của GATT quy định: 'Các thành viên phát triển không chờ đợi sự đối xử có đi có lại khi cam kết trong đàm phán thương mại, bằng việc giảm hay loại bỏ thuế quan và các rào cản khác đối với thương mại của các thành viên kém phát triển hơn'.

Nguyên tắc này được cụ thể hoá tại đoạn 5 của 'Điều khoản cho phép' ('Enabling Clause') được thông qua tại Vòng Tokyo năm 1979,[125] trong đó quy định: 'Các thành viên phát triển không được đòi hỏi... [v]à các thành viên đang phát triển không phải đưa ra các nhượng bộ không phù hợp với nhu cầu phát triển, tài chính và thương mại của các thành viên đang phát triển'.

'Điều khoản cho phép', tại khoản 6, yêu cầu các thành viên phát triển phải 'kiềm chế tối đa' trong việc tìm cách đạt được những nhượng bộ về cam kết từ các thành viên LDCs. Tuy nhiên, 'Điều khoản cho phép' cũng quy định tại phần liên quan của khoản 7 như sau:

> Các thành viên đang phát triển hi vọng rằng khả năng của họ trong việc đưa ra các đóng góp cũng như các cam kết qua đàm phán… [s]ẽ được cải thiện cùng với sự phát triển liên tục nền kinh tế của họ cũng như sự cải thiện về tình hình thương mại của họ, đồng thời họ cũng hi vọng sẽ tham gia một cách đầy đủ hơn vào khuôn khổ quyền và nghĩa vụ theo Hiệp định chung về thuế quan và thương mại.

2. Các rào cản phi thuế quan ('NTBs')

(a) Đối với thương mại hàng hoá

NTBs bao gồm các biện pháp hạn chế số lượng (*ví dụ*, hạn ngạch) và các NTBs khác. GATT đặt ra nghĩa vụ chung là cấm áp dụng các biện pháp hạn chế số lượng đối với cả xuất khẩu lẫn nhập khẩu, tại khoản 1 Điều XI với tiêu đề 'Loại bỏ chung các biện pháp hạn chế số lượng' như sau:

> Không một biện pháp cấm hay hạn chế nào khác, trừ thuế quan và các khoản thu khác, dù dưới hình thức hạn ngạch, giấy phép nhập khẩu hay xuất khẩu hoặc các biện pháp khác, sẽ được bất cứ một thành viên nào định ra hay duy trì, nhằm vào việc nhập khẩu từ lãnh thổ của bất kì thành viên nào khác, hay nhằm vào

[125] Quyết định về đối xử khác biệt và thuận lợi hơn, có đi có lại và tham gia đầy đủ hơn của các nước đang phát triển (Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries).

việc xuất khẩu hay bán hàng để xuất khẩu đến lãnh thổ của bất kì thành viên nào khác.

Ban hội thẩm trong vụ *Japan-Semi-Conductors* lưu ý rằng ngôn từ trong khoản 1 Điều XI là 'tổng quát' và áp dụng:

> … [đ]ối với tất cả các biện pháp được thiết lập hay duy trì bởi một thành viên, nhằm cấm hay hạn chế việc nhập khẩu, xuất khẩu hoặc bán để xuất khẩu sản phẩm, trừ các biện pháp được tiến hành với hình thức là thuế quan, thuế hay các khoản thu khác.[126]

Tuy nhiên, quy định cấm áp dụng các biện pháp hạn chế số lượng nêu tại khoản 1 Điều XI GATT không phải là không có ngoại lệ. Ngoài các ngoại lệ chung và ngoại lệ về an ninh nêu tại Điều XX và Điều XXI GATT (thảo luận dưới đây), bản thân Điều XI cũng có một danh sách các ngoại lệ nêu tại khoản 2. Để hạn chế ảnh hưởng của những ngoại lệ này, Điều XIII của GATT đặt ra các quy định về việc giám sát các biện pháp hạn chế số lượng. Nói ngắn gọn, Điều XIII quy định ba quy tắc, đó là: (i) Quy tắc không phân biệt đối xử; (ii) Quy tắc về phân bổ thương mại; và (iii) Quy tắc về thủ tục cấp phép.

Đối với quy tắc không phân biệt đối xử, khoản 1 Điều XIII GATT quy định:

> Không một biện pháp cấm hay hạn chế nào sẽ được bất kì một bên kí kết nào áp dụng đối với việc nhập khẩu bất kì một sản phẩm nào có xuất xứ từ lãnh thổ của một bên kí kết khác, hay với một sản phẩm xuất khẩu đến lãnh thổ của bất kì một bên kí kết khác, trừ khi những biện pháp cấm hay hạn chế tương tự cũng được áp dụng với sản phẩm tương tự có xuất xứ từ một nước thứ ba hay với một sản phẩm tương tự xuất khẩu đi một nước thứ ba.

Như vậy, khoản 1 Điều XIII quy định nghĩa vụ tương tự như nghĩa vụ MFN, nếu một thành viên áp dụng biện pháp hạn chế số lượng, với tác dụng là: nếu một thành viên đặt ra một biện pháp hạn chế số lượng đối với sản phẩm đến hay tới từ một thành viên khác, thì biện pháp hạn chế số lượng đó cũng sẽ được áp dụng đối với các sản phẩm đến hoặc tới tất cả các thành viên khác.

Trong trường hợp biện pháp hạn chế số lượng không phải là biện pháp hạn chế số lượng tuyệt đối (cấm) được áp dụng đối với việc nhập khẩu hàng hoá, thì câu hỏi quan trọng được đặt ra là: sẽ phân bổ thương mại như thế nào giữa các thành viên khác nhau cùng xuất khẩu sản phẩm đó? Điều này đặt ra quy tắc về việc phân bổ thương mại. Điều kiện áp dụng khoản 2 Điều XIII GATT được quy định như sau: 'Khi áp dụng biện pháp hạn chế nhập khẩu một sản phẩm nào đó, các thành viên sẽ cố gắng đạt đến sự phân bổ về thương mại sản phẩm đó gần nhất với tỉ lệ mà các thành viên khác nhau có thể có được trong hoàn cảnh không có các hạn chế đó…'

Cuối cùng, khi mà các biện pháp hạn chế số lượng được áp dụng dưới hình thức hạn ngạch hay hạn ngạch thuế quan, chúng sẽ được giám sát thông qua thủ tục cấp phép. Một thương nhân muốn nhập khẩu một sản phẩm chịu hạn ngạch hay hạn ngạch thuế quan, sẽ phải nộp đơn xin giấy phép nhập khẩu. Việc cấp giấy phép nhập khẩu sẽ phụ thuộc vào việc hạn ngạch đã được sử dụng hết hay chưa.[127] Điều 1 của Hiệp định về thủ tục cấp phép nhập khẩu tại Phụ lục 1A của Hiệp định WTO đặt ra các quy định về việc áp dụng và quản lí các quy tắc về cấp phép nhập khẩu, trong đó quan trọng nhất là quy định theo đó: 'Các quy tắc về thủ tục cấp phép nhập khẩu sẽ được áp dụng theo cách trung lập và được quản lí theo phương thức công bằng và bình đẳng'.[128]

Bên cạnh các rào cản về thuế quan và hạn chế số lượng tương đối dễ nhận biết, thương mại hàng hoá còn bị hạn chế bởi các NTBs khác. Không có gì ngạc nhiên, khi đây là loại rào cản đa dạng nhất và có số lượng lớn nhất trong số các NTBs. Luật WTO (bao gồm GATT và các quy định khác) có một số quy định để xử lí vấn đề NTBs, cụ thể là đối với sự thiếu minh bạch trong quy định về thương mại, việc áp dụng không công bằng và tuỳ tiện các quy định về thương mại, thủ tục hải quan, các rào cản kĩ thuật đối với thương mại và hoạt động mua sắm chính phủ.

Để loại bỏ sự thiếu minh bạch trong các quy định về thương mại, khoản 1 Điều X GATT với tiêu đề 'Công bố và quản lí các quy định về thương mại', yêu cầu các thành viên phải công bố 'nhanh chóng' các luật, quy định, các quyết định của toà án, các quy tắc hành chính có tính chất áp dụng chung và các thoả thuận quốc tế liên quan đến các vấn đề thương mại. Tuy nhiên, khoản 1 Điều X không quy định cụ thể việc này sẽ được làm như thế nào, mà chỉ nêu chung chung rằng những văn bản này phải được công bố 'theo cách cho phép chính phủ và các thương nhân làm quen được với chúng'.

[126] WTO, Báo cáo của Ban hội thẩm GATT, vụ *Japan-Semi-Conductors*, đoạn 104.

[127] Tất nhiên, việc cấp phép còn phụ thuộc vào việc thương nhân đáp ứng các yêu cầu của việc cấp phép nhập khẩu.

[128] Khoản 3 Điều 1 Hiệp định ILP.

Đối với 'các áp dụng không công bằng và tuỳ tiện các biện pháp thương mại', đây là điều đi ngược lại với việc áp dụng công bằng và đúng đắn các biện pháp thương mại. Khoản 3(a) Điều X GATT quy định rằng 'mỗi thành viên sẽ quản lí các luật, quy tắc, các quyết định hay quy chế đã nêu tại khoản 1 của điều khoản này một cách thống nhất, vô tư và hợp lí'. Cần nhấn mạnh rằng yêu cầu về sự thống nhất, vô tư và hợp lí chỉ áp dụng đối với việc quản lí các luật, quy định và phán quyết, chứ không phải với bản thân các văn bản này.

Đối với các thủ tục và trình tự hải quan, khoản 1(c) Điều VIII GATT quy định chung rằng:

> Các thành viên… [t]hừa nhận nhu cầu hạn chế tối thiểu các tác động cũng như tính phức tạp của các thủ tục về xuất nhập khẩu và nhu cầu giảm bớt và đơn giản hoá yêu cầu về chứng từ thủ tục xuất nhập khẩu.[129]

Việc thiếu các quy tắc trong luật WTO về thủ tục và trình tự hải quan dẫn đến việc Hội nghị bộ trưởng tại phiên họp ở Singapore năm 1996 đã yêu cầu Hội đồng thương mại hàng hoá 'tiến hành công việc tìm tòi và phân tích… [v]ề việc đơn giản hoá thủ tục thương mại nhằm đánh giá phạm vi của các quy tắc WTO trong lĩnh vực này'.[130] Tại Hội nghị bộ trưởng Doha năm 2001, các thành viên đã thống nhất tổ chức đàm phán về 'thuận lợi hóa thương mại' sau phiên họp thứ năm của Hội nghị bộ trưởng năm 2003. Tuy nhiên, tại phiên họp thứ năm, các thành viên đã không thống nhất được về cách thức tiến hành đàm phán về bất kì vấn đề nào đã được nêu tại Hội nghị Singapore. Năm 2004, các thành viên thống nhất rằng vấn đề thuận lợi hóa thương mại sẽ được đưa vào chương trình nghị sự của Vòng đàm phán phát triển Doha.[131]

Cuối cùng, đối với rào cản kĩ thuật, luật WTO đặt ra các quy tắc cụ thể trong hai hiệp định riêng biệt, đó là Hiệp định về rào cản kĩ thuật đối với thương mại (viết tắt là 'Hiệp định TBT') và Hiệp định về áp dụng các biện pháp kiểm dịch động thực vật (viết tắt là 'Hiệp định SPS'). Hiệp định thứ nhất điều chỉnh về các rào cản kĩ thuật đối với thương mại nói chung, còn Hiệp định thứ hai điều chỉnh về một loại rào cản riêng biệt, đó là các biện pháp kiểm dịch động thực vật. Hai hiệp định này, bản thân nó không cấm việc áp dụng các rào cản kĩ thuật đối với thương mại. Thay vào đó, chúng đặt ra các điều kiện cho việc áp dụng các rào cản đó. Khoản 2 Điều 2 Hiệp định TBT quy định: 'Các thành viên sẽ bảo đảm rằng các quy định về kĩ thuật sẽ không được chuẩn bị, thông qua hay áp dụng nhằm mục đích hay với tác dụng tạo ra những rào cản không cần thiết cho thương mại quốc tế'.

Tương tự, Điều 2 Hiệp định SPS, sau khi công nhận quyền tiến hành các biện pháp SPS tại khoản 1, tiếp tục quy định tại khoản 2 rằng: 'Bất kì biện pháp kiểm dịch động thực vật nào cũng chỉ được áp dụng trong chừng mực cần thiết để bảo vệ tính mạng và sức khoẻ của người, động vật và thực vật'.

Đáng chú ý là các hiệp định TBT và SPS đã đi vượt quá nghĩa vụ của GATT về việc không phân biệt đối xử giữa các sản phẩm nhập khẩu hoặc chống lại các sản phẩm nhập khẩu. Hai hiệp định này thậm chí còn áp đặt một số quy tắc quốc tế liên quan đến sản phẩm, đặc điểm hay việc sản xuất chúng. Nói cách khác, hai hiệp định này thúc đẩy việc làm hài hoà các quy tắc quốc gia trên cơ sở tiêu chuẩn quốc tế.

(b) Đối với thương mại dịch vụ

Thương mại dịch vụ, khác với thương mại hàng hoá, không phải đối mặt với các biện pháp ở cửa khẩu. Thay vào đó, việc sản xuất và tiêu dùng dịch vụ lại chịu sự điều chỉnh của một số lượng lớn các quy định nội địa. Do vậy, những rào cản đối với thương mại dịch vụ chủ yếu là các quy định nội địa. Những rào cản này được phân loại thành 'rào cản về tiếp cận thị trường' và 'các rào cản khác về thương mại dịch vụ'.

GATS bản thân nó không định nghĩa rõ ràng khái niệm 'rào cản về tiếp cận thị trường'. Tuy nhiên, tại khoản 2 từ (a) đến (f) Điều XVI GATS, có một danh mục tất cả các biện pháp, đó là:

- *hạn chế số lượng nhà cung ứng dịch vụ, dù dưới hình thức hạn ngạch theo số lượng, độc quyền, đặc quyền cung ứng dịch vụ hoặc yêu cầu đáp ứng nhu cầu kinh tế;*
- *hạn chế tổng trị giá các giao dịch về dịch vụ hoặc tài sản dưới hình thức hạn ngạch theo số lượng, hoặc yêu cầu phải đáp ứng nhu cầu kinh tế;*
- *hạn chế tổng số các hoạt động dịch vụ hoặc tổng số lượng dịch vụ đầu ra tính theo số lượng đơn vị dưới hình thức hạn ngạch hoặc yêu cầu về nhu cầu kinh tế;*

[129] Khoản 3 Điều VIII GATT quy định thêm là: chế tài đối với những vi phạm về quy định hải quan cũng như yêu cầu thủ tục phải tương xứng.

[130] Hội nghị bộ trưởng, *Singapore Ministerial Conference*, ngày 13/12/1996, WT/MIN(96)/DEC, đoạn 21.

[131] Đại hội đồng, *Doha Work Programme*, Quyết định ngày 01/8/2004, WT/L/579, đoạn 1(g).

- *hạn chế về tổng số thể nhân có thể được tuyển dụng trong một lĩnh vực dịch vụ cụ thể hoặc một nhà cung ứng dịch vụ được phép tuyển dụng cần thiết hoặc trực tiếp liên quan tới việc cung ứng một dịch vụ cụ thể dưới hình thức hạn ngạch hoặc yêu cầu về nhu cầu kinh tế;*

- *các biện pháp hạn chế hoặc yêu cầu các hình thức pháp nhân cụ thể hoặc liên doanh thông qua đó người cung ứng dịch vụ có thể cung ứng dịch vụ;*

- *hạn chế về tỉ lệ vốn góp của bên nước ngoài bằng việc quy định tỉ lệ phần trăm tối đa cổ phần của bên nước ngoài hoặc tổng trị giá đầu tư nước ngoài tính đơn hoặc tính gộp.*

GATS không đưa ra quy định chung nhằm cấm các 'rào cản về tiếp cận thị trường' liệt kê ở trên. Khác với GATT, GATS áp dụng cái gọi là 'danh sách khẳng định' hay cách tiếp cận 'từ dưới lên' đối với việc tự do hoá thương mại dịch vụ. Theo cách này, một thành viên sẽ chỉ bị hạn chế đối với những cam kết cụ thể mà thành viên đó đã đưa ra trong Biểu cam kết dịch vụ.[132] Khi một thành viên đưa ra cam kết về MA, thành viên đó sẽ ràng buộc với mức độ MA nêu trong Biểu cam kết dịch vụ,[133] và đồng ý không áp dụng bất kì rào cản nào về MA có thể hạn chế việc tiếp cận thị trường hơn mức độ đã chỉ rõ.[134]

Bên cạnh các rào cản về MA, thương mại dịch vụ còn có thể bị cản trở bởi hàng loạt các rào cản khác. Một số rào cản này tương tự như NTBs khác trong thương mại hàng hoá, *ví dụ*, thiếu minh bạch, hay áp dụng các biện pháp gây tác động đến thương mại dịch vụ một cách không công bằng hay tuỳ tiện. GATS xử lí những rào cản này theo cách tương tự như GATT.[135] Ngoài ra, còn có những rào cản đặc trưng của GATS, trong đó đáng chú ý là: (i) Quy định pháp luật trong nước; và (ii) Không công nhận bằng cấp hay chứng chỉ nghề nghiệp.

Như đã nói ở trên, quy định pháp luật trong nước là một trong những rào cản chủ yếu đối với thương mại dịch vụ. GATS không đưa ra quy tắc điều chỉnh việc áp dụng các quy định pháp luật trong nước. Tuy nhiên, đối với các quy định liên quan đến việc cấp phép và tiêu chuẩn kĩ thuật, khoản 5(a) Điều VI GATS quy định:

[132] Điều XVI GATS.

[133] Khoản 1 Điều XVI GATS.

[134] Khoản 2 Điều XVI GATS.

[135] Đối với 'thiếu minh bạch': so sánh Điều III GATS với Điều X GATT; về 'việc áp dụng các biện pháp không công bằng và tuỳ tiện', so sánh khoản 3 Điều VI GATS với khoản 3(a) Điều X GATT.

> Trong những lĩnh vực mà thành viên đã cam kết cụ thể, thì trong thời gian chưa áp dụng các nguyên tắc được đề ra trong những lĩnh vực này phù hợp với khoản 4, thành viên đó không được áp dụng các yêu cầu về cấp phép và chuyên môn và các tiêu chuẩn kĩ thuật làm vô hiệu hoặc giảm mức cam kết đó theo cách thức:
>
> (i) Không phù hợp với các tiêu chí đã được nêu tại điểm 4(a), (b) hoặc (c); và
>
> (ii) Tại thời điểm các cam kết cụ thể trong các lĩnh vực đó được đưa ra, các thành viên đã không có ý định áp dụng các biện pháp này.

GATS nói riêng và luật WTO nói chung không yêu cầu các thành viên phải công nhận bằng cấp hay chứng chỉ nghề nghiệp của nhau. Tuy nhiên, GATS khuyến khích các thành viên làm như vậy. Khoản 1 Điều VII GATS quy định như sau: 'Một thành viên có thể thừa nhận nền giáo dục hay các kinh nghiệm có được, yêu cầu đã được đáp ứng hay giấy phép hoặc chứng nhận do một quốc gia cụ thể cấp'.

C. *Chống bán phá giá, trợ cấp và thuế đối kháng*

Như đã nêu trên, hai hình thức phổ biến về thương mại không công bằng là bán phá giá và trợ cấp. Luật WTO đặt ra các quy tắc tương đối chi tiết đối với việc bán phá giá và điều chỉnh một số loại trợ cấp. Bên cạnh các quy định cụ thể trong GATT, cả hai loại hình thương mại không công bằng này đều được điều chỉnh bởi các hiệp định riêng, đó là Hiệp định về việc thực hiện Điều VI của Hiệp định chung về thuế quan và thương mại (Hiệp định chống bán phá giá - viết tắt là 'ADA'); và Hiệp định về trợ cấp và các biện pháp đối kháng (viết tắt là 'Hiệp định SCM').

1. Bán phá giá và các biện pháp chống bán phá giá

Điều VI GATT và khoản 1 Điều 2 ADA định nghĩa sản phẩm bán phá giá là một sản phẩm được đưa vào thị trường của một thành viên khác với giá thấp hơn 'giá trị thông thường' ('NV'). Luật WTO không quy định cấm hành vi bán phá giá, nhưng áp đặt nghĩa vụ cho các thành viên WTO và điều chỉnh hành vi bán phá giá của các thành viên WTO. Do việc bán phá giá có thể gây thiệt hại cho ngành kinh tế nội địa của nước nhập khẩu, nên hành vi đó 'bị lên án'.[136] Từ đó, cả Điều VI GATT và ADA đều đưa ra các quy tắc về nội dung và thủ tục điều chỉnh hành động của một thành

[136] Điều VI GATT.

viên khi họ phải chống lại hoặc 'khắc phục' thiệt hại từ việc bán phá giá bằng cách áp đặt các biện pháp chống bán phá giá (viết tắt là 'AD'). Cần nhấn mạnh rằng các biện pháp AD không phải là bắt buộc, mà là một lựa chọn về chính sách của thành viên WTO. Tuy nhiên, việc áp dụng các biện pháp, chính sách này phải tuân thủ một số trình tự cụ thể được quy định trong GATT và ADA.[137]

Theo Điều VI GATT và ADA, thành viên WTO có quyền áp đặt các biện pháp AD, nếu sau khi tiến hành điều tra phù hợp với ADA và trên cơ sở pháp luật hiện hành đã được thông báo cho WTO, đã xác định được rằng: (i) Có việc bán phá giá; (ii) Có thiệt hại đối với ngành kinh tế nội địa sản xuất sản phẩm tương tự; và (iii) Có mối liên hệ nhân quả giữa việc bán phá giá và sự thiệt hại. Như vậy, vấn đề cơ bản của luật WTO về chống bán phá giá là việc xác định hành vi bán phá giá, việc xác định thiệt hại cũng như việc chứng minh mối liên hệ nhân quả.

(a) Việc xác định hành vi bán phá giá

Như đã nêu trên, do bán phá giá là việc đưa một sản phẩm vào tiêu thụ tại nước khác với giá thấp hơn 'NV', nên việc xác định hành vi bán phá giá bắt đầu từ việc xác định 'NV'. Khoản 1 Điều 2 ADA định nghĩa 'NV' của sản phẩm là 'giá trị tương ứng, trong giao dịch thương mại bình thường của sản phẩm tương tự, khi được đưa đến tiêu thụ ở nước xuất khẩu'.

Cơ quan phúc thẩm trong vụ *US-Hot-Rolled Steel* cho rằng khoản 1 Điều 2 đặt ra bốn điều kiện để một giao dịch mua bán nội địa có thể được sử dụng nhằm xác định NV. Những điều kiện này là:

(i) Việc bán hàng phải diễn ra 'trong quá trình thương mại bình thường';

(ii) Hàng được bán phải là 'sản phẩm tương tự';

(iii) Sản phẩm phải 'được tiêu thụ tại nước xuất khẩu'; và

(iv) Giá cả phải 'so sánh được'.[138]

Tuy nhiên, cũng có trường hợp không có 'sản phẩm tương tự' được 'bán trong giao dịch thương mại thông thường' tại 'nước xuất khẩu', hoặc do điều kiện thị trường cụ thể, hoặc do khối lượng bán hàng tại thị trường nội địa của nước xuất khẩu thấp, nên không cho phép so sánh chính xác các giao dịch bán hàng. Trong trường hợp này, khoản 2 Điều 2 ADA đưa ra hai cách tính thay thế nhau theo đó biên độ phá giá có thể được xác định, đó là thông qua việc so sánh với giá tương ứng của sản phẩm tương tự khi được xuất khẩu sang nước thứ ba phù hợp, hoặc thông qua việc 'áp đặt giá trị thông thường'. Theo khoản 2 Điều 2 của ADA, việc 'áp đặt giá trị thông thường' được tính toán trên cơ sở chi phí sản xuất tại nước xuất xứ cộng với chi phí hợp lí về hành chính, bán hàng và chi phí chung cũng như lợi nhuận.

Sau khi xác định được NV, giá xuất khẩu (viết tắt là 'EP')[139] được so sánh với NV để xác định xem có việc bán phá giá hay không. Việc so sánh này cần phải là 'công bằng' như quy định tại khoản 4 Điều 2 ADA. Để bảo đảm việc so sánh công bằng giữa EP và NV, khoản 4 Điều 2 quy định thêm rằng cần có sự điều chỉnh đối với NV, EP hoặc cả hai. Khoản 4 Điều 2 quy định như sau:

> Đối với từng trường hợp cụ thể, có thể có sự chiếu cố hợp lí về những sự khác biệt có thể ảnh hưởng đến việc so sánh giá, trong đó bao gồm sự khác biệt về điều kiện bán hàng, thuế, khối lượng thương mại, khối lượng, đặc tính vật lí và bất kì sự khác biệt nào khác có biểu hiện ảnh hưởng đến việc so sánh giá.

Trong vụ *Argentina Tiles*, Ban hội thẩm thấy rằng khoản 4 Điều 2 đã bị vi phạm do Argentina chỉ tiến hành điều chỉnh đối với một số khác biệt vật lí nhất định mà không tiến hành điều chỉnh đối với những khác biệt khác, do đó không được coi là đã 'so sánh công bằng'.[140]

(b) Việc xác định thiệt hại

Việc thứ hai cần xác định là có 'thiệt hại' do bán phá giá hay không? Vấn đề này được quy định tại Điều 3 ADA với tiêu đề 'Xác định thiệt hại'. Thực vậy, Cơ quan phúc thẩm trong vụ *Thailand Steel* coi Điều 3 tập trung vào nghĩa vụ của một thành viên tiến hành việc xác định thiệt hại.[141] Cơ quan phúc thẩm cũng chỉ ra rằng khoản 1 Điều 3 là 'một điều khoản có tính bao trùm, đặt ra nghĩa vụ thực chất cơ bản của thành viên' đối với việc xác định thiệt hại, và 'định hướng cho các nghĩa vụ cụ thể hơn ở các khoản sau'.[142] Khoản 1 Điều 3 quy định:

[137] Điều 1 ADA.

[138] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Hot-Rolled Steel*, đoạn 165.

[139] Trong trường hợp không có giá xuất khẩu, *ví dụ* do giao dịch là thuộc loại chuyển giao nội bộ hoặc trao đổi, khoản 3 Điều 2 ADA quy định phương pháp khác để 'xác định' giá xuất khẩu. Giá xuất khẩu được xác định theo cách này dựa trên giá sản phẩm được bán cho người mua độc lập. Nếu không thể tính giá theo cách này, cơ quan điều tra sẽ tự xác định giá hợp lí để tính giá xuất khẩu.

[140] WTO, Báo cáo của Ban hội thẩm, vụ *Argentina-Tiles*, các đoạn 610-617.

[141] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Thailand Steel*, đoạn 106.

[142] Như trên.

Việc xác định thiệt hại nhằm thực hiện Điều VI GATT 1994 phải được tiến hành dựa trên bằng chứng xác thực và thông qua điều tra khách quan cả về hai khía cạnh: (a) Khối lượng sản phẩm nhập khẩu được bán phá giá và ảnh hưởng của hàng hoá được bán phá giá đến giá trên thị trường nội địa của các sản phẩm tương tự; và (b) Hậu quả của hàng nhập khẩu này đối với các nhà sản xuất các sản phẩm trên ở trong nước.

Khoản 1 Điều 3 được làm rõ tại các khoản tiếp theo về:

- Việc xác định khối lượng nhập khẩu và tác động của chúng đối với giá (khoản 2 Điều 3);
- Tác động của hàng nhập khẩu bị bán phá giá đối với ngành kinh tế nội địa (khoản 4 Điều 3);
- Mối quan hệ nhân quả giữa hàng nhập khẩu bị bán phá giá và thiệt hại (khoản 5 Điều 3);
- Đánh giá việc sản xuất nội địa của sản phẩm tương tự (khoản 6 Điều 3); và
- Việc xác định mối đe dọa của việc xảy ra thiệt hại đáng kể (các khoản 7 và 8 Điều 3).

Trong vụ *Thailand Steel*, Cơ quan phúc thẩm chỉ ra rằng khoản 1 Điều 3 cho phép cơ quan điều tra xác định một thiệt hại dựa trên tất cả lập luận và tình tiết có liên quan mà họ có được, chứ không chỉ những lập luận hay tình tiết được tiết lộ hoặc được nhận thức rõ.[143] Trong vụ *US-Hot-Rolled Steel*, Cơ quan phúc thẩm mở rộng việc tranh luận về khoản 1 Điều 3 bằng việc đưa ra định nghĩa về 'bằng chứng xác thực' và 'việc xem xét khách quan'. Theo Cơ quan phúc thẩm, 'bằng chứng xác thực' là những bằng chứng 'có tính chất khẳng định, khách quan và có thể xác minh và phải có độ tin cậy'[144] trong khi 'việc xem xét khách quan' đòi hỏi rằng ngành kinh tế nội địa và tác động của sản phẩm nhập khẩu bị phá giá được điều tra một cách không thiên vị và không ủng hộ lợi ích của bất kì một bên liên quan, hay một nhóm các bên liên quan nào trong quá trình điều tra.'[145]

[143] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Thailand Steel*, đoạn 111.

[144] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Hot-Rolled Steel*, đoạn 192.

[145] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Hot-Rolled Steel*, đoạn 193. Về trường hợp cơ quan điều tra bị cho là không khách quan, *xem*: WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Bed Linen (Điều 21.5-India)*.

Như lưu ý nêu trên, khoản 1 Điều 3 đòi hỏi việc xác định thiệt hại đối với thị trường nội địa phải bao gồm việc xem xét: (i) Khối lượng sản phẩm nhập khẩu bị bán phá giá và tác động của chúng đối với giá (khoản 2 Điều 3); và (ii) Tác động của sản phẩm nhập khẩu bị bán phá giá đối với ngành kinh tế nội địa (khoản 4 Điều 3). Đối với yêu cầu của khoản 2 Điều 3, Cơ quan phúc thẩm trong vụ *EC-Bed Linen (Điều 21.5-India)* cho rằng sản phẩm nhập khẩu từ những nhà xuất khẩu không bị coi là bán phá giá sẽ không được tính gộp vào khối lượng sản phẩm nhập khẩu bị bán phá giá của một thành viên.[146] Đối với yêu cầu thứ hai, khoản 4 Điều 3 quy định: 'Việc xem xét tác động của sản phẩm nhập khẩu bị bán phá giá đối với ngành kinh tế nội địa liên quan sẽ bao gồm việc đánh giá tất cả các yếu tố kinh tế liên quan'.

Khoản 4 Điều 3 sau đó liệt kê 15 yếu tố kinh tế liên quan, bao gồm: Các yếu tố và chỉ số có ảnh hưởng đến tình trạng của ngành kinh tế (*ví dụ*, mức suy giảm thực tế và tiềm ẩn của doanh số, lợi nhuận, sản lượng, thị phần, năng suất, tỉ lệ lãi đối với đầu tư, tỉ lệ năng lực được sử dụng); các yếu tố ảnh hưởng đến giá trong nước; mức độ của biên độ bán phá giá và ảnh hưởng bất lợi thực tế hoặc tiềm ẩn đối với luồng tiền, lượng lưu kho, công ăn việc làm, tiền lương, tăng trưởng, khả năng huy động vốn hoặc nguồn đầu tư. Khoản 4 Điều 3 cũng nói rõ rằng danh mục trên chưa phải là đầy đủ, và nhấn mạnh rằng việc xác định được một hoặc một số yếu tố cũng không nhất thiết dẫn đến kết luận mang tính quyết định. Ban hội thẩm trong vụ *Thailand-H-Beams* cho rằng danh mục các yếu tố nêu tại khoản 4 Điều 3 là ngưỡng tối thiểu bắt buộc.[147]

Thuật ngữ 'thiệt hại' trong ADA được dùng để chỉ không những thiệt hại đáng kể, mà cả những đe dọa sẽ xảy ra thiệt hại đáng kể. Khoản 7 Điều 3 ADA liệt kê các yêu cầu đối với việc xác định 'đe dọa sẽ xảy ra thiệt hại đáng kể'. Trong vụ *Mexico-Corn Syrup*, Cơ quan phúc thẩm tuyên bố rằng trong phạm vi khoản 7 Điều 3, cơ quan điều tra có thể đưa ra các giả định, vì các sự kiện trong tương lai 'không bao giờ có thể chứng minh dứt khoát bằng thực tế'.[148] Tuy nhiên, khoản 7 Điều 3 chỉ ra rằng 'tình huống mà việc bán phá giá gây thiệt hại phải được nhìn thấy trước một cách rõ ràng và phải hiện hữu.'[149] Liên quan đến vấn đề này, đáng lưu ý là khoản 8 Điều 3 ADA đòi hỏi rằng việc áp dụng các biện pháp chống bán phá giá phải được

[146] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Bed Linen (Điều 21.5-India)*, đoạn 111. Kết luận này được củng cố bằng việc xem xét khoản 5 Điều 3. Như trên, đoạn 112.

[147] WTO, Báo cáo của Ban hội thẩm, vụ *Thailand-H-Beams*, các đoạn 7.224-7.225. Cơ quan phúc thẩm khẳng định lại khía cạnh này trong Báo cáo của Ban hội thẩm.

[148] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Mexico-Corn Syrup (Điều 21.5-US)*, đoạn 85.

[149] Như trên.

cân nhắc và quyết định với 'sự cẩn trọng đặc biệt' khi xác định sự đe dọa sẽ xảy ra thiệt hại đáng kể.

(c) Chứng minh mối liên hệ nhân quả giữa sự bán phá giá hàng nhập khẩu và thiệt hại gây ra cho ngành kinh tế nội địa

Sau khi xác định được thiệt hại, bước cuối cùng cần phải làm - đó là chứng minh mối liên hệ nhân quả. Khoản 5 Điều 3 ADA quy định rằng việc chứng minh mối quan hệ nhân quả giữa sự bán phá giá hàng nhập khẩu và thiệt hại gây ra cho ngành kinh tế nội địa phải dựa trên việc xem xét tất cả các bằng chứng liên quan. Khoản 5 Điều 3 yêu cầu về việc 'không quy kết' ('non-attribution') theo đó cần xem xét bất kì các yếu tố được biết đến nào khác ngoài sản phẩm nhập khẩu bị bán phá giá, những yếu tố cũng đồng thời gây thiệt hại đối với nền kinh tế nội địa. Những thiệt hại gây ra bởi các yếu tố này không được quy kết cho các sản phẩm nhập khẩu bị bán phá giá. Trong vụ *US-Hot-Rolled Steel*, Cơ quan phúc thẩm tuyên bố rằng nếu tác động của các yếu tố khác không thể tách rời khỏi sản phẩm nhập khẩu bị bán phá giá, thì cơ quan điều tra không được quy kết thiệt hại cho sản phẩm nhập khẩu đó.[150]

2. Trợ cấp và thuế đối kháng

Như đã nêu trên, bên cạnh các quy tắc về bán phá giá, luật WTO cũng có các quy tắc về việc trợ cấp, coi đây như là hành vi thương mại không công bằng. Tuy nhiên, trợ cấp là vấn đề nhạy cảm trong quan hệ thương mại quốc tế, vì về mặt đối nội, việc trợ cấp có thể giúp theo đuổi hoặc thúc đẩy những mục tiêu chính sách kinh tế và xã hội, trong khi đó, về mặt đối ngoại, chúng có ảnh hưởng bất lợi đối với lợi ích của các đối tác thương mại khác - những đối tác có ngành kinh tế chịu sự cạnh tranh không lành mạnh với các sản phẩm được trợ cấp tại các thị trường nội địa và xuất khẩu.

Các quy tắc về trợ cấp được quy định tại Điều XVI của GATT, đồng thời tại Hiệp định về trợ cấp và các biện pháp đối kháng (Hiệp định SCM). Hiệp định SCM rất quan trọng, vì đây là lần đầu tiên trong lịch sử WTO, nó đưa ra một định nghĩa chi tiết và đầy đủ về 'trợ cấp'.[151] Khoản 1 Điều 1 Hiệp định SCM định nghĩa 'trợ cấp' là hành vi *đóng góp tài chính* của *chính phủ hoặc cơ quan của nhà nước* mà việc đóng góp đó tạo ra *lợi nhuận*.

[150] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Hot-Rolled Steel*, đoạn 223. Cơ quan phúc thẩm trong vụ *US-Hot-Rolled Steel* thực chất bác bỏ các án lệ trước đây, theo đó không cần thiết xác định riêng biệt những tác động gây thiệt hại của các yếu tố khác; WTO, Báo cáo của Ban hội thẩm GATT, vụ *US-Norwegian Salmon AD*, đoạn 550.

[151] WTO, Báo cáo của Ban hội thẩm, vụ *US-FSC*, đoạn 7.80, cho rằng đây là một trong những thành tựu quan trọng nhất của Vòng U-ru-goay trong lĩnh vực trợ cấp.

Cần lưu ý rằng theo luật WTO, trợ cấp được phân thành ba loại, bao gồm loại trợ cấp có thể bị kiện, trợ cấp không thể bị kiện và trợ cấp bị cấm. Sự khác nhau giữa các loại trợ cấp này là ở hành vi mà một thành viên có thể tiến hành. Cụ thể, đối với trợ cấp có thể bị kiện và trợ cấp bị cấm, một thành viên có thể áp dụng một trong hai cách thức để phản ứng lại việc hàng hoá được trợ cấp, đó là: đưa vấn đề ra cơ quan giải quyết tranh chấp, hoặc áp đặt thuế đối kháng để bù trừ vào việc trợ cấp. Đối với trợ cấp không thể bị kiện, các thành viên WTO không được áp dụng hai cách vừa nêu.[152] Tuy nhiên, loại trợ cấp này đã chấm dứt vào năm 2000 theo quy định tại Điều 31 Hiệp định SCM. Như vậy, từ sau năm 2000, chỉ còn tồn tại hai loại trợ cấp - là trợ cấp bị cấm và trợ cấp có thể bị kiện.

Trợ cấp bị cấm được quy định tại khoản 1 Điều 3 Hiệp định SCM, có tiêu đề 'Những quy định cấm'. Khoản 1 Điều 3 quy định:

> Trừ khi có quy định khác tại Hiệp định nông nghiệp, các khoản trợ cấp sau đây, theo định nghĩa tại Điều 1, sẽ bị cấm:
>
> *(a) Trợ cấp căn cứ vào kết quả thực hiện xuất khẩu, bao gồm những khoản trợ cấp minh họa tại Phụ lục I, theo pháp luật hay trong thực tế, dù là một điều kiện riêng biệt hay kèm theo những điều kiện khác;*
>
> *(b) Trợ cấp căn cứ vào việc ưu tiên sử dụng hàng nội địa hơn hàng nhập khẩu, dù là một điều kiện riêng biệt hay kèm theo những điều kiện khác.*

Nói một cách ngắn gọn, hai loại trợ cấp bị cấm là: (i) Trợ cấp xuất khẩu; và (ii) Trợ cấp thay thế nhập khẩu. Những khoản trợ cấp này, thường được gọi là trợ cấp 'đèn đỏ' và bị cấm, do chúng gây tác động đến thương mại, và có nhiều khả năng gây tác động bất lợi cho các thành viên khác.

Khoản 1(a) Điều 3 cấm việc trợ cấp căn cứ vào kết quả thực hiện xuất khẩu, cả 'trên thực tế' ('*de facto*') lẫn 'theo pháp luật' ('*de jure*'). Điều khoản này cũng dẫn chiếu đến Phụ lục I, tại đó có danh mục không đầy đủ 11 loại trợ cấp xuất khẩu. Cơ quan phúc thẩm trong vụ *Canada-Aircraft* thừa nhận rằng từ 'căn cứ vào' ('contingent') có cùng nghĩa pháp lí trong cả hai trường hợp 'căn cứ 'theo pháp luật' ('*de jure*') và 'trên thực tế' ('*de facto*'), nghĩa là việc trợ cấp phải 'có điều kiện' hay 'phụ thuộc vào sự tồn tại của một thứ gì đó khác'.[153] Sự khác nhau giữa việc căn cứ 'theo pháp luật' ('*de jure*') và 'trên thực tế' ('*de facto*') là ở chỗ: bằng chứng nào sẽ được

[152] Trong trường hợp trợ cấp không thể bị kiện gây ra thiệt hại bất lợi nghiêm trọng đối với ngành kinh tế của một thành viên, Uỷ ban trợ cấp có thể đưa ra khuyến nghị về việc sửa đổi chương trình này.

[153] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada-Aircraft*, đoạn 166.

sử dụng để chứng minh rằng sự trợ cấp đó căn cứ vào kết quả thực hiện xuất khẩu. Trong trường hợp 'căn cứ là 'theo pháp luật' ('*de jure*'), việc chứng minh nhất thiết phải sử dụng đến các ngôn từ trong văn bản pháp luật.[154] Đối với 'căn cứ' là dựa 'trên thực tế' ('*de facto*'), chú thích 4 của Hiệp định SCM nói rằng tiêu chuẩn chỉ được đáp ứng, nếu các chứng cứ cho thấy rằng việc trợ cấp 'trên thực tế gắn với việc xuất khẩu hay thu nhập từ xuất khẩu đang có hoặc dự kiến là sẽ có'.[155] Rõ ràng việc chứng minh sự tồn tại trợ cấp căn cứ vào kết quả xuất khẩu 'trên thực tế' ('*de facto*') là khó khăn hơn so với việc chứng minh sự tồn tại trợ cấp căn cứ kết quả xuất khẩu 'theo pháp luật' ('*de jure*'). Cơ quan phúc thẩm trong vụ *Canada-Aircraft* tuyên bố rằng tiêu chuẩn cho việc xác định 'căn cứ vào kết quả xuất khẩu''trên thực tế' ('*de facto*'), nêu tại chú thích 4, đòi hỏi có bằng chứng về ba yếu tố thực chất, đó là: (i) 'có cấp tiền trợ cấp' ('the granting of a subsidy'); (ii) 'gắn với' ('is … tied to…'); và (iii) 'việc xuất khẩu hay thu nhập từ xuất khẩu đang có hoặc dự kiến là sẽ có', ('actual or anticipated exportation or export earnings').[156]

Bên cạnh việc quy định cấm trợ cấp xuất khẩu, khoản 1 Điều 3 cũng quy định cấm trợ cấp thay thế nhập khẩu. Như định nghĩa tại khoản 1(b) Điều 3, trợ cấp thay thế nhập khẩu là trợ cấp căn cứ vào việc ưu tiên sử dụng hàng nội địa hơn so với hàng nhập khẩu. Dù các từ '*de jure*' và '*de facto*' không được ghi trong khoản 1(b) Điều 3, Cơ quan phúc thẩm trong vụ *Canada-Autos* vẫn tuyên bố rằng khoản 1(b) Điều 3 áp dụng với cả việc ưu tiên sử dụng hàng nội địa hơn so với hàng nhập khẩu 'theo pháp luật' ('*de jure*') lẫn 'trên thực tế' ('*de facto*').[157]

Loại trợ cấp không bị cấm và không bị kiện đã được thay thế bằng loại trợ cấp có thể bị kiện. Điều 5 Hiệp định SCM định nghĩa 'trợ cấp có thể bị kiện' là hình thức trợ cấp cụ thể của chính phủ cho các ngành nông nghiệp hay công nghiệp. Có ba căn cứ để phản đối một sự trợ cấp có thể bị kiện,[158] đó là:

- Việc trợ cấp gây thiệt hại cho ngành kinh tế nội địa của một thành viên khác (Điều 5(a));
- Việc trợ cấp làm vô hiệu hay phương hại đến lợi nhuận của thành viên khác (Điều 5(b)); hoặc
- Việc trợ cấp gây thiệt hại nghiêm trọng đến lợi ích của thành viên khác (Điều 5(c)).

Khái niệm 'thiệt hại nghiêm trọng' tại Điều 5(c) được giải thích tại khoản 3 Điều 6. Theo khoản 3 Điều 6, sự thiệt hại đó có thể nảy sinh nếu như nó có một trong những tác động sau: (a) Loại bỏ hay ngăn cản nhập khẩu một sản phẩm tương tự của một thành viên khác vào thị trường thành viên đang áp dụng trợ cấp; (b) Loại bỏ hay ngăn cản xuất khẩu một sản phẩm tương tự của một thành viên khác từ thị trường của một nước thứ ba; (c) Làm hạ giá của một sản phẩm được trợ cấp ở mức độ lớn so với giá của sản phẩm tương tự của một thành viên khác trên cùng một thị trường; hay gây ra ép giá, hạ giá hay giảm doanh số đáng kể trên cùng một thị trường; (d) Làm tăng thị phần trên thị trường thế giới của thành viên đang áp dụng trợ cấp cho một sản phẩm hoặc mặt hàng chưa chế biến được trợ cấp, so với mức thị phần trung bình của thành viên đó trong ba năm trước đó, hoặc việc tăng thị phần như vậy duy trì một tốc độ tăng đều trong thời kì được trợ cấp.

Các điều 5 và 7 Hiệp định SCM lần lượt quy định về các biện pháp khắc phục thương mại đa phương đối với các trợ cấp bị cấm hoặc trợ cấp có thể bị kiện. Đó là thủ tục theo đó một thành viên sẽ yêu cầu tham vấn với một thành viên khác liên quan đến việc trợ cấp bị cấm hay trợ cấp có thể bị kiện của thành viên khác đó. Nếu việc tham vấn không thành công, vấn đề sẽ được đưa ra trước Cơ quan giải quyết tranh chấp để giải quyết.[159]

Bên cạnh các biện pháp khắc phục thương mại đa phương, một thành viên phản đối một trợ cấp bị cấm hay trợ cấp có thể bị kiện, mà nó có thể gây ra những thiệt hại đối với nền kinh tế nội địa của mình, được phép áp dụng biện pháp đối kháng để bù đắp. Phần V Hiệp định SCM đặt ra các quy tắc cụ thể điều chỉnh việc tiến hành các biện pháp đối kháng.

2. Các ngoại lệ chung và ngoại lệ về an ninh

Mặc dù các nguyên tắc cơ bản của WTO trên đây đặt nền tảng cho hệ thống WTO, nhưng khi nghiên cứu các nguyên tắc này, chúng ta sẽ

154 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada-Autos*, đoạn 100.

155 WTO, Báo cáo của Ban hội thẩm, vụ *Australia-Automotive Leather II*, đoạn 9.55, để xem giải thích về từ 'gắn với'.

156 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada-Aircraft*, đoạn 169.

157 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada-Autos*, đoạn 169. Cơ quan phúc thẩm lật lại kết luận của Ban hội thẩm rằng khoản 1(b) Điều 3 chỉ liên quan đến các biện pháp 'theo pháp luật' ('*de jure*').

158 Trước đây, Điều 11 của Bộ luật Vòng Tokyo về trợ cấp liệt kê các căn cứ để chứng minh cho việc áp dụng trợ cấp nội địa. Tuy nhiên, Điều này đã bị bỏ tại Vòng Uruguay.

159 Đối với trợ cấp bị cấm, Ban hội thẩm có thể yêu cầu sự trợ giúp của Nhóm chuyên gia thường trực được thành lập theo Điều 24 Hiệp định SCM.

không thể hiểu một cách toàn diện, nếu không nói là sẽ có cái nhìn khá méo mó, trừ khi nhận thức rõ ràng rằng mỗi nguyên tắc này đều mang tính chất điều kiện. GATT và GATS, bên cạnh việc quy định ba nguyên tắc và các quy định cơ bản của luật WTO như đã nêu trên, còn đưa ra một số ngoại lệ. Mục đích của các ngoại lệ là nhằm cho phép các thành viên có thể biện minh cho các chính sách áp dụng biện pháp hạn chế thương mại, những chính sách bị coi là vi phạm luật WTO, nếu không dựa vào các ngoại lệ này. Do WTO được thành lập không chỉ nhằm nâng cao mức sống (bằng việc tự do hoá thương mại), mà còn để theo đuổi các mục tiêu lớn hơn, cụ thể là phát triển bền vững, nên sự tồn tại của các ngoại lệ là điều cần thiết, để có thể đạt được sự cân bằng giữa tự do hoá thương mại và các mục tiêu chính sách quan trọng khác mà các thành viên WTO theo đuổi. Với cách nhìn nhận như vậy, các ngoại lệ có thể được xem như các nguyên tắc của chính sách phi thương mại với chức năng là điều hoà các xung đột giữa tự do hoá thương mại và các giá trị và mối quan tâm xã hội khác.

Các hiệp định của WTO quy định về các ngoại lệ trên nhiều lĩnh vực, tuy nhiên có thể gộp chúng lại thành sáu nhóm chính, đó là: 'các ngoại lệ chung'; 'các ngoại lệ về an ninh'; 'các ngoại lệ về các biện pháp kinh tế khẩn cấp'; 'các ngoại lệ về hội nhập khu vực'; 'các ngoại lệ về cán cân thanh toán'; và 'các ngoại lệ về phát triển kinh tế'. Phần này sẽ tập trung xem xét ngoại lệ đầu tiên - ngoại lệ được coi là quan trọng nhất trong tất cả các ngoại lệ - và sau đó điểm qua về ngoại lệ thứ hai - một ngoại lệ có chức năng tương tự như ngoại lệ thứ nhất. Tuy nhiên, trước hết, cũng cần đề cập ngắn gọn về các ngoại lệ còn lại.

'Ngoại lệ về các biện pháp kinh tế khẩn cấp' được quy định tại Điều XIX GATT và được quy định cụ thể hơn tại Hiệp định về các biện pháp tự vệ. Về cơ bản, các ngoại lệ này cho phép một thành viên được áp dụng những biện pháp, vốn không phù hợp với GATT, đối với một sản phẩm đã được: 'nhập khẩu vào lãnh thổ của mình, khi có sự gia tăng nhập khẩu tương đối hay tuyệt đối so với sản xuất nội địa, và theo đó có thể gây ra hoặc đe dọa gây ra thiệt hại nghiêm trọng cho ngành kinh tế nội địa sản xuất ra các sản phẩm tương tự hoặc các sản phẩm cạnh tranh trực tiếp'.[160]

Tương tự, 'ngoại lệ về hội nhập khu vực' - được quy định tại Điều XXIV[161] và Điều V GATS, cho phép các thành viên áp dụng các biện pháp,

[160] Khoản 1(a) Điều XIX GATT; khoản 1 Điều 2 Hiệp định SA.

[161] Lưu ý rằng tại Vòng Uruguay đã thông qua Thoả thuận về cách giải thích Điều XXIV của GATT 1994.

vốn không phù hợp với luật WTO, nhằm theo đuổi mục tiêu hội nhập kinh tế khu vực. Một thành viên cũng có thể viện dẫn 'các ngoại lệ về cán cân thanh toán' được quy định tại các Điều XII và XVIII:B GATT,[162] cũng như Điều XII GATS để bảo vệ tình hình tài chính đối ngoại và cán cân thanh toán. Cuối cùng, luật WTO có một số quy tắc tạo thành 'các ngoại lệ về phát triển kinh tế' có lợi cho các thành viên DCs.

Những quy tắc này, như đã nêu trên, được xây dựng nhằm tính đến nhu cầu của các thành viên DCs - đó là cần có nhiều sự linh động về thời gian thực hiện các hiệp định của WTO. Nói cách khác, các thành viên DCs được hưởng 'sự đối xử đặc biệt và khác biệt' (viết tắt là 'S&D') trong việc thực hiện các nghĩa vụ của WTO để phục vụ lợi ích kinh tế của họ. Những quy định về S&D xuất hiện ở hầu hết các hiệp định của WTO và được Ban thư kí WTO phân chia thành 6 loại sau:

(i) Các điều khoản nhằm tăng cơ hội thương mại cho các thành viên DCs;

(ii) Các điều khoản theo đó các thành viên WTO cần bảo vệ lợi ích của các thành viên DCs;

(iii) Sự linh hoạt trong các cam kết, hành động hay việc sử dụng các công cụ chính sách;

(iv) Các giai đoạn quá độ;

(v) Hỗ trợ kĩ thuật;

(vi) Các quy định đối với các thành viên LDCs.[163]

Trong số 6 loại quy định về đối xử S&D, 'Hệ thống ưu đãi phổ cập' (viết tắt là 'GSP') là một ngoại lệ đặc biệt quan trọng và được quy định trong 'Điều khoản cho phép' ('Enabling Clause').[164] 'Điều khoản cho phép', bên cạnh việc đưa ra ngoại lệ đối với nguyên tắc có đi có lại trong đàm phán về thuế quan như nêu trên, cũng cho phép các thành viên phát triển trao ưu đãi về thuế quan cho các hàng hoá nhập khẩu từ các thành viên DCs,[165] nếu đáp ứng một số điều kiện về nội dung và thủ

[162] Lưu ý rằng tại Vòng Uruguay đã thông qua Thoả thuận về cách giải thích các điều khoản liên quan đến cán cân thanh toán GATT 1994.

[163] WTO, Uỷ ban Thương mại và Phát triển, 'Note by Secretariat: Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions', WT/COMTD/W/77, ngày 25/10/2000, đoạn 3.

[164] Như trên.

[165] 'Điều khoản cho phép', đoạn 2(a).

tục.[166] Tác dụng của quy định này là nghĩa vụ đối xử MFN không được áp dụng theo hướng có lợi cho các thành viên DCs. Hơn nữa, cũng có thể nói rằng, 'Điều khoản cho phép' thậm chí còn cho phép một thành viên phát triển trao ưu đãi về thuế quan cho 'một số', nhưng không phải tất cả, các thành viên DCs, nếu một số yêu cầu cụ thể được đáp ứng.[167]

Nội dung dưới đây sẽ phân tích về 'các ngoại lệ chung' và 'các ngoại lệ về an ninh' được quy định tại các điều khoản riêng biệt trong GATT và GATS.

A. *Các ngoại lệ chung*

Các ngoại lệ chung là những quy định quan trọng của GATT và GATS. Các ngoại lệ này được đưa vào Điều XX GATT (sau đây gọi là Điều XX), và Điều XIV GATS (sau đây gọi là Điều XIV). Điều XX quy định như sau:

> *Với bảo lưu rằng các biện pháp đề cập ở đây không được theo cách tạo ra công cụ phân biệt đối xử tùy tiện hay vô căn cứ giữa các nước có cùng điều kiện như nhau, hay tạo ra một sự hạn chế trá hình với thương mại quốc tế, không có quy định nào trong Hiệp định này được hiểu là ngăn cản bất kì bên kí kết nào thi hành hay áp dụng các biện pháp:*
>
> *(a) Cần thiết để bảo vệ đạo đức công cộng;*
>
> *(b) Cần thiết để bảo vệ sức khoẻ của con người, thực vật hoặc động vật;*
>
> *…*
>
> *(d) Cần thiết để đảm bảo việc tuân thủ luật pháp và các quy định không trái với các điều khoản trong Hiệp định này, kể cả những quy định liên quan đến áp dụng các biện pháp hải quan, duy trì hiệu lực của chính sách độc quyền theo khoản 4 Điều II và Điều XVII, bảo hộ quyền tác giả, nhãn hiệu thương mại, và các biện pháp ngăn ngừa gian lận thương mại;*
>
> *…*
>
> *(g) Liên quan đến việc bảo vệ nguồn tài nguyên thiên nhiên có thể bị cạn kiệt, nếu các biện pháp này được thực hiện kết hợp với các hạn chế sản xuất và tiêu thụ nội địa;*
>
> *…*[168]

Điều XIV bắt đầu với quy định về điều kiện áp dụng ('chapeau') giống hệt như Điều XX nêu trên. Về nội dung chính, Điều XIV quy định các biện pháp:

> *(a) Cần thiết để bảo vệ đạo đức công cộng và duy trì trật tự xã hội;*
>
> *(b) Cần thiết để vệ sức khoẻ của con người, động vật và thực vật;*
>
> *(c) Cần thiết để đảm bảo việc tuân thủ luật lệ và quy định không trái với các điều khoản của Hiệp định này bao gồm các biện pháp liên quan đến:*
>
> *(i) Việc ngăn ngừa các hành vi lừa đảo và gian lận hoặc để giải quyết hậu quả của việc không thanh toán hợp đồng dịch vụ;*
>
> *(ii) Việc bảo vệ sự riêng tư của cá nhân liên quan đến việc xử lí và phân phối thông tin cá nhân và việc bảo mật các thông tin và tài khoản cá nhân;*
>
> *(iii) An toàn;*
>
> *(d) Không phù hợp với Điều XVII, miễn là những khác biệt trong đối xử là nhằm đảm bảo việc áp dụng hoặc thu một cách công bằng và hiệu quả các loại thuế trực tiếp liên quan đến các dịch vụ hoặc các nhà cung ứng dịch vụ của các thành viên khác;*
>
> *(e) Không phù hợp với Điều II, miễn là sự khác biệt về đối xử là kết quả của một sự thoả thuận nhằm tránh việc đánh thuế hai lần hoặc các quy định về việc tránh đánh thuế hai lần trong bất kì một thoả thuận quốc tế nào khác ràng buộc các thành viên.*

Mặc dù có những khác biệt về quy định giữa Điều XX và Điều XIV, theo Cơ quan phúc thẩm, trong vụ *US-Gambling*, hai điều khoản này có cùng cấu trúc, ngôn từ và chức năng, vì vậy có thể tham khảo lẫn nhau

[166] *Xem* các quy định này tại các khoản 3 và 4 của 'Điều khoản cho phép'.

[167] Điều này xuất phát từ ý kiến của Cơ quan phúc thẩm trong vụ *EC-Tariff Preferences* theo đó nguyên tắc không phân biệt đối xử khi áp dụng GSP 'không ngăn cấm việc một thành viên phát triển trao thuế quan khác nhau cho các sản phẩm có xuất xứ từ các thành viên thụ hưởng GSP khác nhau, với điều kiện rằng việc đối xử thuế quan khác biệt đó đáp ứng những điều kiện còn lại của "Điều khoản cho phép"', và rằng 'theo quy định về không phân biệt đối xử, các nước khi trao ưu đãi cần bảo đảm sự đối xử như nhau đối với những thành viên thụ hưởng GSP có hoàn cảnh giống nhau, tức là tất cả các thành viên thụ hưởng GSP có "nhu cầu thương mại, tài chính và phát triển" mà ưu đãi đó được đưa ra để đáp ứng'. *Xem* WTO, Báo cáo của Cơ quan phúc thẩm, vụ *EC-Tariff Preferences*, đoạn 173.

[168] Sáu tiểu khoản khác (c), (e), (f), (h), (i) và (j) đề cập đến vấn đề các biện pháp liên quan đến vàng và bạc, sản phẩm do lao động tù nhân, di sản quốc gia, hiệp định hàng hoá quốc tế, nguyên liệu cần thiết cho ngành chế biến nội địa và các sản phẩm khan hiếm.

khi phân tích chúng.[169] Cơ quan phúc thẩm, khi tái khẳng định các án lệ trước đó, cũng chỉ ra 'phép phân tích gồm hai bước' đối với một biện pháp mà các thành viên muốn biện minh theo quy định này, đó là: *Thứ nhất*, phải xác định xem, liệu biện pháp đang xem xét có thuộc phạm vi của một trong các khoản của Điều XX về ngoại lệ chung hay không? *Thứ hai*, nếu biện pháp đang xem xét đúng là đã thuộc một trong các khoản của Điều này, khi đó cần phải xem xét liệu biện pháp này có thoả mãn yêu cầu tại điều kiện áp dụng của điều khoản này hay không? Do đó, việc xem xét các điều khoản sẽ được tiến hành theo trình tự hai bước đã được Cơ quan phúc thẩm nêu ra như trên. Nhưng trước khi thực hiện điều này, cần phải đưa ra một số nhận định về mục đích của hai điều khoản này và mối quan hệ giữa các biện pháp và các mục tiêu được nêu trong bốn khoản nhỏ.

Mục đích của các ngoại lệ chung là cho phép các thành viên áp dụng các biện pháp nhằm theo đuổi các mục tiêu chính sách được xem là 'hợp lệ' và 'quan trọng.' Cụm từ 'không một điều khoản nào trong Hiệp định này' trong đoạn viết về điều kiện áp dụng ngoại lệ, cho thấy các ngoại lệ được áp dụng đối với tất cả các nghĩa vụ được quy định trong GATT và GATS.[170] Mặt khác, Ban hội thẩm trong vụ *US-Section 337* đã chỉ ra rằng các ngoại lệ có 'hạn chế và 'có điều kiện'.[171] Điều này có nghĩa là một thành viên chỉ có thể biện minh cho các biện pháp không phù hợp với GATT hoặc không phù hợp với GATT hoặc GATS bằng việc viện dẫn một trong các mục tiêu chính sách nêu ra các tiểu khoản của Điều XX và Điều XIV.

Cần phải lưu ý rằng các phần có liên quan của Điều XX và Điều XIV nêu trên đều bao gồm ba tiểu khoản về ngoại lệ chung bắt đầu bằng từ 'cần thiết' và một tiểu khoản bắt đầu bằng từ 'liên quan đến'. Từ này cho thấy một mức độ liên quan giữa biện pháp và mục tiêu đề ra. Cơ quan phúc thẩm trong vụ *Korea-Various Measures on Beef* lần đầu tiên đã xem xét ý nghĩa của từ 'cần thiết' trong quy định về ngoại lệ chung. Theo Cơ quan phúc thẩm, để có thể được xem là 'cần thiết', một biện pháp không cần phải là một biện pháp không thể thiếu để đạt được mục tiêu đề ra, cũng như không cần phải là sự đối phó không thể tránh khỏi cho vấn đề đặt ra. Mặc khác, tiêu chuẩn này sẽ không được thoả mãn, nếu như có các biện pháp khác mà bên bị đơn có thể áp dụng được một cách hợp lí, không trái với Hiệp định WTO, mà vẫn có thể đạt được mục tiêu giống như biện pháp đang xem xét.

169 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Gambling*, đoạn 291.

170 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Gasoline*, đoạn 24.

171 WTO, Báo cáo của Ban hội thẩm, vụ *US-Section 337*, đoạn 5.9.

Đối với từ 'liên quan đến', Cơ quan phúc thẩm trong vụ *US-Gasoline* kết luận rằng không cần thiết phải có 'cùng loại hoặc mức độ liên quan hoặc quan hệ giữa các biện pháp đang xem xét và lợi ích hoặc chính sách mà nước đó mong muốn thúc đẩy hoặc thực hiện' như từ 'cần thiết'.[172] Trong vụ này, Cơ quan phúc thẩm đã chấp nhận rằng một biện pháp được coi là 'liên quan' đến mục tiêu, nếu nó 'chủ yếu hướng đến' mục tiêu đó.[173] Tuy nhiên, Cơ quan phúc thẩm cũng kết luận rằng phải 'một mối quan hệ thực chất' giữa biện pháp đang xem xét và mục tiêu mong muốn đạt được, và rằng một biện pháp chỉ liên quan một cách 'tình cờ hoặc không chủ đích' sẽ không thoả mãn phép thử.[174] Tiếp theo, từng mục tiêu chính sách được nêu trong các điều XX và XIV sẽ lần lượt được xem xét.

1. Tiểu khoản (a): Đạo đức công cộng

Khái niệm 'đạo đức công cộng' là khái niệm có bản chất khá khó hiểu, bao gồm một loạt các biện pháp có thể trùng lặp với các biện pháp được quy định trong các tiểu khoản khác. Mặc dù có phạm vi có thể khá rộng, ngoại lệ về đạo đức công cộng chưa bao giờ được viện dẫn trong thời kì GATT 1947. Trong án lệ của WTO, cho đến nay đã có hai vụ việc trong đó ngoại lệ này được viện dẫn. Vụ đầu tiên là *US-Gambling*, và vụ thứ hai là *China-Publications and Audiovisual Products*.

Trong vụ *US-Gambling*, các biện pháp gây ra tranh cãi là các biện pháp hạn chế việc cung ứng dịch vụ đánh bạc từ xa thông qua mạng Internet vào Hoa Kỳ. Ban hội thẩm, sau khi ghi nhận các khó khăn trong việc xác định phạm vi chính xác của 'đạo đức công cộng', lưu ý rằng tiền lệ án của Cơ quan phúc thẩm và các ngoại lệ chung khác cho thấy các thành viên cần có một mức độ tự do nhất định trong việc xác định xem đạo đức công cộng có nghĩa như thế nào trong xã hội của mình.[175] Ban hội thẩm sau đó đã dựa vào định nghĩa của 'công cộng' và 'đạo đức' theo từ điển và kết luận rằng cụm từ 'đạo đức công cộng' có nghĩa là 'tiêu chuẩn về các hành vi đúng hoặc sai được duy trì bởi hoặc thay mặt cho một cộng đồng hoặc quốc gia.'[176] Cơ quan phúc thẩm đã không thay đổi định nghĩa này, mặc dù điều này cũng không bị bên nguyên đơn phản đối một cách công khai.[177]

172 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Gasoline*, đoạn 18.

173 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Gasoline*, đoạn 18-19.

174 Như trên, đoạn 19.

175 WTO, Báo cáo của Ban hội thẩm, vụ *US-Gambling*, đoạn 6.461.

176 WTO, Báo cáo của Ban hội thẩm, vụ *US-Gambling*, đoạn 6.465.

177 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Gambling*, các đoạn 296-299.

Trong vụ thứ hai mà 'đạo đức công cộng' được viện dẫn, biện pháp được xem xét trong vụ việc đó là biện pháp hạn chế năng lực của các doanh nghiệp nước ngoài trong việc nhập khẩu và phân phối các ấn phẩm và sản phẩm nghe nhìn nước ngoài; đồng thời áp đặt các tiêu chuẩn kiểm định về nội dung đối với các sản phẩm nước ngoài nghiêm ngặt hơn so với các sản phẩm nội địa tương tự. Mặc dù Trung Quốc lập luận rằng các biện pháp của nước này là nhằm bảo vệ đạo đức công cộng, Hoa Kỳ cũng không phản đối điều này. Kết quả là, cả Ban hội thẩm và Cơ quan phúc thẩm đều mặc nhiên cho rằng các nội dung bị cấm mà các biện pháp nhằm vào có thể làm ảnh hưởng đến đạo đức công cộng của Trung Quốc.[178] Khi đưa ra nhận định như vậy, Ban hội thẩm đã xác nhận cách tiếp cận đối với từng nước, cho rằng 'nội dung và phạm vi của "đạo đức công cộng" có thể thay đổi theo từng thành viên, bởi vì chúng bị ảnh hưởng bởi các giá trị xã hội, văn hoá, đạo đức và tôn giáo của từng thành viên'.[179]

Có một sự khác biệt quan trọng giữa Điều XX(a) GATT và Điều XIV(a) GATS, đó là Điều XIV(a) GATS bao gồm các biện pháp nhằm 'duy trì trật tự công cộng' bên cạnh các ngoại lệ chung về 'đạo đức công cộng'. Trong chú thích 5 cho Điều XIV GATS, điều này đã được làm rõ hơn như sau: 'Ngoại lệ về trật tự công cộng có thể được viện dẫn chỉ khi có một mối đe doạ thực chất và đủ nghiêm trọng đối với một trong những lợi ích cơ bản của xã hội'.

Trong vụ *US-Gambling*, Ban hội thẩm kết luận rằng nghĩa theo từ điển của từ 'trật tự', theo chú thích 5 của Điều XIV(a) GATS và khái niệm 'trật tự công cộng' trong luật dân sự, 'trật tự công cộng' có nghĩa là 'việc bảo vệ các lợi ích cơ bản của một xã hội, được thể hiện trong luật và chính sách công'.[180] Cách tiếp cận này đã được Cơ quan phúc thẩm đồng ý.[181]

2. Tiểu khoản (b): Cuộc sống và sức khoẻ của người, động vật hoặc thực vật

Tiểu khoản (b) của Điều XX GATT bao gồm các biện pháp được đưa ra nhằm bảo vệ 'cuộc sống và sức khoẻ của người, động vật và thực vật'. Đây là một phép thử tương đối dễ thoả mãn, vì bất kì biện pháp nào nhằm mục đích giảm ô nhiễm không khí,[182] loại bỏ các nguy cơ gây ung thư[183] hoặc bảo vệ đời sống hoang dã[184] hoàn toàn có thể rơi vào phạm vi của tiểu khoản này.[185]

Tuy nhiên, trong vụ *China-Raw Materials*, Ban hội thẩm đã ngầm hiểu rằng: một biện pháp được coi là bị điều chỉnh bởi Điều XX(b) phải được thiết kế một cách rõ ràng là nhằm bảo vệ sức khoẻ, và nếu chỉ là một sự liên quan giữa tác động của biện pháp và mục tiêu đề ra, thì điều này là không đủ.[186]

Cuối cùng, liên quan đến vấn đề bảo vệ sức khoẻ, các biện pháp được viện dẫn theo Điều XX(b), cũng có thể được xem xét theo Hiệp định SPS,[187] vì Hiệp định này cũng áp dụng cho các biện pháp nhằm bảo vệ cuộc sống và sức khoẻ của con người, động vật và thực vật khỏi một số rủi ro nhất định. Hiệp định này, như được nêu trong Lời mở đầu, nhằm 'soạn thảo các quy tắc để áp dụng các điều khoản của GATT 1994 liên quan đến việc sử dụng các biện pháp kiểm dịch', cụ thể là Điều XX(b) GATT.

3. Tiểu khoản (d) Điều XX GATT và tiểu khoản (c) Điều XIV GATS: Ngăn ngừa các hành vi lừa đảo

Tiểu khoản (d) tương đối phức tạp hơn các tiểu khoản (a) và (b), do nó liên quan đến các biện pháp nhằm đảm bảo việc tuân thủ luật lệ và các quy định (không trái với GATT và GATS), trong khi các tiểu khoản (a) và (b) quy định các mục tiêu chính sách cụ thể. Tiểu khoản (d) của Điều XX GATT và tiểu khoản (c) của Điều XIV GATS đều bao gồm một danh sách không đầy đủ, nhằm liệt kê một số luật lệ và quy định có thể áp dụng ngoại lệ. Trong mối quan hệ này, cần lưu ý rằng hai danh sách này là khác nhau, thể hiện các đối tượng khác nhau trong GATT và GATS. Để xác định xem một biện pháp có thoả mãn yêu cầu của Điều XX(d) hay không, Cơ quan phúc thẩm trong vụ *Korea-Various Measures on Beef* đã đưa ra một phép thử gồm hai phần: '*Thứ nhất*, biện pháp đó phải là một biện pháp nhằm 'đảm bảo việc tuân thủ' các luật lệ hoặc quy định mà chúng không trái với các quy định của GATT 1994. *Thứ hai*, biện pháp đó phải 'cần thiết' để đảm bảo sự tuân thủ này'.[188]

178 WTO, Báo cáo của Ban hội thẩm, vụ *China-Publications and Audiovisual Products*, đoạn 7.763; WTO, Báo cáo của Cơ quan phúc thẩm, đoạn 148.

179 WTO, Báo cáo của Ban hội thẩm, vụ *China-Publications and Audiovisual Products*, đoạn 7.763.

180 WTO, Báo cáo của Ban hội thẩm, vụ *US-Gambling*, các đoạn 6.466-6.470.

181 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Gambling*, các đoạn 296-299.

182 WTO, Báo cáo của Ban hội thẩm, vụ *US-Gasoline*, đoạn 6.21.

183 WTO, Báo cáo của Ban hội thẩm, vụ *EC-Asbestos*, các đoạn 8.173, 8.193-8.194.

184 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Shrimp*, các đoạn 28, 127, 146.

185 Dù rằng điều này không có nghĩa là không có những biện pháp nằm bên ngoài ngoại lệ này. *Ví dụ*, Ban hội thẩm trong vụ *EC-Tariff Preferences* thấy rằng một hệ thống trao ưu đãi thuế quan để khuyến khích các nước đấu tranh với việc sản xuất và buôn bán ma tuý không nằm trong ngoại lệ nêu tại Điều XX(b) GATT.

186 WTO, Báo cáo của Ban hội thẩm, vụ *China-Raw Materials,* đoạn 7.515.

187 Phụ lục 1A Hiệp định WTO.

188 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Korea-Various Measures on Beef*, đoạn 157.

Yếu tố đầu tiên đã được Ban hội thẩm chia nhỏ hơn nữa trong vụ *Canada-Wheat Exports and Grain Imports* thành hai phần: (i) Biện pháp đó phải đảm bảo việc tuân thủ các luật lệ và quy định; và (ii) Các luật lệ và quy định đó không trái với GATT.[189]

Đối với câu hỏi thứ hai, Cơ quan phúc thẩm trong vụ *Mexico-Taxes on Soft Drinks* lưu ý rằng 'các luật lệ và quy định' được hiểu là các luật và quy định pháp luật trong nước, và không bao gồm các nghĩa vụ theo luật quốc tế.[190]

4. Tiểu khoản (g) Điều XX GATT: Bảo tồn các tài nguyên thiên nhiên có thể bị cạn kiệt

Ngoại lệ liên quan đến việc bảo tồn các nguồn tài nguyên thiên nhiên có thể bị cạn kiệt chỉ có trong Điều XX GATT và không có một tiểu khoản tương tự trong GATS. Điều XX(g) đưa ra hai điều kiện để viện dẫn biện pháp này: *Một là*, biện pháp này phải liên quan đến 'việc bảo tồn các nguồn tài nguyên thiên nhiên có thể bị cạn kiệt'; và *hai là*, 'biện pháp này phải được thực hiện một cách hiệu quả cùng với các hạn chế sản xuất và tiêu dùng nội địa'.

Trong án lệ của WTO, cụm từ 'các tài nguyên thiên nhiên có thể bị cạn kiệt' đã được giải thích theo nghĩa rộng, không chỉ giới hạn ở các khoáng sản và các tài nguyên phi sinh vật,[191] mà còn bao gồm cả 'không khí trong lành'[192] và 'động vật hoang dã'.[193]

Điều kiện thứ hai đòi hỏi một sự đối xử công bằng và thoả đáng giữa việc tiêu thụ và sản xuất trong nước và nước ngoài. Cơ quan phúc thẩm trong vụ *US-Gasoline* đã giải thích cụm từ 'được thực hiện một cách hiệu quả cùng với các hạn chế sản xuất và tiêu dùng nội địa' đồng nghĩa với 'một sự công bằng trong việc áp đặt các hạn chế, dưới danh nghĩa là bảo tồn, đối với sản xuất và tiêu thụ các tài nguyên thiên nhiên có nguy cơ bị cạn kiệt'.[194] Cơ quan này cho rằng một biện pháp rõ ràng sẽ không thoả mãn yêu cầu của Điều XX(g), nếu không có một hạn chế nào được áp đặt đối với việc sử dụng và tiêu thụ các sản phẩm nội địa tương tự. Tuy nhiên, như cơ quan thừa nhận, việc yêu cầu một sự đối xử giống hệt giữa các sản phẩm nội địa và nhập khẩu sẽ làm cho Điều XX(g), vốn dĩ không phù hợp với Điều III GATT (về NT), mất đi chức năng của nó với tư cách là một ngoại lệ.[195] Báo cáo của Ban hội thẩm trong vụ *China-Rare Earths*,[196] được Cơ quan phúc thẩm khẳng định,[197] nhận xét:

> … Tiêu chuẩn công bằng được đáp ứng khi Thành viên đưa ra biện pháp cho thấy rằng bên cạnh các biện pháp không phù hợp WTO của mình, thành viên này cũng đã áp dụng những hạn chế thực sự trong việc tiêu thụ hay sản xuất trong nước đối với tài nguyên chịu sự điều chỉnh của các biện pháp không phù hợp WTO của mình. Những biện pháp nội địa này phải chia sẻ gánh nặng bảo tồn giữa những nhà tiêu thụ trong và ngoài nước theo một cách thức công bằng hay cân bằng. Tuy nhiên, 'công bằng' theo tiểu khoản (g) không có đòi hỏi Ban hội thẩm phải đánh giá tác động của những hạn chế được đưa ra. Thay vào đó, 'sự cân bằng' hay 'công bằng' theo tiểu khoản (g) là có tính cấu trúc và điều chỉnh. Bản chất cân bằng hay công bằng của những hạn chế về nội địa và nước ngoài cần được thấy rõ từ thiết kế, cấu trúc và việc xây dựng biện pháp được nêu ra.[198]

Như đã nêu trên (và cũng được nêu trong vụ *China-Rare Earths*), sau khi cho rằng một biện pháp rơi vào phạm vi điều chỉnh của một trong các tiểu khoản của Điều XX và Điều XIV, điều kiện áp dụng của điều khoản này cần phải được xem xét để xác định xem liệu biện pháp đó có thoả mãn các yêu cầu của ngoại lệ chung hay không. Điều kiện áp dụng của Điều XX và Điều XIV bao gồm hai yêu cầu quan trọng, đó là: (i) Không được 'phân biệt đối xử tuỳ tiện và vô căn cứ' trong việc áp dụng biện pháp; và (ii) Biện pháp đó không phải là sự 'hạn chế trá hình đối với thương mại quốc tế'. Nói cách khác, điều này liên quan đến cách thức mà biện pháp được áp dụng. Cơ quan phúc thẩm trong vụ *US-Gasoline*, trong một đoạn quan trọng đã giải thích mối quan hệ của việc cấm 'hạn chế trá hình đối với thương mại quốc tế' và hai quy định cấm khác trong đoạn về điều kiện áp dụng ngoại lệ, cụ thể là 'phân biệt đối xử tuỳ tiện' và 'phân biệt đối xử vô căn cứ'.

189 WTO, Báo cáo của Ban hội thẩm, vụ *Canada-Wheat Exports and Grain Imports*, đoạn 6.218.

190 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Mexico-Taxes on Soft Drinks*, các đoạn 69-71.

191 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Shrimp*, đoạn 127.

192 WTO, Báo cáo của Ban hội thẩm, vụ *US-Gasoline*, đoạn 6.37. Ở giai đoạn phúc thẩm, Cơ quan phúc thẩm không xem xét điểm này vì lí do thủ tục, nhưng Cơ quan phúc thẩm cũng không bác bỏ ý kiến của Ban hội thẩm.

193 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Shrimp*, đoạn 127, tr. 31.

194 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Gasoline*, tr. 21.

195 Như trên.

196 See WTO, Panel Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*.

197 *See* WTO, Appellate Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*.

198 See WTO, Panel Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, para 7.337

> Do đó, 'phân biệt đối xử tuỳ tiện', 'phân biệt đối xử vô căn cứ', và 'hạn chế trá hình' đối với thương mại quốc tế có thể được xem xét cùng với nhau; cụm từ này sẽ giúp làm sáng tỏ cụm từ kia. Rõ ràng 'hạn chế trá hình' bao gồm sự đối xử phân biệt trá hình trong thương mại quốc tế, và những hạn chế hoặc phân biệt đối xử bị che giấu hoặc không thông báo không phải là nghĩa đầy đủ của cụm từ 'hạn chế trá hình'. Chúng tôi cho rằng 'hạn chế trá hình', dù cụm từ này có bao gồm thêm bất cứ điều gì đi nữa, có thể được hiểu một cách chính xác là bao gồm các hạn chế cấu thành phân biệt đối xử tuỳ tiện hoặc vô căn cứ trong thương mại quốc tế, được che đậy bằng một biện pháp mà về hình thức thì đáp ứng các điều kiện của một ngoại lệ được nêu trong Điều XX… [Y]ếu tố cơ bản đã được tìm thấy trong mục tiêu và đối tượng của việc tránh lạm dụng hoặc sử dụng một cách bất hợp pháp các ngoại lệ đối với các quy định thực chất trong Điều XX.[199]

Liên quan đến điều kiện thứ nhất - không 'phân biệt đối xử tuỳ tiện hoặc vô căn cứ', vụ việc quan trọng nhất là vụ *US-Shrimp*. Trong vụ này, biện pháp của Hoa Kỳ,[200] được xem như chịu sự điều chỉnh của Điều XX(g), được kết luận là cấu thành một sự phân biệt đối xử 'tuỳ tiện' và 'vô căn cứ'.[201] Biện pháp của Hoa Kỳ được xem là 'phân biệt đối xử vô căn cứ', bởi vì biện pháp này yêu cầu các nước khác phải áp dụng 'về cơ bản một chương trình điều chỉnh toàn diện tương tự' như chương trình mà Hoa Kỳ đang áp dụng một cách thiếu linh hoạt, không tính đến các điều kiện khác nhau ở các nước khác nhau.[202] Thêm vào đó, Cơ quan phúc thẩm cũng kết luận rằng biện pháp được áp dụng theo cách 'phân biệt đối xử tuỳ tiện', bởi vì quy trình chứng nhận để các nước có thể nhập khẩu tôm vào Hoa Kỳ không minh bạch, và các bên nguyên đơn đã bị Hoa Kỳ từ chối áp dụng nguyên tắc tuân thủ đúng các thủ tục ('due process').[203]

Trong vụ *Brazil-Retreated Tyres*, Cơ quan phúc thẩm đã phân tích một cách chi tiết hơn lập luận của mình trong vụ *US-Shrimp*. Theo Cơ quan phúc thẩm, việc áp dụng một biện pháp phân biệt đối xử sẽ là 'tuỳ tiện hoặc vô căn cứ', khi 'việc phân biệt đối xử không có mối liên quan hợp lí nào với mục tiêu' trong tiểu khoản của Điều XX, 'hoặc đi ngược lại với mục tiêu đó'.[204]

Đối với điều kiện thứ hai - 'hạn chế trá hình đối với thương mại quốc tế', án lệ trong các vụ việc trước đây của GATT đã khẳng định rằng một sự hạn chế có thể là 'trá hình', nếu như nó không được thông báo một cách rộng rãi.[205] Một số yếu tố khác cũng có thể cho thấy sự trá hình. *Ví dụ*, trong khuôn khổ của Hiệp định SPS, Cơ quan phúc thẩm trong vụ *Australia-Salmon* kết luận rằng các biện pháp của Australia hạn chế việc nhập khẩu cá hồi từ Canada cấu thành 'một sự hạn chế trá hình đối với thương mại quốc tế', bởi vì một loạt các 'dấu hiệu cảnh báo' và 'các yếu tố bổ sung', kể cả việc các biện pháp được áp dụng mà không dựa trên yêu cầu về đánh giá rủi ro theo quy định tại khoản 1 Điều 5 Hiệp định SPS. Mặc dù yêu cầu đánh giá rủi ro không được quy định trong Điều XX GATT, nhưng cách tiếp cận của Cơ quan phúc thẩm trong vụ này đã có vai trò quan trọng trong việc chỉ ra khả năng sử dụng tổng hợp các dấu hiệu, nhằm chứng minh sự thiếu cơ sở trong việc áp dụng một biện pháp, và hỗ trợ trong việc xác định xem liệu có sự hạn chế trá hình đối với thương mại quốc tế hay không. Mặt khác, theo Ban hội thẩm trong vụ *EC-Asbestos*, nếu chỉ có một thực tế là biện pháp này có tác động bảo hộ các nhà sản xuất nội địa, thì điều này không đủ để chứng minh rằng biện pháp này là trá hình.[206]

B. *Ngoại lệ về an ninh*

Bên cạnh các ngoại lệ chung, Điều XXI GATT và Điều XIVbis GATS quy định các ngoại lệ mà các thành viên có thể viện dẫn để biện minh cho các hành động của mình liên quan đến các lợi ích an ninh thiết yếu. Điều XXI GATT quy định như sau:

199 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Gasoline*, tr. 25.

200 Đây là lệnh cấm nhập khẩu vào Hoa Kỳ các sản phẩm tôm từ những nước không yêu cầu người đánh bắt tôm thương mại phải sử dụng thiết bị lọc rùa (Turtle Excluder Devices). *Xem:* WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Shrimp*, các đoạn 3-5.

201 Lưu ý rằng, sau khi đi đến kết luận, Cơ quan phúc thẩm rất cẩn thận giải thích rằng quyết định của mình không ngăn cản việc các thành viên khác áp dụng các biện pháp giống như Hoa Kỳ, với điều kiện là các biện pháp đó không vi phạm các yêu cầu nêu trong điều kiện áp dụng. *Xem:* WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Shrimp*, các đoạn 185-186.

202 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Shrimp*, đoạn 164. Cơ quan phúc thẩm cũng thấy rằng các biện pháp này cũng dẫn đến việc loại bỏ cả những con tôm được bắt bằng phương pháp có sử dụng thiết bị lọc rùa, và rằng Hoa Kỳ đã 'có chọn lọc' trong việc đàm phán các thoả thuận quốc tế về nhập khẩu tôm với các thành viên khác. Theo Cơ quan phúc thẩm, tác động tổng hợp của những khác biệt này cũng tạo nên 'sự phân biệt đối xử không thể biện minh được'. *Xem*: WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Shrimp*, các đoạn 166-176.

203 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *US-Shrimp*, các đoạn 179-181, 184.

204 WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Brazil-Retreated Tyres*, các đoạn 226-227.

205 GATT, Báo cáo của Ban hội thẩm, vụ *US-Tuna from Canada*, đoạn 4.8, vụ *United States-Automotive Springs*, GATT BISD 30S/107 (11 June 1982), đoạn 56, được trích dẫn trong Báo cáo của Ban hội thẩm, vụ *EC-Asbestos*, đoạn 8.233, n 194.

206 WTO, Báo cáo của Ban hội thẩm, vụ *EC-Asbestos*, đoạn 8.239.

Không một điều khoản nào trong Hiệp định này có thể được hiểu là:

(a) Yêu cầu một bên kí kết đưa ra hoặc tiết lộ bất kì thông tin nào mà bên kí kết này cho rằng đi ngược lại với các lợi ích an ninh thiết yếu; hoặc

(b) Ngăn không cho bất kì bên kí kết nào thực hiện các biện pháp mà bên kí kết này cho rằng cần thiết để bảo vệ các lợi ích an ninh thiết yếu của mình

(i) Liên quan đến nguyên liệu phân hạch hạt nhân hoặc các nguyên liệu sản sinh ra chúng;

(ii) Liên quan đến việc mua bán vũ khí, đạn dược và các thiết bị quân sự và việc buôn bán các hàng hoá và nguyên liệu khác trực tiếp hoặc gián tiếp nhằm mục đích trang bị cho quân đội;

(iii) Thực hiện trong thời gian chiến tranh hoặc các thời điểm khẩn cấp trong quan hệ quốc tế; hoặc

(c) Ngăn không cho bất kì bên kí kết nào thực hiện các hành động theo nghĩa vụ của mình theo Hiến chương Liên hợp quốc nhằm duy trì hoà bình và an ninh quốc tế.

Các ngoại lệ về an ninh có thể có chức năng tương tự như ngoại lệ chung, khi chúng cho phép các thành viên biện minh các biện pháp hạn chế thương mại của mình dựa vào các lí do phi thương mại. Tuy nhiên, về mặt ngôn từ, giữa các khoản của hai loại ngoại lệ, vẫn có những sự khác biệt nhất định và những khác biệt này có thể có ý nghĩa quan trọng. *Thứ nhất*, các ngoại lệ an ninh không có đoạn đầu ghi điều kiện áp dụng. Điều này có thể được hiểu là các ngoại lệ an ninh không chịu sự điều chỉnh của việc cấm phân biệt đối xử tuỳ tiện hoặc vô căn cứ. *Thứ hai*, các thành viên chỉ cần phải xem xét rằng các lợi ích an ninh thiết yếu của mình là có liên quan, để có thể viện dẫn ngoại lệ về an ninh.[207] Do đó, có ý kiến cho rằng Điều XXI GATT, đặc biệt là khoản (b), trao cho một thành viên rất nhiều tự do trong việc áp dụng các biện pháp an ninh quốc gia.[208] Trong trường hợp này, cần phải duy trì một mức độ 'rà soát pháp lí' nhất định; nếu không, điều khoản này rất dễ bị lạm dụng mà không được đền bù.[209]

[207] Ji Yeong Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security', (2016), 19 *Journal of International Economic Law* 417.

[208] Peter Van den Bossche, Sđd, tr. 666.

[209] GATT's Panel Statement, *Activities 1986,* tr. 58-59.

Trong thời kì GATT 1947, đã có một số vụ việc trong đó Điều XXI GATT có thể được viện dẫn.[210] Vụ *US-Export Restrictions (Czechoslovakia)* [1949] là vụ việc đầu tiên và duy nhất trong đó ngoại lệ về an ninh được viện dẫn một cách thành công.[211] Hoa Kỳ đã viện dẫn Điều XXI GATT 1947 để biện minh cho việc áp dụng quy chế giấy phép xuất khẩu mà Tiệp Khắc cho là đã được thực hiện trái với Điều I GATT 1947. Tại cuộc họp mà các bên kí kết đã bỏ phiếu cho rằng Hoa Kỳ đã thực hiện đúng các nghĩa vụ của mình, đại diện của Anh Quốc tuyên bố rằng: 'Hành động của Hoa Kỳ là hợp lí, bởi vì mỗi quốc gia cần phải có biện pháp cuối cùng mà quốc gia này có thể sử dụng liên quan đến an ninh của chính quốc gia mình'.[212] Tuy nhiên, trong vụ việc gây nhiều tranh cãi *US-Trade Measures Affecting Nicaragua*, Ban hội thẩm, sau khi kết luận rằng không thể xác định được tính hợp pháp của việc Hoa Kỳ viện dẫn Điều XXI GATT 1947 do những quy định về thẩm quyền, đã đặt ra một câu hỏi:

> Nếu chúng ta thừa nhận rằng việc giải thích Điều XXI hoàn toàn phụ thuộc vào bên kí kết viện dẫn điều này, thì làm sao các bên kí kết có thể đảm bảo rằng ngoại lệ chung đối với mọi nghĩa vụ trong Hiệp định không bị viện dẫn một cách thái quá hoặc nhằm những mục đích không phải là mục đích được nêu ra trong điều khoản này?[213]

Cả Điều XXI GATT và XIV GATS đều chưa được xem xét thấu đáo trong bất kì vụ việc nào trong thời kì WTO.[214] Câu hỏi trên do vậy vẫn còn để ngỏ.

[210] WTO, Báo cáo của Ban hội thẩm, GATT, vụ *US-Export Restrictions (Czechoslovakia)*; WTO, Báo cáo của Ban hội thẩm, GATT, vụ *US-Trade Measures Affecting Nicaragua* (chưa thông qua); Vụ *Trade Measures Taken by the European Community against the Socialist Federal Republic of Yugoslavia*, (Communication from the European Communities). Vụ *United States-Imports of Sugar from Nicaragua* có thể là một án lệ nữa để tham khảo, nhưng Hoa Kỳ đã từ chối viện dẫn bất cứ ngoại lệ nào.

[211] Trong vụ *Trade Measures Taken by the European Community against the Socialist Federal Republic of Yugoslavia,* Ban hội thẩm đã không được thành lập do có sự không rõ ràng về vấn đề thừa kế quy chế của Liên bang cộng hoà xã hội chủ nghĩa Nam Tư và Liên bang cộng hoà Nam Tư. Trong vụ *US-Trade Measures Affecting Nicaragua*, Ban hội thẩm bị hạn chế về thẩm quyền nên không xem xét được ngoại lệ về an ninh.

[212] Contracting Parties, 3rd Session, *Summary Record of the Twenty-Second Meeting*, ngày 08/6/1949, tr. 3.

[213] WTO, Báo cáo của Ban hội thẩm, GATT, vụ *US-Trade Measures Affecting Nicaragua*, đoạn 5.17.

[214] Ba vụ tranh chấp mà trong đó Điều XXI được viện dẫn đều đã được giải quyết trong quá trình tham vấn. Ba vụ này là *US - The Cuban Liberty and Democratic Solidarity Act* in 1996 (DS38), *Nicaragua - Measures Affecting Imports from Honduras and Colombia* (Colombia) in 2000 (DS188) và *Nicaragua - Measures Affecting Imports from Honduras and Colombia* (Honduras) in 2000 (DS201)

Mục 3. THƯƠNG MẠI HÀNG HOÁ VÀ CÁC HIỆP ĐỊNH CỦA WTO

Mục này trước hết giới thiệu tổng quan khung pháp lí của WTO điều chỉnh thương mại hàng hoá quốc tế; sau đó sẽ trình bày ngắn gọn những khía cạnh chính của thương mại hàng hoá quốc tế trong 6 tiểu mục, bao gồm: (1) Thuế quan - rào cản chính trong thương mại quốc tế; (2) Nông nghiệp - lĩnh vực đặc biệt và quan trọng; (3) Các vấn đề liên quan đến tiêu chuẩn và an toàn, đặc biệt là các biện pháp kiểm dịch động thực vật và các rào cản kĩ thuật đối với thương mại; (4) Dệt may - giống như nông nghiệp, là lĩnh vực thương mại đặc thù; (5) Các biện pháp khắc phục thương mại và các biện pháp đối phó với những tình huống không thể lường trước trong thương mại quốc tế, trong đó đặc biệt quan trọng là các biện pháp chống bán phá giá, chống trợ cấp và tự vệ; (6) Các vấn đề liên quan đến rào cản phi thuế quan trong thương mại, bao gồm những vấn đề quan trọng nhất là cấp phép nhập khẩu, xác định trị giá tính thuế hải quan, giám định hàng hoá trước khi chuyển hàng và các biện pháp đầu tư liên quan đến thương mại.[215] Mỗi tiểu mục sẽ mở đầu bằng phần tổng quan giới thiệu ngắn gọn về vấn đề sẽ trình bày, sau đó đề cập phạm vi của vấn đề và các định nghĩa có liên quan được đề cập trong hiệp định về vấn đề đó, và cuối cùng trình bày về những khía cạnh chính của vấn đề. Lời nói đầu và các điều khoản được đề cập trong mỗi tiểu mục là lời nói đầu và các điều khoản của hiệp định WTO đề cập tại tiểu mục đó.

Tổng quan về khung pháp lí

Theo Hiệp định WTO, thương mại hàng hoá được điều chỉnh bởi hệ thống các hiệp định có cấu trúc như sau:[216]

- *Thứ nhất*, hệ thống này bắt đầu bằng việc quy định các nguyên tắc chung như MFN, NT trong GATT;
- *Tiếp đó* là các hiệp định bổ sung và các phụ lục để điều chỉnh những yêu cầu đặc thù của từng lĩnh vực thương mại hoặc các vấn đề cụ thể. Các hiệp định này bao gồm: Hiệp định về nông nghiệp, Hiệp định về việc áp dụng các biện pháp kiểm dịch động thực vật, Hiệp định về dệt may, Hiệp định về các rào cản kĩ thuật đối với thương mại, Hiệp định về các biện pháp đầu tư liên quan đến thương mại; Hiệp định về thực thi Điều VI (chống bán phá giá); Hiệp định về thực thi Điều VII (định giá hải quan), Hiệp định về giám định hàng hoá trước khi xuất hàng; Hiệp định về quy tắc xuất xứ; Hiệp định về thủ tục cấp phép nhập khẩu, Hiệp định về trợ cấp và các biện pháp đối kháng và Hiệp định về các biện pháp tự vệ.
- *Cuối cùng* là các biểu cam kết dài và chi tiết hoặc danh sách những cam kết cụ thể của từng thành viên cho phép các loại sản phẩm cụ thể của nước ngoài tiếp cận thị trường của mình. Các cam kết này có hình thức: Đối với hàng hoá nói chung là cam kết ràng buộc về thuế quan; đối với một số sản phẩm nông nghiệp là sự kết hợp giữa thuế quan và hạn ngạch.[217]

GATT được cấu thành bởi:

- Các quy định trong GATT 1947;
- Các quy định của những văn bản pháp lí có hiệu lực theo GATT 1947 trước ngày Hiệp định về thành lập WTO có hiệu lực, như các văn kiện và chứng nhận liên quan đến cam kết thuế quan; văn kiện gia nhập v.v..
- Các thoả thuận liên quan đến việc giải thích một số điều của GATT 1994 điều chỉnh các vấn đề pháp lí như các biểu cam kết về nhượng bộ thuế quan, doanh nghiệp nhà nước, cán cân thanh toán, các liên minh hải quan và khu vực thương mại tự do, các miễn trừ, sửa đổi các biểu cam kết trong GATT, và trường hợp không áp dụng của GATT.
- Nghị định thư Marrakesh về GATT 1994.

1. Thuế quan

A. *Tổng quan*

Thuế quan được điều chỉnh chủ yếu bằng GATT 1994 (sau đây gọi là 'GATT'). Có thể nhận thấy sự ưu tiên mà Hiệp định này dành cho thuế quan so với các biện pháp bảo hộ khác. Thuế quan có thể được áp dụng trên cơ sở từng đơn vị hoặc trên cơ sở giá trị của hàng hoá ('*ad valorem*'). Các nhượng bộ thuế quan mà các nước đưa ra khi gia nhập WTO hoặc trong các cuộc đàm phán được ghi nhận trong biểu cam kết của những

[215] Cách phân loại này được sử dụng trong tài liệu: The WTO Secretariat, *Understanding the World Trade Organization*, (2003), http://www.wto.org.

[216] Ban thư kí WTO, như trên, tr. 1.

[217] WTO, http://wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm.

nước này là các mức thuế quan 'ràng buộc'. Theo Điều II GATT, các biểu cam kết này cấu thành bộ phận không tách rời của GATT. Chúng được xây dựng theo cách tiếp cận 'danh sách khẳng định', nghĩa là không có cam kết nào đối với các sản phẩm không nằm trong biểu cam kết. Đối với những sản phẩm được liệt kê, các thành viên sẽ không áp dụng mức thuế quan cao hơn mức trần cam kết trong biểu cam kết của mình đối các thành viên WTO.[218]

B. *Định nghĩa*

Trong khuôn khổ WTO, thuế quan được hiểu là loại thuế áp dụng tại cửa khẩu đối với hàng hoá dịch chuyển từ một lãnh thổ hải quan này sang một lãnh thổ hải quan khác (Điều I GATT). Nó thường là thuế nhập khẩu. Tuy nhiên, một số thành viên WTO cũng áp dụng thuế xuất khẩu. Mặc dù vậy, mối quan tâm chính của GATT/WTO từ trước đến nay vẫn luôn là thuế nhập khẩu. Cần nói rõ thuế quan không phải là 'thuế nội địa', *ví dụ*, thuế giá trị gia tăng (khoản 2 Điều III GATT), cũng không phải là phí hay lệ phí nhập khẩu (Điều VIII GATT).

C. *Những khía cạnh chính của thuế quan*

1. Tính ràng buộc

Nhượng bộ thuế quan mà một thành viên WTO đưa ra có 'giá trị ràng buộc' và là mức thuế trần, không phải ở mức sàn. Điều đó có nghĩa rằng thành viên đó không thể áp dụng mức thuế suất cao hơn so với mức ràng buộc đã cam kết. Liên quan đến hiệu lực ràng buộc của thuế quan, các nước phát triển đã tăng số lượng dòng sản phẩm nhập khẩu chịu thuế suất 'ràng buộc' (tức là thuế suất đã cam kết và khó có thể tăng lên) từ mức 78% tổng số dòng lên mức 99%. Đối với các DCs, có sự gia tăng đáng kể từ 21% lên 73%. Các nền kinh tế trong quá trình chuyển đổi từ kinh tế kế hoạch hoá tập trung cũng tăng số dòng sản phẩm nhập khẩu chịu thuế cam kết ràng buộc từ 73% lên 98%. Tất cả đồng nghĩa với mức độ an toàn thị trường cao hơn đáng kể dành cho các thương nhân và nhà đầu tư.[219]

[218] Arvind Panagariya, *Core WTO Agreements: Trade in Goods and Services and Intellectual Property*, tr. 9.

[219] Ban thư kí WTO, như trên, tr. 16.

2. Thuế quan phải được giảm dần

Ngoài tính ràng buộc, thuế quan còn có lộ trình giảm dần. Theo quy định của WTO, hầu hết lộ trình giảm thuế quan của các nước phát triển được chia thành các giai đoạn thực hiện trong vòng 5 năm kể từ ngày 01/01/1995. Kết quả là sẽ giảm 40% số dòng thuế đối với các sản phẩm công nghiệp, giảm từ mức thuế suất trung bình 6,3% xuống 3,8%. Giá trị của các sản phẩm nhập khẩu được miễn thuế từ các DCs sẽ tăng từ mức 20% lên 44%. Ngoài ra, số dòng sản phẩm phải chịu mức thuế suất cao cũng giảm. Tỉ lệ sản phẩm nhập khẩu vào các nước phát triển từ mọi nguồn đang chịu mức thuế cao hơn 15% sẽ giảm xuống từ 7% đến 5%. Tỉ lệ các sản phẩm xuất khẩu của các DCs đang chịu mức thuế trên 15% tại các nước phát triển sẽ giảm xuống còn từ 9% đến 5%.[220]

2. Nông nghiệp[221]

A. *Tổng quan*

Hiệp định về nông nghiệp (gọi tắt là 'Hiệp định AoA') có hiệu lực từ ngày 01/01/1995. Lời nói đầu của Hiệp định này ghi nhận mục tiêu lâu dài của quá trình cải cách, được khởi động trong chương trình cải cách của Vòng đàm phán Uruguay, là xây dựng một hệ thống thương mại về nông nghiệp công bằng và theo định hướng thị trường. Chương trình tái cấu trúc bao gồm các cam kết cụ thể nhằm giảm sự hỗ trợ và bảo hộ trong các lĩnh vực hỗ trợ nội địa, trợ cấp xuất khẩu và tiếp cận thị trường thông qua việc thiết lập các quy tắc mạnh hơn, hiệu quả thực thi cao hơn của GATT. Đồng thời, Hiệp định cũng xem xét những vấn đề phi thương mại như an ninh lương thực và nhu cầu bảo vệ môi trường; quy định về những đối xử S&D dành cho các DCs, trong đó có sự cải thiện về cơ hội và điều kiện tiếp cận thị trường của sản phẩm nông nghiệp mà các thành viên này có quan tâm cụ thể.[222]

B. *Phạm vi và định nghĩa*

Điều 2 quy định rằng Hiệp định này áp dụng đối với các sản phẩm được liệt kê trong Phụ lục 1 của Hiệp định, sau đây gọi tắt là sản phẩm nông nghiệp. Tại Phụ lục 1, Hiệp định định nghĩa sản phẩm nông nghiệp bằng

[220] Ban thư kí WTO, như trên, tr. 16.

[221] Ban thư kí WTO, *The WTO Agreements Series-Agriculture*, (2003).

[222] Phần mở đầu của Hiệp định AoA.

cách tham chiếu đến hệ thống hài hoà hoá về phân loại sản phẩm - định nghĩa này bao quát không chỉ (i) Các sản phẩm nông nghiệp cơ bản như lúa mì, sữa và các động vật sống, mà cả (ii) Các sản phẩm có nguồn gốc từ chúng như bánh mì, bơ và thịt, cũng như (iii) Tất cả các sản phẩm nông nghiệp đã qua chế biến, như chocolate và xúc xích. Định nghĩa này cũng bao hàm cả rượu vang, rượu mạnh, các sản phẩm thuốc lá, các loại sợi như len, bông và lụa, da động vật thô sử dụng trong sản xuất da. Cá, các sản phẩm từ cá và lâm sản không nằm trong phạm vi của sản phẩm nông nghiệp.[223]

C. *Những khía cạnh chính của Hiệp định AoA*

Hiệp định thiết lập một số quy tắc áp dụng chung đối với các biện pháp nông nghiệp liên quan đến thương mại, chủ yếu trong các lĩnh vực tiếp cận thị trường, hỗ trợ nội địa và cạnh tranh xuất khẩu. Những quy định này liên quan đến các cam kết cụ thể của thành viên nhằm tăng khả năng tiếp cận thị trường và giảm các khoản trợ cấp bóp méo thương mại, được ghi nhận trong biểu cam kết của từng thành viên WTO và là một bộ phận không tách rời của GATT. Tiểu mục này sẽ phác thảo những nét chính về các quy định của Hiệp định về tiếp cận thị trường, hỗ trợ nội địa và cạnh tranh xuất khẩu.

1. Tiếp cận thị trường ('MA')

(a) Chỉ bảo hộ bằng thuế quan

Liên quan đến MA, Vòng đàm phán Uruguay đạt được sự thay đổi quan trọng về hệ thống: Chuyển từ thực tế là có vô số các NTBs cản trở dòng chảy của thương mại nông nghiệp sang chế độ chỉ sử dụng thuế quan ràng buộc để bảo hộ và có cam kết cắt giảm. Khía cạnh quan trọng của sự thay đổi có tính căn bản này là nhằm kích thích đầu tư, sản xuất và thương mại trong nông nghiệp bằng cách: (i) Tăng tính minh bạch, tính có thể dự đoán và tính cạnh tranh của các điều kiện tiếp cận thị trường nông nghiệp; (ii) Thiết lập hoặc tăng cường mối liên kết giữa thị trường nông sản các quốc gia và quốc tế; và từ đó (iii) Căn cứ nhiều hơn vào thị trường để định hướng sử dụng các nguồn tài nguyên khan hiếm một cách hiệu quả nhất, cả trong lĩnh vực nông nghiệp lẫn ở phạm vi toàn bộ nền kinh tế. Trong nhiều trường hợp, thuế quan là hình thức bảo hộ duy nhất dành cho các sản phẩm nông nghiệp trong giai đoạn trước Vòng đàm phán Uruguay - Vòng đàm phán dẫn đến 'sự ràng buộc' trong khuôn khổ WTO về mức trần đối với thuế quan. Tuy nhiên, đối với nhiều sản phẩm khác, các NTBs đã được sử dụng để hạn chế MA. Đây từng là tình trạng phổ biến đối với phần lớn các sản phẩm nông nghiệp ôn đới. Các cuộc đàm phán trong khuôn khổ Vòng Uruguay nhằm loại bỏ các rào cản như vậy. Với mục đích này, cùng với những kết quả khác, một gói 'thuế quan hoá' (hay 'thuế hóa') đã được nhất trí để thay thế các NTBs đối với nông nghiệp bằng thuế quan - biện pháp đảm bảo mức độ bảo hộ tương đương. Sau khi Hiệp định có hiệu lực, hiện nay đã có quy định cấm áp dụng các NTBs đối với nông nghiệp và mức thuế quan áp dụng đối với hầu hết các sản phẩm nông nghiệp được giao dịch quốc tế đều đã bị ràng buộc trong khuôn khổ WTO.[224]

(b) Giảm thuế quan

Hiệp định yêu cầu thành viên phát triển, trong giai đoạn 6 năm bắt đầu từ năm 1995, giảm thuế quan xuống mức trung bình 36% đối với tất cả các sản phẩm nông nghiệp, với mức giảm tối thiểu 15% cho bất kì sản phẩm nào. Đối với thành viên DCs, mức giảm tương ứng lần lượt là 24% và 10% và được thực hiện trong vòng 10 năm. Các thành viên DCs có mức thuế suất ràng buộc ở mức trần, trong nhiều trường hợp, đã không đưa ra cam kết giảm. Các thành viên LDCs được yêu cầu cam kết ràng buộc tất cả các loại thuế quan đối với hàng nông nghiệp, nhưng không phải thực hiện việc giảm thuế quan.[225]

(c) Cấm áp dụng các biện pháp phi thuế quan (NTBs) tại cửa khẩu

Khoản 2 Điều 4 Hiệp định cấm áp dụng các NTBs đối với hàng nông nghiệp. Những biện pháp này bao gồm hạn chế số lượng nhập khẩu, biến thu nhập khẩu, giá sàn nhập khẩu, thủ tục cấp phép nhập khẩu tùy tiện, thoả thuận hạn chế xuất khẩu tự nguyện và các NTBs được duy trì thông qua các doanh nghiệp thương mại nhà nước. Tất cả các biện pháp áp dụng tại cửa khẩu tương tự, mà không phải là 'thuế quan thông thường', cũng không còn được phép áp dụng. Tuy nhiên, khoản 2 Điều 4 Hiệp định không ngăn cấm việc áp dụng các biện pháp hạn chế nhập khẩu phi thuế quan phù hợp với quy định của GATT hoặc các hiệp định khác trong khuôn khổ WTO được áp dụng đối với hàng hoá nói chung.[226]

[223] Ban thư kí WTO, như trên, tr. 4. Xem thêm Phụ lục 1 Hiệp định AoA.

[224] Ban thư kí WTO, như trên, tr. 5-6.

[225] Bộ Tư pháp, *Hội nhập kinh tế quốc tế - Tài liệu tập huấn dành cho các cơ quan tư pháp*, (2008), tr. 97.

[226] Những biện pháp này bao gồm những biện pháp được duy trì theo các quy định sau đây: các quy định về bảo đảm cân bằng thanh toán (Điều XII và Điều XVIII GATT); các quy định chung về tự vệ (Điều XIX GATT và các hiệp định WTO liên quan); các ngoại lệ chung (Điều XX GATT); Hiệp định SPS, Hiệp định TBT. *Xem*: Ban thư kí WTO, như trên, tr. 7-8.

(d) Các quy định về biện pháp tự vệ đặc biệt

Như là yếu tố thứ ba của gói 'thuế quan hoá', các thành viên có quyền viện dẫn quy định về tự vệ đặc biệt của Hiệp định (Điều 5) đối với sản phẩm đã được thuế quan hoá, với điều kiện việc bảo lưu áp dụng quy định tự vệ đặc biệt (viết tắt là 'SSG') đối với sản phẩm này được thể hiện trong Biểu cam kết của thành viên. Quyền áp dụng SSG được 38 thành viên bảo lưu đối với một số lượng hạn chế các sản phẩm trong mỗi trường hợp. SSG cho phép một thành viên áp dụng thuế quan bổ sung khi đáp ứng các tiêu chí nhất định. Các tiêu chí này có thể là sự gia tăng nhập khẩu đột biến, hoặc trên cơ sở từng chuyến hàng, có sự sụt giảm của giá nhập khẩu xuống dưới mức giá tham chiếu định trước. Đối với trường hợp khởi phát về khối lượng, mức thuế cao hơn chỉ áp dụng cho đến hết năm liên quan. Đối với khởi phát về giá, thuế bổ sung chỉ được áp dụng đối với chuyến hàng có liên quan. Các khoản thuế bổ sung không thể được áp dụng với hàng hoá nhập khẩu trong hạn ngạch thuế quan.[227]

2. Hỗ trợ nội địa

WTO phân loại các 'hỗ trợ nội địa' ('domestic support') theo ba nhóm:

- Hộp màu hổ phách ('Amber box'): bao gồm tất cả các biện pháp hỗ trợ nội địa, như trợ giá, được xem là bóp méo sản xuất và thương mại. Các loại trợ cấp thuộc nhóm này được thể hiện bằng 'Tổng lượng hỗ trợ tính gộp' ('Total AMS') - số liệu được cộng gộp từ tất cả các hỗ trợ. Các hỗ trợ nhóm hộp màu hổ phách là đối tượng của các cam kết giảm trong khuôn khổ WTO.
- Hộp màu xanh lơ ('Blue Box'): bao gồm các khoản hỗ trợ chi trả trực tiếp trên cơ sở diện tích hoặc số lượng vật nuôi, nhưng kèm theo điều kiện về hạn chế sản xuất bằng cách áp đặt hạn ngạch sản xuất hoặc yêu cầu nông dân không sử dụng một phần đất của họ. Theo quy định của WTO, các biện pháp hỗ trợ này được coi là tách rời một phần với sản xuất và không thuộc đối tượng cam kết giảm. Ở EU, những hỗ trợ này được coi là các khoản chi trả trực tiếp.
- Hộp màu xanh lá cây ('Green Box'): bao gồm các biện pháp hỗ trợ được coi là không bóp méo thương mại, hoặc chỉ gây ra tác động ở mức tối thiểu và không thuộc đối tượng cam kết giảm trong khuôn khổ WTO. Đối với EU và Hoa Kỳ, một trong những biện pháp hỗ trợ được phép áp dụng có ý nghĩa quan trọng nhất thuộc nhóm này là hỗ trợ độc lập, trực tiếp dành cho người sản xuất. Biện pháp hỗ trợ này không liên quan đến mức sản xuất hoặc giá cả hiện tại. Nó cũng có thể được áp dụng với điều kiện sự hỗ trợ không gắn với yêu cầu về sản xuất.[228]

3. Trợ cấp xuất khẩu

Theo Hiệp định, trợ cấp xuất khẩu chỉ được áp dụng trong bốn trường hợp:

(i) Đối với trợ cấp xuất khẩu là đối tượng của cam kết giảm áp dụng đối với từng sản phẩm cụ thể, thì được phép áp dụng trong mức giới hạn quy định tại biểu cam kết của thành viên có liên quan;

(ii) Bất kì khoản thặng dư nào của ngân sách chi tiêu dành cho trợ cấp xuất khẩu hoặc cho khối lượng xuất khẩu đã được trợ cấp vượt quá giới hạn quy định trong biểu cam kết mà được điều chỉnh bởi khoản 2(b) Điều 9 Hiệp định;

(iii) Các loại trợ cấp xuất khẩu phù hợp với quy định về đối xử S&D dành cho các thành viên DCs (khoản 4 Điều 9 Hiệp định);

(iv) Các loại trợ cấp xuất khẩu khác, ngoài những loại là đối tượng của cam kết giảm, với điều kiện chúng phù hợp với quy định về ngăn chặn việc trốn tránh các cam kết về trợ cấp xuất khẩu tại Điều 10 Hiệp định.

Trong tất cả những trường hợp khác, các biện pháp trợ cấp xuất khẩu dành cho sản phẩm nông nghiệp đều bị cấm áp dụng (khoản 3 Điều 3, các điều 8 và 10 Hiệp định).[229]

3. Tiêu chuẩn và an toàn

A. *Các biện pháp kiểm dịch động-thực vật*

1. Tổng quan

Trong khuôn khổ WTO, các biện pháp kiểm dịch động-thực vật được

227 Ban thư kí WTO, như trên, tr. 8-9.

228 Actionaid, *Hiệp định của WTO về nông nghiệp,* tr. 5. *Xem* http://www.actionaid.org.

229 Ban thư kí WTO, như trên, tr. 17.

quy định tại GATT (Điều XX(b)) và Hiệp định về việc áp dụng các biện pháp kiểm dịch động-thực vật (sau đây gọi là 'Hiệp định SPS'). Hiệp định SPS có 14 điều và 3 phụ lục đưa ra định nghĩa về các thuật ngữ và làm rõ một số nghĩa vụ trong phần nội dung chính của Hiệp định. Hiệp định này liên quan đến việc áp dụng các biện pháp kiểm dịch động thực vật; nói cách khác là liên quan đến các quy định về an toàn thực phẩm và sức khoẻ động thực vật. Hiệp định ghi nhận rằng các chính phủ có quyền tiến hành các biện pháp kiểm dịch động thực vật, nhưng chỉ trong phạm vi cần thiết để bảo vệ cuộc sống và sức khoẻ của con người, động vật hoặc thực vật, và không được phân biệt đối xử tùy tiện hoặc vô căn cứ giữa các thành viên có điều kiện giống nhau hoặc tương tự.[230]

2. Phạm vi và định nghĩa

Theo Phụ lục A Hiệp định SPS, các biện pháp kiểm dịch động thực vật có nghĩa là bất kì biện pháp nào được áp dụng để:

(i) Bảo vệ đời sống hoặc sức khoẻ của động vật hoặc thực vật trước những nguy cơ phát sinh từ sự xâm nhập, hình thành hay phát tán của sâu bệnh, dịch bệnh, sinh vật mang bệnh hoặc gây bệnh;

(ii) Bảo vệ cuộc sống hay sức khoẻ của con người hoặc động vật khỏi các nguy cơ phát sinh từ các chất phụ gia, chất gây ô nhiễm, chất độc hoặc các sinh vật gây bệnh có trong thực phẩm, đồ uống hoặc thức ăn chăn nuôi;

(iii) Bảo vệ cuộc sống hoặc sức khoẻ của con người khỏi các bệnh mang từ động vật, thực vật hoặc sản phẩm của chúng hoặc từ sự xâm nhập, hình thành hoặc phát tán của sâu bệnh; hoặc

(iv) Ngăn chặn hoặc hạn chế các thiệt hại khác phát sinh do xâm nhập, hình thành hoặc phát tán của sâu bệnh.

3. Những khía cạnh chính của Hiệp định

Hiệp định SPS cho phép các thành viên thông qua và thực thi các biện pháp cần thiết để bảo vệ cuộc sống hoặc sức khoẻ của con người, động vật hoặc thực vật, với điều kiện các biện pháp này không được áp dụng để tạo ra sự phân biệt đối xử tuỳ tiện hoặc vô căn cứ giữa các thành viên có cùng điều kiện như nhau hoặc để dẫn đến sự hạn chế thương mại quốc tế (Lời nói đầu).

[230] WTO, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#gAgreement. Ban thư kí WTO, *The WTO Agreements Series-The SPS Agreement: An Overview*, (2003).

Hiệp định SPS quy định rằng việc sử dụng các biện pháp kiểm dịch động thực vật phải phù hợp với những nguyên tắc cơ bản sau:[231]

(a) Không phân biệt đối xử

Hiệp định SPS đảm bảo rằng không có sự phân biệt đối xử giữa các thành viên trong việc sử dụng các biện pháp SPS. Các thành viên phải đảm bảo rằng các biện pháp kiểm dịch động thực vật mà mình áp dụng không phân biệt đối xử một cách tùy tiện hoặc vô căn cứ giữa các thành viên có điều kiện giống hệt nhau hoặc tương tự nhau, kể cả giữa lãnh thổ của mình và của các thành viên khác (khoản 3 Điều 2).

(b) Hài hoà hoá

Để hài hoà hoá các biện pháp kiểm dịch động thực vật trên cơ sở chung nhất có thể được, các thành viên phải lấy các tiêu chuẩn, hướng dẫn hay khuyến nghị quốc tế nơi chúng tồn tại làm cơ sở áp dụng các biện pháp này (khoản 1 Điều 3). Tuy nhiên, các thành viên có thể áp dụng hoặc duy trì các biện pháp kiểm dịch động thực vật có mức độ bảo hộ cao hơn so với các biện pháp dựa trên các tiêu chuẩn, hướng dẫn hay khuyến nghị quốc tế có liên quan, nếu có sự khẳng định về khoa học hoặc là kết quả của mức độ bảo hộ động thực vật mà một thành viên xác định là thích hợp, phù hợp với quy định của Hiệp định SPS (khoản 3 Điều 3).

(c) Tính tương đương

Các thành viên sẽ chấp nhận các biện pháp kiểm dịch động thực vật của các thành viên khác là tương đương, ngay cả khi nếu các biện pháp này khác với các biện pháp của mình hoặc với các biện pháp mà những thành viên buôn bán cùng sản phẩm áp dụng, nếu thành viên xuất khẩu chứng minh được một cách khách quan với thành viên nhập khẩu rằng các biện pháp đó đạt được mức độ bảo hộ về vệ sinh động thực vật của thành viên nhập khẩu (khoản 1 Điều 4).

(d) Mức độ bảo hộ phù hợp

Theo Hiệp định SPS, mức độ bảo hộ phù hợp (viết tắt là 'ALOP') là mức độ bảo hộ mà thành viên WTO cho là thích hợp để bảo vệ cuộc sống hoặc sức khoẻ của con người, động vật hoặc thực vật trong phạm vi lãnh thổ của mình. Các thành viên phải đảm bảo rằng bất kì biện pháp kiểm dịch động thực vật nào cũng chỉ được áp dụng trong phạm vi cần thiết để bảo vệ cuộc sống hoặc sức khoẻ của con người, động vật hoặc thực vật, được dựa trên các nguyên tắc khoa học và không được duy trì mà không có bằng chứng khoa học xác đáng (khoản 2 Điều 2).

[231] Bộ Tư pháp, Sđd, tr. 97.

Mỗi thành viên WTO có quyền xác định ALOP riêng của mình. Tuy nhiên, khi xác định ALOP, các thành viên WTO sẽ tính đến mục tiêu giảm thiểu các tác động thương mại bất lợi. Ngoài ra, các thành viên WTO được yêu cầu áp dụng các khái niệm của ALOP một cách phù hợp, tức là họ phải 'tránh sự phân biệt đối xử tuỳ tiện hoặc vô căn cứ' dẫn đến sự phân biệt đối xử hoặc sự hạn chế trá hình trong thương mại quốc tế'.[232]

(e) Đánh giá rủi ro

Trong việc đánh giá rủi ro đối với đời sống và sức khoẻ của động vật hoặc thực vật và xác định biện pháp kiểm dịch sẽ áp dụng để đạt được mức độ thích hợp, bảo vệ động thực vật khỏi nguy cơ đó, các thành viên phải xem xét tới chứng cứ khoa học hiện có và các phương pháp sản xuất và chế biến có liên quan; các phương pháp điều tra, lấy mẫu và kiểm định có liên quan; sự phổ biến của loại bệnh hoặc sâu hại cụ thể; sự tồn tại của các vùng không nhiễm sâu hại hoặc nhiễm bệnh; các điều kiện sinh thái và môi trường có liên quan; và biện pháp cách ly hoặc các biện pháp xử lí khác (khoản 2 Điều 5). Bên cạnh đó, trong việc giám định, các thành viên phải xem xét các yếu tố kinh tế có liên quan như: những thiệt hại có thể xảy ra do sụt giảm sản xuất, kinh doanh khi có sâu bệnh xâm nhập, hình thành và phát tán; chi phí để kiểm soát hay loại bỏ sâu bệnh trong lãnh thổ của thành viên nhập khẩu; tương quan hiệu quả - chi phí của các phương pháp thay thế nhằm hạn chế rủi ro (khoản 3 Điều 5).

Tuy nhiên, Hiệp định SPS cũng quy định rằng trong trường hợp chưa có đủ bằng chứng khoa học liên quan, một thành viên có thể tạm thời áp dụng các biện pháp kiểm dịch động thực vật trên cơ sở thông tin chuyên môn sẵn có, bao gồm thông tin từ các tổ chức quốc tế liên quan cũng như từ các biện pháp kiểm dịch động thực vật mà thành viên khác áp dụng (khoản 7 Điều 5).

(f) Sự minh bạch

Nguyên tắc minh bạch trong Hiệp định SPS yêu cầu các thành viên WTO cung cấp thông tin về các biện pháp SPS mà họ áp dụng và thông báo về sự thay đổi của các biện pháp này. Các thành viên cũng phải công bố các quy định SPS của họ. Các yêu cầu về thông báo được đáp ứng thông qua cơ quan thông báo quốc gia. Mỗi thành viên WTO cũng phải chỉ định một điểm hỏi-đáp quốc gia để trả lời các câu hỏi liên quan đến SPS do các thành viên khác nêu ra. Hai chức năng thông báo và hỏi đáp có thể do cơ quan duy nhất đảm nhận.[233] *Ví dụ,* Hiệp định SPS quy định rằng các thành viên phải thông báo về những sự thay đổi trong các biện pháp kiểm dịch động thực vật và có trách nhiệm cung cấp thông tin về các biện pháp kiểm dịch động thực vật của mình một cách phù hợp với quy định của Hiệp định này (Điều 7).

Để đảm bảo việc tuân thủ các nguyên tắc nêu trên, Hiệp định SPS quy định rằng khi thành viên có lí do để tin rằng biện pháp kiểm dịch động thực vật cụ thể do thành viên khác áp dụng hoặc duy trì đang hạn chế hoặc có khả năng hạn chế hoạt động xuất khẩu của mình và biện pháp này không dựa trên các tiêu chuẩn, hướng dẫn hoặc khuyến nghị quốc tế có liên quan hoặc không tồn tại các tiêu chuẩn, hướng dẫn hoặc khuyến nghị như vậy, thì có thể yêu cầu thành viên đang duy trì biện pháp đó đó giải thích về lí do áp dụng biện pháp kiểm dịch này và thành viên này có nghĩa vụ giải đáp (khoản 8 Điều 5).

B. *Các rào cản kĩ thuật đối với thương mại*

1. Tổng quan

Trong WTO, các rào cản kĩ thuật đối với thương mại được quy định trong Hiệp định về các rào cản kĩ thuật đối với thương mại (sau đây gọi là 'Hiệp định TBT'). Hiệp định TBT ra đời trong khuôn khổ của WTO, nhằm: (i) Ghi nhận sự cần thiết của các rào cản kĩ thuật đối với thương mại; đồng thời (ii) Kiểm soát những rào cản này để đảm bảo rằng các thành viên sử dụng chúng một cách phù hợp và hợp pháp, các rào cản này không được sử dụng như công cụ bảo hộ đơn thuần.[234]

Hiệp định TBT thừa nhận sự đóng góp quan trọng mà các tiêu chuẩn quốc tế và các hệ thống đánh giá hợp chuẩn có thể đem lại bằng việc cải thiện hiệu quả sản xuất và tạo thuận lợi cho thương mại quốc tế. Tuy nhiên, Hiệp định TBT muốn đảm bảo rằng các quy chuẩn kĩ thuật và tiêu chuẩn, bao gồm các yêu cầu về đóng gói, đánh dấu và ghi nhãn, cũng như các thủ tục đánh giá hợp chuẩn, hợp quy không gây ra trở ngại không cần thiết cho thương mại quốc tế. Hiệp định TBT thừa nhận rằng bất cứ thành viên nào cũng có quyền áp dụng các biện pháp cần thiết để đảm bảo chất lượng hàng hoá xuất khẩu của mình, hoặc để bảo vệ cuộc sống hay sức khoẻ của con người, động vật hoặc thực vật, bảo vệ môi trường, hoặc để ngăn ngừa các hành vi lừa đảo, ở mức độ mà các thành

[232] Chính phủ Australia, Bộ Nông nghiệp, Ngư nghiệp và Lâm nghiệp, AusAID, *The WTO Sanitary and Phytosanitary (SPS) Agreement - Why Do You Need to Know?*, tr. 12.

[233] Chính phủ Australia, Bộ Nông nghiệp, Ngư nghiệp và Lâm nghiệp, AusAID, Sđd, tr. 18.

[234] VCCI, *Các hiệp định của WTO và những nguyên tắc cơ bản: Các rào cản kĩ thuật đối với thương mại,* Hà Nội, Nxb Thông tấn, tr. 6.

viên này xét thấy là thích hợp, với điều kiện các biện pháp này không được áp dụng theo cách sẽ gây ra sự phân biệt đối xử tuỳ tiện hoặc vô căn cứ giữa các thành viên có điều kiện tương tự nhau hoặc nhằm hạn chế một cách trá hình đối với thương mại quốc tế (Lời nói đầu).

2. Phạm vi và định nghĩa

Hiệp định TBT phân biệt ba loại rào cản kĩ thuật đối với thương mại như sau:

- Quy chuẩn kĩ thuật: là tài liệu đặt ra quy định về các đặc tính của sản phẩm hoặc các phương pháp sản xuất, chế biến liên quan, bao gồm các quy định hành chính bắt buộc phải tuân thủ.

- Tiêu chuẩn: là tài liệu được phê duyệt bởi tổ chức có uy tín, quy định các quy tắc, hướng dẫn hoặc đặc tính được áp dụng chung và lặp đi lặp lại đối với sản phẩm hoặc các phương pháp sản xuất và chế biến liên quan, mà việc tuân thủ chúng là không bắt buộc.[235]

- Thủ tục đánh giá sự phù hợp: bất kì thủ tục nào được sử dụng, một cách trực tiếp hoặc gián tiếp, để xác định sự tuân thủ các yêu cầu liên quan của quy chuẩn kĩ thuật hoặc tiêu chuẩn.[236]

Các quy chuẩn kĩ thuật được đề cập trong phần nội dung chính của Hiệp định, và các quy định được đặt ra để đảm bảo rằng chúng không biến thành những trở ngại không cần thiết đối với thương mại. Các quy định của Hiệp định TBT áp dụng đối với các quy chuẩn kĩ thuật được ban hành bởi chính quyền trung ương và địa phương, cũng như bởi các cơ quan phi chính phủ. Các thành viên WTO chịu hoàn toàn trách nhiệm về việc đảm bảo thực thi tất cả các quy định của Hiệp định TBT liên quan đến quy chuẩn kĩ thuật. Tuy nhiên, các tiêu chuẩn được đề cập riêng tại 'Bộ luật về ứng xử tốt' ('Code of Good Practice'), là một trong các phụ lục của Hiệp định (Phụ lục 3). Hầu hết các nguyên tắc của Hiệp định áp dụng đối với quy chuẩn kĩ thuật, cũng được áp dụng với tiêu chuẩn thông qua 'Bộ luật' này. 'Bộ luật' để ngỏ để các cơ quan tiêu chuẩn hoá của chính quyền trung ương, địa phương hoặc phi chính phủ (ở cấp quốc gia), cũng như các cơ quan tiêu chuẩn hoá chính phủ hoặc phi chính phủ ở cấp khu vực chấp thuận áp dụng.[237]

[235] Cả quy chuẩn kĩ thuật và tiêu chuẩn đều có thể bao gồm hoặc quy định riêng về các yêu cầu về thuật ngữ, kí hiệu, đóng gói, đánh dấu, hoặc ghi nhãn áp dụng đối với một sản phẩm hoặc một phương pháp sản xuất hoặc chế biến. Chúng khác nhau ở chỗ, quy chuẩn kĩ thuật có tính bắt buộc tuân thủ, còn tiêu chuẩn thì không.

[236] Phụ lục 1 Hiệp định TBT.

3. Những khía cạnh chính của Hiệp định TBT

Hiệp định TBT quy định các nguyên tắc mà thành viên phải tuân thủ như sau:

(a) Không phân biệt đối xử

Các thành viên phải đảm bảo rằng, liên quan đến các quy chuẩn kĩ thuật, các sản phẩm nhập khẩu từ lãnh thổ của bất kì thành viên nào cũng phải được đối xử không kém thuận lợi hơn so với các sản phẩm tương tự có nguồn gốc nội địa hoặc có nguồn gốc từ bất kì nước nào khác (khoản 1 Điều 2).

(b) Không gây ra trở ngại không cần thiết cho thương mại quốc tế

Các thành viên phải đảm bảo rằng các quy chuẩn kĩ thuật không được chuẩn bị, thông qua hoặc áp dụng với mục đích hoặc hiệu ứng tạo ra các trở ngại không cần thiết đối với thương mại quốc tế. Với mục đích như vậy, các quy chuẩn kĩ thuật không được có tính chất hạn chế thương mại cao hơn mức cần thiết để đạt được một mục tiêu chính đáng, có tính đến những rủi ro mà sự không tuân thủ quy chuẩn có thể gây ra. Mục tiêu chính đáng có thể là yêu cầu về an ninh quốc gia, phòng ngừa hành vi lừa đảo, bảo vệ sức khoẻ hoặc sự an toàn của con người, động vật hoặc thực vật, hoặc bảo vệ môi trường. Khi đánh giá rủi ro, các yếu tố có liên quan cần xem xét, bao gồm (nhưng không giới hạn): các thông tin khoa học và kĩ thuật sẵn có liên quan đến công nghệ chế biến hoặc mục đích sử dụng cuối cùng của sản phẩm (khoản 2 Điều 2).

(c) Minh bạch

Trong trường hợp không có tiêu chuẩn quốc tế liên quan, hoặc quy chuẩn kĩ thuật được đề xuất có nội dung kĩ thuật không phù hợp với nội dung kĩ thuật của tiêu chuẩn quốc tế có liên quan, và nếu quy chuẩn kĩ thuật này có thể gây tác động đáng kể đối với thương mại cho các thành viên khác; hoặc trong trường hợp khẩn cấp liên quan đến an toàn, sức khoẻ, bảo vệ môi trường hoặc liên quan đến an ninh quốc gia phát sinh hoặc có nguy cơ phát sinh đối với thành viên, thì thành viên đó phải thông báo cho các thành viên khác; và khi có yêu cầu, thì phải cung cấp cho các thành viên khác bản sao của quy chuẩn kĩ thuật được đề xuất

[237] Doaa Abdel Motaal, *Overview of the World Trade Organization Agreement on Technical Barriers to Trade*. http://*www.who.int/mta/Doc8.doc*.

áp dụng; cho phép các thành viên khác đóng góp ý kiến bằng văn bản (khoản 9 Điều 2; khoản 10 Điều 2; khoản 6 Điều 5; và khoản 7 Điều 5).

(d) Căn cứ khoa học

Khi chuẩn bị, ban hành hoặc áp dụng quy chuẩn kĩ thuật, thành viên phải dựa trên căn cứ khoa học và thực tiễn xác đáng. Không được duy trì các quy chuẩn kĩ thuật, nếu tình huống hoặc mục đích đòi hỏi phải áp dụng chúng không còn tồn tại, hoặc nếu tình huống hoặc mục đích áp dụng đã thay đổi và có thể được giải quyết bằng theo cách ít gây hạn chế thương mại hơn (khoản 3 Điều 2).

(e) Hài hoà hoá

Trong trường hợp thực tế đòi hỏi phải có các quy chuẩn kĩ thuật và đang có (hoặc chắc chắn sắp hoàn thành) các tiêu chuẩn quốc tế có liên quan, các thành viên có thể sử dụng các tiêu chuẩn quốc tế này hoặc các bộ phận có liên quan của chúng, để làm cơ sở cho các quy chuẩn kĩ thuật của mình, trừ một số trường hợp ngoại lệ. Nhằm mục đích hài hoà hoá các quy chuẩn kĩ thuật trên cơ sở chung nhất có thể, các thành viên phải tham gia đầy đủ, trong phạm vi khả năng cho phép, vào sự chuẩn bị của các cơ quan tiêu chuẩn hoá quốc tế để ban hành các tiêu chuẩn quốc tế cho sản phẩm mà các thành viên này đã ban hành quy chuẩn hoặc dự định ban hành quy chuẩn áp dụng cho sản phẩm đó (khoản 4 và khoản 6 Điều 2).

(f) Tính tương đương

Thành viên WTO cần xem xét một cách tích cực việc chấp nhận các quy chuẩn kĩ thuật của các thành viên khác là tương đương, kể cả khi các quy chuẩn này khác biệt so với các quy chuẩn của mình, nếu thành viên này hài lòng rằng các quy chuẩn kĩ thuật đó đáp ứng được các mục tiêu của các quy chuẩn của mình (khoản 7 Điều 2).

(g) Công nhận

Các thành viên được khuyến khích, trên cơ sở yêu cầu của các thành viên khác, sẵn sàng tham gia đàm phán, đi đến kí kết các thoả thuận về cùng công nhận kết quả của thủ tục của nhau về đánh giá sự phù hợp (khoản 3 Điều 6).

4. Dệt may

Từ năm 1995, Hiệp định về hàng dệt may của WTO (sau đây gọi là 'ATC') đã thay thế Hiệp định đa sợi ('MFA'). Tới năm 2005, lĩnh vực dệt may được đưa trọn vẹn vào sự điều chỉnh theo các quy tắc điều chỉnh thương mại hàng hóa thông thường của GATT. Đặc biệt, hạn ngạch sẽ phải bị loại bỏ và nước nhập khẩu không được phân biệt đối xử giữa các nhà xuất khẩu nữa. Và ATC đã hết hiệu lực: đây là Hiệp định WTO duy nhất có điều khoản tự hủy.[238] Tóm lại, từ năm 2005, hàng dệt may sẽ chịu sự điều chỉnh của GATT và các hiệp định liên quan như tất cả các hàng hoá khác.

5. Chống bán phá giá; trợ cấp, các biện pháp đối kháng; và tự vệ

Ràng buộc thuế quan và áp dụng chúng bình đẳng với tất cả các đối tác thương mại (MFN) là vấn đề then chốt trong lưu thông của thương mại hàng hoá. Những hiệp định của WTO ủng hộ những nguyên tắc này nhưng đồng thời cũng cho phép các ngoại lệ trong 3 trường hợp sau: (A) Hành vi chống bán phá giá (bán với giá thấp không công bằng); (B) Trợ cấp và thuế đối kháng đặc biệt để bù đắp trợ cấp; và (C) Các biện pháp khẩn cấp để hạn chế nhập khẩu tạm thời, nhằm mục đích 'bảo hộ' những ngành kinh tế nội địa.[239] Phần này sẽ đề cập cụ thể đến từng nội dung riêng biệt.

A. *Các biện pháp chống bán phá giá*

1. Khái quát

Các biện pháp chống bán phá giá ('AD') được quy định tại Điều VI GATT và ADA.

2. Phạm vi điều chỉnh và định nghĩa

Theo ADA, tại khoản 1 Điều 2:

> Một sản phẩm được coi là bán phá giá, nghĩa là được đưa vào thị trường của một nước khác với giá thấp hơn giá trị thông thường, nếu giá xuất khẩu của một sản phẩm xuất khẩu từ một nước này sang nước khác thấp hơn giá có thể so sánh được, trong điều kiện thương mại thông thường, của sản phẩm tương tự tại nước xuất khẩu.

238 Ban thư kí WTO, Sđd, tr. 20.

239 Ban thư kí WTO, Sđd, tr. 29.

Vì vậy, bán phá giá sẽ xuất hiện khi sản phẩm được xuất khẩu với giá thấp hơn 'giá trị thông thường' ('NV') của sản phẩm đó. Theo ADA, 'NV' là:

(i) Giá ở thị trường nội địa, khi sản phẩm được bán với giá cao hơn chi phí sản xuất;

(ii) Giá của sản phẩm khi được bán ở mức giá cao hơn chi phí tại thị trường nước thứ ba;

(iii) 'Giá trị thông thường áp đặt' ('Constructed Nomal Value') được tính là tổng chi phí cho việc sản xuất sản phẩm đó cộng với một khoản hợp lí các chi phí bán hàng, chi phí quản lí, chi phí chung và lợi nhuận.[240]

3. Những nội dung chủ yếu của ADA

Vấn đề được quan tâm ở đây là: thiệt hại của việc hàng hoá nhập khẩu được bán với giá thấp 'không công bằng' (bán phá giá) cần được xử lí bằng biện pháp khắc phục thương mại. Đó là biện pháp chống bán phá giá (AD). Biện pháp khắc phục này thường là áp thuế nhập khẩu bổ sung, hoặc đàm phán về giá để bù đắp biên độ phá giá. Nếu biên độ bán phá giá còn tồn tại, thì thuế AD sẽ vẫn được duy trì.

(a) Tiền đề vụ kiện chống bán phá giá

Theo ADA, sau khi thực hiện điều tra chặt chẽ theo đơn kiện của một ngành kinh tế bị ảnh hưởng, cơ quan có thẩm quyền của nước nhập khẩu phải chứng minh ba điều kiện sau:

- Hàng nhập khẩu được bán phá giá (với biên độ phá giá không thấp hơn 2%);
- Có thiệt hại đáng kể, đe dọa gây thiệt hại đáng kể đối với ngành kinh tế nội địa, hoặc gây chậm trễ đáng kể cho việc thành lập ngành kinh tế nội địa;
- Có mối quan hệ nhân quả giữa hàng nhập khẩu bán phá giá và thiệt hại đối với ngành kinh tế nội địa.

(b) Xác định thiệt hại

Việc xác định thiệt hại được dựa trên những chứng cứ xác thực và thông qua điều tra khách quan về cả hai khía cạnh:

[240] Khoản 2 Điều 2 ADA.

(i) Khối lượng hàng hoá nhập khẩu được bán phá giá và tác động của hàng hoá được bán phá giá đến giá trên thị trường nội địa của các sản phẩm tương tự; và

(ii) Hậu quả của việc nhập khẩu này đối với các nhà sản xuất cc sản phẩm trên ở nội địa (khoản 1 Điều 3).

Đối với khối lượng hàng hoá nhập khẩu được bán phá giá, cơ quan điều tra phải xem xét: liệu hàng nhập khẩu được bán phá giá này có tăng lên đáng kể hay không? và việc tăng lên này là tăng tuyệt đối hay tương đối so với mức sản xuất hoặc nhu cầu tiêu dùng tại nước nhập khẩu? Về tác động của hàng hoá nhập khẩu được bán phá giá đến giá cả, cơ quan điều tra phải xem xét: Liệu giá của hàng nhập khẩu được bán phá giá có giảm giá đáng kể so với giá của sản phẩm tương tự của nước nhập khẩu hay không? Hoặc liệu hàng nhập khẩu đó có tác động khác là làm giảm giá đáng kể hoặc ngăn không cho giá tăng lên đáng kể hay không? Điều đáng lẽ xảy ra nếu hàng nhập khẩu không được bán phá giá là gì? Không một hoặc một số yếu tố nào trong số tất cả các yếu tố trên đủ để có thể đưa ra các kết luận mang tính quyết định (khoản 2 Điều 3).

Việc xem xét tác động của hàng nhập khẩu được bán phá giá đối với ngành kinh tế nội địa có liên quan phải bao gồm việc đánh giá tất cả các yếu tố và chỉ số có ảnh hưởng đến tình trạng của ngành kinh tế, trong đó bao gồm mức suy giảm thực tế và tiềm ẩn của doanh số, lợi nhuận, sản lượng, thị phần, năng suất, tỉ lệ lãi đối với đầu tư, tỉ lệ năng lực được sử dụng; các yếu tố tác động đến giá nội địa; độ lớn của biên độ bán phá giá; các tác động tiêu cực có trên thực tế hoặc tiềm ẩn đối với lưu thông tiền mặt, lượng lưu kho, công ăn việc làm, tiền lương, tăng trưởng, khả năng huy động vốn hoặc nguồn đầu tư (khoản 4 Điều 3). Cần phải chứng minh rằng: thông qua những tác động của việc bán phá giá, hàng nhập khẩu được bán phá giá đã gây ra thiệt hại theo cách hiểu của Hiệp định này. Việc chứng minh mối quan hệ nhân quả giữa hàng nhập khẩu được bán phá giá với thiệt hại cho ngành kinh tế nội địa phải căn cứ vào việc xem xét tất cả các chứng cứ liên quan trước các cơ quan có thẩm quyền (khoản 5 Điều 3).

(c) Quyền khởi xướng vụ kiện chống bán phá giá

Cuộc điều tra nhằm xác định sự tồn tại, mức độ và ảnh hưởng của bất kì hành vi được coi là bán phá giá nào đều phải được bắt đầu khi có đơn yêu cầu bằng văn bản của ngành kinh tế nội địa hoặc của người đại diện ngành kinh tế nội địa (khoản 1 Điều 5). Đơn yêu cầu phải đưa ra những

chứng cứ của (i) Việc bán phá giá; (ii) Thiệt hại; và (iii) Mối quan hệ nhân quả giữa hàng hoá nhập khẩu bán phá giá với thiệt hại đang nghi ngờ xảy ra (khoản 2 Điều 5).

Đơn yêu cầu sẽ được coi là yêu cầu của ngành kinh tế nội địa hoặc đại diện ngành kinh tế nội địa, nếu nó được sự ủng hộ của những nhà sản xuất nội địa chiếm tỉ lệ hơn 50% tổng sản lượng của sản phẩm tương tự được sản xuất bởi các nhà sản xuất nội địa bày tỏ ý kiến tán thành hoặc phản đối đơn yêu cầu. Tuy nhiên, việc điều tra cũng sẽ không được tiến hành, nếu nhà sản xuất nội địa bày tỏ sự ủng hộ đơn yêu cầu điều tra chiếm ít hơn 25% so với tổng sản lượng hàng hoá tương tự được sản xuất bởi ngành kinh tế nội địa (khoản 4 Điều 5).

Trong hầu hết các trường hợp, vụ kiện chống bán phá giá được ngành kinh tế nội địa khởi xướng. Tuy nhiên, trong trường hợp đặc biệt, nếu cơ quan có thẩm quyền quyết định bắt đầu điều tra mà không nhận được đơn yêu cầu bằng văn bản hoặc nhân danh ngành kinh tế nội địa yêu cầu bắt đầu điều tra vụ việc đó, thì họ sẽ tiến hành điều tra chỉ khi có đủ các bằng chứng về việc bán phá giá, thiệt hại và mối quan hệ nhân quả để bắt đầu quá trình điều tra.

(d) Tiến hành vụ kiện chống bán phá giá và những vấn đề có liên quan

Thông thường, sau khi ngành kinh tế nội địa nộp đơn yêu cầu bằng văn bản yêu cầu xem xét hành vi bán phá giá với chứng cứ ban đầu, cơ quan có thẩm quyền sẽ quyết định tiến hành hoặc từ chối điều tra. ADA quy định trình tự cụ thể để tiến hành vụ kiện chống bán phá giá; cách thức tiến hành điều tra và các điều kiện cần phải hoàn thành để đảm bảo rằng tất cả các bên có quyền lợi liên quan đều có đầy đủ cơ hội đưa ra chứng cứ; áp dụng các biện pháp tạm thời (Điều 7); giá tự nguyện do bất kì nhà xuất khẩu nào cam kết nhằm điều chỉnh giá của mình, hoặc đình chỉ hành động bán phá giá vào khu vực đang điều tra để cơ quan có thẩm quyền tin rằng thiệt hại do việc bán phá giá gây ra đã được loại bỏ (Điều 8); quyết định áp thuế và thu thuế chống bán phá giá (Điều 9); thời hạn rà soát thuế chống bán phá giá và cam kết giá (Điều 11) v.v..

B. *Trợ cấp và các biện pháp đối kháng*

1. Khái quát

Trợ cấp và các biện pháp đối kháng được quy định tại Hiệp định trợ cấp và các biện pháp đối kháng (Hiệp định SCM). Hiệp định SCM có hai chức năng: *thứ nhất*, đưa ra khuôn khổ cho việc áp dụng trợ cấp; *thứ hai*, điều chỉnh các hành động có thể được các thành viên thực hiện để đối kháng lại các tác động của trợ cấp. Hiệp định quy định một nước có thể sử dụng thủ tục giải quyết tranh chấp của WTO để làm cho nước xuất khẩu rút lại biện pháp trợ cấp, hoặc loại bỏ những tác động tiêu cực của trợ cấp. Hoặc nước đó có thể tự tiến hành điều tra và cuối cùng áp thuế nhập khẩu bổ sung (được gọi là 'thuế đối kháng') đối với hàng hoá nhập khẩu được trợ cấp và được cho là gây thiệt hại cho nhà sản xuất nội địa.[241]

Trong khuôn khổ WTO, trợ cấp không hoàn toàn bị cấm. Trợ cấp được phép thực hiện trong những điều kiện và hạn chế nhất định. WTO có hai nhóm hiệp định về trợ cấp, tùy thuộc vào loại sản phẩm được trợ cấp, đó là: (i) Hiệp định SCM áp dụng cho cả hàng công nghiệp và hàng nông nghiệp; và (ii) Hiệp định AoA áp dụng cho hàng nông nghiệp.[242]

2. Phạm vi điều chỉnh và định nghĩa

Theo khoản 1 Điều 1 Hiệp định SCM, trợ cấp được cho là tồn tại khi có *sự đóng góp về tài chính* của *chính phủ hoặc của bất kì cơ quan công quyền nào* nằm trong lãnh thổ của một thành viên theo một trong các cách *mang lại lợi nhuận*, đáng chú ý là những cách sau:

(i) Chính phủ chuyển vốn trực tiếp (*ví dụ*, tài trợ, cho vay và góp cổ phần), có khả năng chuyển hoặc nhận nợ trực tiếp (*ví dụ*, bảo lãnh tiền vay);

(ii) Các khoản thu nộp cho chính phủ đã được bỏ qua hay không thu (*ví dụ*, ưu đãi tài chính như miễn thuế);

(iii) Chính phủ cung cấp hàng hoá hoặc dịch vụ không phải là cơ sở hạ tầng chung hoặc mua hàng hoá;

(iv) Chính phủ góp tiền vào một cơ chế tài trợ, hoặc giao hoặc lệnh cho một tổ chức tư nhân thực thi một hoặc nhiều chức năng đã nêu từ (i) đến (iii) nêu trên - là những chức năng thông thường được giao cho chính phủ, và công việc của tổ chức tư nhân trên thực tế không khác gì với những hoạt động thông thường của chính phủ.

241 Ban thư kí WTO, Sđd, tr. 30.

242 Hiệp định AoA.

3. Những nội dung chủ yếu của Hiệp định

Kể từ năm 2000, Hiệp định SCM điều chỉnh hai loại trợ cấp: trợ cấp bị cấm, và trợ cấp có thể bị kiện. Hiệp định áp dụng đối với hàng nông nghiệp cũng như hàng công nghiệp, ngoại trừ những trợ cấp theo Hiệp định AoA.[243]

(a) Trợ cấp bị cấm

Trợ cấp bị cấm là trợ cấp có điều kiện theo đó người được trợ cấp phải đáp ứng những mục tiêu xuất khẩu nhất định ('trợ cấp xuất khẩu'), hoặc phải sử dụng hàng nội địa thay cho hàng nhập khẩu ('trợ cấp thay thế nhập khẩu'). Trợ cấp này bị cấm bởi vì chúng bóp méo thương mại quốc tế, từ đó có khả năng gây thiệt hại đến thương mại của thành viên khác.

(b) Trợ cấp có thể bị kiện

Đối với loại trợ cấp này, thành viên khởi kiện phải chỉ ra rằng trợ cấp có tác động tiêu cực đến lợi ích của họ. Nhưng mặt khác, trợ cấp này không bị cấm. Hiệp định nêu rõ ba loại thiệt hại mà trợ cấp có thể gây ra. *Thứ nhất*, gây thiệt hại cho ngành kinh tế nội địa của nước nhập khẩu; *thứ hai*, gây thiệt hại cho các đối thủ xuất khẩu từ một nước khác, khi cả hai cạnh tranh ở thị trường nước thứ ba; và *thứ ba*, gây thiệt hại cho những nhà xuất khẩu đang cạnh tranh tại thị trường nội địa của nước trợ cấp.

Theo Hiệp định, thuế đối kháng chỉ có thể được áp dụng sau khi nước nhập khẩu đã tiến hành điều tra chi tiết, tương tự như việc điều tra hành vi AD. Có những quy tắc cụ thể nhằm xác định liệu một mặt hàng có được trợ cấp hay không (việc xác định này không phải luôn luôn dễ dàng); tiêu chuẩn để xác định việc nhập khẩu hàng hoá được trợ cấp đang gây thiệt hại cho ngành kinh tế nội địa; thủ tục bắt đầu và thực hiện điều tra; và những quy định về việc thực thi và thời hạn áp dụng các biện pháp đối kháng trợ cấp (thông thường là 5 năm).[244]

C. *Biện pháp tự vệ*

1. Khái quát

Biện pháp tự vệ được quy định tại Hiệp định về các biện pháp tự vệ (viết tắt là 'SA'), đề cập đến việc bảo hộ khẩn cấp ngành kinh tế nội địa khỏi sự cạnh tranh của hàng nhập khẩu. Thành viên WTO có thể tạm thời hạn chế nhập khẩu hàng hoá (thực hiện hành động 'tự vệ'), nếu ngành kinh tế nội địa của họ bị thiệt hại hay bị đe dọa gây thiệt hại bởi sự gia tăng nhập khẩu. Trong trường hợp này, thiệt hại phải là 'nghiêm trọng'. Các biện pháp tự vệ đã được quy định từ thời GATT 1947 (tại Điều XIX).[245] SA làm rõ và củng cố các quy tắc của GATT, nhất là các quy tắc tại Điều XIX (Hành động khẩn cấp đối với việc nhập khẩu hàng hoá đặc biệt), nhằm tái lập sự kiểm soát đa phương đối với các biện pháp tự vệ và loại trừ những biện pháp vượt khỏi tầm kiểm soát (Lời nói đầu).

2. Những nội dung chủ yếu của Hiệp định[246]

Hiệp định dành phần lớn nội dung để xây dựng quy định cấm đối với những biện pháp được gọi là 'vùng xám' và thiết lập một 'điều khoản hoàng hôn' đối với tất cả các hành động tự vệ. Hiệp định quy định rằng một thành viên không được dự kiến, ban hành hay duy trì bất kì hành động hạn chế xuất khẩu tự nguyện nào, thoả thuận marketing có trật tự hoặc bất cứ các biện pháp tương tự nào khác đối với bên xuất khẩu hoặc bên nhập khẩu.

Hiệp định đề ra những thủ tục điều tra tự vệ, bao gồm thông báo thẩm vấn công khai và các biện pháp thích hợp khác để các bên có liên quan đưa ra các chứng cứ, bao gồm chứng cứ về việc liệu một biện pháp có vì lợi ích chung hay không. Trong những trường hợp nghiêm trọng, có thể áp dụng biện pháp tự vệ tạm thời dựa trên sự xác định sơ bộ về thiệt hại nghiêm trọng.

Hiệp định đưa ra tiêu chuẩn của 'thiệt hại nghiêm trọng' và những yếu tố cần được xem xét để xác định tác động của nhập khẩu. Biện pháp tự vệ chỉ nên áp dụng ở giới hạn cần thiết nhằm ngăn chặn hay khắc phục những thiệt hại nghiêm trọng và tạo thuận lợi cho việc điều chỉnh.

Hiệp định ấn định thời hạn cho tất cả các biện pháp tự vệ. Nhìn chung, thời hạn áp dụng một biện pháp tự vệ không quá 4 năm, tuy nhiên thời hạn này có thể được gia hạn tối đa 8 năm, với điều kiện cơ quan có thẩm quyền của nước nhập khẩu xác định sự cần thiết phải kéo dài thời hạn, và nếu có bằng chứng rằng ngành kinh tế đó đang được điều chỉnh. Bất cứ biện pháp nào, khi được gia hạn với thời gian hơn một năm, phải được tiếp tục nới lỏng trong thời gian gia hạn.

243 Ban thư kí WTO, Sđd, tr. 31-32.

244 Ban thư kí WTO, Sđd, tr. 30.

245 Ban thư kí WTO, Sđd, tr. 30.

246 WTO, http://wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm.

6. Rào cản phi thuế quan (NTBs)

A. *Cấp phép nhập khẩu*

1. Khái quát

Hiệp định về thủ tục cấp phép nhập khẩu của WTO (sau đây gọi là 'Hiệp định ILP') đặt ra những quy tắc cho tất cả các thành viên trong việc sử dụng hệ thống cấp phép nhập khẩu để điều chỉnh hoạt động thương mại của mình. Hiệp định này bao gồm những hướng dẫn về cách áp dụng thủ tục cấp phép nhập khẩu công bằng và không phân biệt đối xử, với mục tiêu bảo vệ các thành viên khỏi những yêu cầu bất hợp lí hoặc chậm trễ cấp phép.

Hiệp định nhấn mạnh rằng việc cấp phép nhập khẩu, đặc biệt là cấp phép nhập khẩu tự động, phải được thực hiện một cách minh bạch và có thể dự đoán được; thủ tục cấp phép không tự động không được tạo ra gánh nặng hành chính quá mức cần thiết để thực thi các biện pháp liên quan; mong muốn đơn giản hoá và minh bạch hoá các thủ tục hành chính và thực tiễn áp dụng trong thương mại quốc tế để đảm bảo việc áp dụng, quản lí các thủ tục và thực tiễn đó được bình đẳng và công bằng (Lời nói đầu).

2. Phạm vi điều chỉnh và định nghĩa

Cấp phép nhập khẩu được hiểu là các thủ tục hành chính được sử dụng để thực hiện chế độ cấp phép nhập khẩu, yêu cầu phải nộp đơn xin nhập khẩu hoặc các loại giấy tờ khác (không phải giấy tờ cần thiết cho các mục đích hải quan) cho cơ quan hành chính liên quan như là điều kiện đặt ra trước khi nhập khẩu hàng vào lãnh thổ hải quan của thành viên nhập khẩu (khoản 1 Điều 1). Bên cạnh việc cấp phép nhập khẩu, Hiệp định còn quy định các thủ tục liên quan đến một số hoạt động gắn liền với thực tiễn, bao gồm chấp thuận nhập khẩu, cho phép hay giấy phép nhập khẩu và các giấy phép hoạt động cần thiết cho việc nhập khẩu.

3. Những nội dung chủ yếu của Hiệp định

Hiệp định quy định cả hệ thống cấp phép 'tự động' - chỉ nhằm kiểm soát chứ không nhằm điều chỉnh nhập khẩu, và hệ thống cấp phép 'không tự động', theo đó những điều kiện nhất định phải được đáp ứng trước khi cấp giấy phép nhập khẩu. Chính phủ thường sử dụng việc cấp giấy phép 'không tự động' để thực hiện các biện pháp hạn chế nhập khẩu, *ví dụ*, hạn ngạch, hạn ngạch thuế quan (viết tắt là 'TRQs'), hoặc để quản lí sự an toàn hay những yêu cầu khác (*ví dụ*, đối với hàng hoá độc hại, vũ khí, đồ cổ v.v.). Những yêu cầu đối với cấp phép nhập khẩu, giấy chứng nhận chất lượng, giấy chứng nhận vệ sinh và giấy chứng nhận các quy định kĩ thuật cũng là đối tượng điều chỉnh của Hiệp định ILP.[247]

B. *Hiệp định xác định trị giá hải quan*

1. Khái quát

Hiệp định về thực thi Điều VII (Hiệp định xác định trị giá hải quan - viết tắt là CVA) công nhận sự cần thiết của hệ thống xác định giá hàng hoá một cách thoả đáng, thống nhất và vô tư vì các mục đích thuế quan, nhằm ngăn chặn việc sử dụng cách xác định trị giá hải quan một cách tuỳ tiện hay thái quá; trong phạm vi rộng nhất có thể, cơ sở để xác định trị giá hàng hoá vì mục đích thuế quan cần phải là giá trị giao dịch của hàng hoá được định giá; việc xác định trị giá hải quan cần dựa trên tiêu chí đơn giản và công bằng, phù hợp với các thông lệ thương mại, và những thủ tục xác định trị giá này phải được áp dụng chung mà không có sự phân biệt giữa các nguồn cung cấp (Lời nói đầu). Do đó, Hiệp định đề ra 6 phương pháp xác định trị giá hải quan, trong đó phương pháp xác định trị giá giao dịch được ưu tiên hàng đầu và là phương pháp quan trọng nhất.

2. Phạm vi điều chỉnh và định nghĩa

Theo CVA, xác định trị giá tính thuế hải quan có nghĩa là thủ tục hải quan được áp dụng để xác định giá trị tính thuế hải quan của hàng hoá nhập khẩu. Nếu tính tỉ lệ thuế theo giá hàng, trị giá hải quan có ý nghĩa quan trọng trong việc xác định thuế phải trả trên hàng hoá được nhập khẩu. Vì vậy, Hiệp định này rất quan trọng đối với cả cơ quan có thẩm quyền về hải quan và những nhà xuất khẩu.

3. Nội dung của Hiệp định

Khoản 2(a) Điều VII GATT quy định rằng việc xác định trị giá tính thuế hải quan của hàng nhập khẩu phải dựa vào giá trị thực của hàng nhập khẩu, hoặc trị giá thực của hàng tương tự, không được phép căn cứ vào trị giá của hàng có xuất xứ nội địa, hay trị giá mang tính áp đặt, hoặc được đưa ra một cách vô căn cứ.

Hiệp định quy định 6 phương pháp xác định trị giá hải quan, đó là: (i) Trị giá giao dịch (phương pháp đầu tiên và quan trọng nhất); (ii) Trị

[247] USTR, http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/import-licensing

giá giao dịch của hàng hoá giống hệt ('identical goods'); (iii) Trị giá giao dịch của hàng hoá tương tự ('similar goods'); (iv) Trị giá khấu trừ; (v) Trị giá tính toán; và (vi) Phương pháp suy luận - là phương pháp được áp dụng cuối cùng.

Thông thường, trị giá tính thuế hải quan của hàng hoá nhập khẩu sẽ là giá trị giao dịch, đó là giá thực tế đã thanh toán cho hàng hoá được bán để xuất khẩu đến nước nhập khẩu với điều kiện sau (khoản 1 Điều 1):

(a) Không có sự hạn chế nào trong việc người mua định đoạt hay sử dụng hàng hoá, trừ những hạn chế:

(i) Đã được áp dụng hoặc quy định bởi pháp luật hoặc bởi các cơ quan có thẩm quyền tại nước nhập khẩu;

(ii) Nhằm giới hạn những khu vực địa lí mà hàng hoá có thể được phép bán lại; hoặc

(iii) Không gây ảnh hưởng lớn tới giá trị hàng hoá.

(b) Việc mua bán hoặc giá cả không phụ thuộc vào điều kiện hoặc suy xét nào đó khiến không thể xác định được giá trị của hàng hoá đang được định giá.

(c) Người bán sẽ không được trực tiếp hoặc gián tiếp hưởng bất kì phần nào từ số tiền do người mua thu được qua bán lại, nhượng lại hoặc sử dụng hàng hoá này, trừ một số điều chỉnh hợp lí được phép thực hiện theo quy định tại Điều 8; và

(d) Người mua và người bán không có liên hệ, hoặc trong trường hợp đó thì giá trị giao dịch chỉ được chấp nhận cho mục đích hải quan theo các quy định tại khoản 2.

Tuy nhiên, cơ quan hải quan có quyền 'tự chứng minh về tính đúng đắn và tính chính xác của bất kì báo cáo, văn bản hoặc tuyên bố nào đã được đưa ra nhằm mục đích xác định trị giá hải quan' (Điều 17). Vì vậy, nếu nghi ngờ về trị giá giao dịch đã khai báo, cơ quan hải quan có thể yêu cầu nhà nhập khẩu giải thích rõ hơn rằng giá trị đã khai báo thể hiện được tổng số giá trị thực tế đã thanh toán hoặc phải thanh toán cho hàng hoá nhập khẩu. Nếu những nghi ngờ hợp lí vẫn tồn tại, cơ quan hải quan có thể quyết định rằng trị giá hải quan không thể được xác định theo phương pháp trị giá giao dịch. Trước khi đưa ra quyết định cuối cùng, cơ quan hải quan phải thông báo lập luận của họ cho nhà nhập khẩu, ngược lại, nhà nhập khẩu phải được dành khoảng thời gian hợp lí để phản hồi. Lập luận cho quyết định cuối cùng phải được thông báo bằng văn bản cho nhà nhập khẩu.

Nếu trị giá hải quan của hàng nhập khẩu không thể được xác định theo phương pháp trị giá giao dịch, thì trị giá hải quan sẽ là trị giá giao dịch của hàng hoá giống hệt được bán để xuất khẩu sang cùng nước nhập khẩu đó và được xuất khẩu vào cùng thời điểm mà hàng hoá đó được xác định trị giá. Trị giá giao dịch của hàng hoá giống hệt, được bán với cùng cấp lưu thông và về cơ bản cùng số lượng tại thời điểm hàng hoá đó được xác định trị giá, sẽ được sử dụng để xác định trị giá hải quan (Điều 2).

Nếu trị giá hải quan của hàng nhập khẩu không thể được xác định theo cả phương pháp trị giá giao dịch hoặc trị giá giao dịch của hàng giống hệt, thì trị giá hải quan sẽ là trị giá giao dịch của hàng hoá tương tự được bán để xuất khẩu sang cùng nước nhập khẩu đó và được xuất khẩu vào cùng thời điểm mà hàng hoá đó đang được xác định trị giá. Trị giá giao dịch của hàng hoá tương tự, được bán với cùng cấp lưu thông và về cơ bản cùng số lượng tại thời điểm hàng hoá đang được xác định trị giá, sẽ được sử dụng để xác định trị giá hải quan (Điều 3).

Nếu hàng hoá nhập khẩu, hoặc hàng hoá nhập khẩu giống hệt hay tương tự được bán tại nước nhập khẩu theo điều kiện nhập khẩu, thì trị giá hải quan của hàng hoá nhập khẩu đó sẽ phải được tính toán dựa trên giá của đơn vị hàng hoá mà hàng hoá nhập khẩu, hoặc hàng hoá nhập khẩu giống hệt hoặc tương tự, được bán với tổng số lượng lớn nhất, vào cùng hoặc khoảng cùng thời gian nhập khẩu hàng hoá đang được xác định trị giá, bán cho người mà người đó không có liên hệ với người bán hàng hoá đó, có khấu trừ các chi phí được quy định tại Điều 5.

Nếu trị giá hải quan vẫn chưa xác định được, thì nó sẽ phải được xác định dựa trên trị giá tính toán. Trị giá tính toán là tổng của các khoản sau:

(a) Các chi phí hoặc giá trị của nguyên vật liệu và quá trình sản xuất hoặc chế biến được sử dụng trong việc sản xuất ra hàng nhập khẩu đó;

(b) Khoản lợi nhuận và các chi phí chung tương đương với lợi nhuận thường có trong việc bán hàng hoá có cùng chất lượng và chủng loại như hàng hoá đang được xác định trị giá, do các nhà sản xuất của nước xuất khẩu sản xuất để xuất khẩu sang nước nhập khẩu;

(c) Các chi phí hoặc giá trị của các phí tổn cần thiết (Điều 6).

Nếu trị giá hải quan của hàng nhập khẩu không thể xác định được theo tất cả các phương pháp trên, thì nó sẽ được xác định bằng cách sử dụng các phương pháp hợp lí phù hợp với các nguyên tắc và quy định chung của Hiệp định này và Điều VII GATT, và trên cơ sở những dữ liệu sẵn có của nước nhập khẩu. Tuy nhiên, không được xác định trị giá hải quan trên cơ sở:

(a) Giá bán tại nước nhập khẩu của hàng hoá sản xuất tại nước đó;

(b) Quy tắc cho phép chấp nhận giá trị cao hơn trong hai giá trị lựa chọn, nhằm mục đích hải quan;

(c) Giá hàng hoá trên thị trường nội địa của nước xuất khẩu;

(d) Chi phí sản xuất ngoài trị giá tính toán đã được xác định đối với hàng hoá giống hệt hoặc tương tự theo các quy định tại Điều 6;

(e) Giá của hàng hoá xuất khẩu sang nước khác không phải là nước nhập khẩu;

(f) Trị giá hải quan tối thiểu; hoặc

(g) Các giá trị tuỳ tiện hoặc không có thực.

C. Giám định hàng hoá trước khi xếp hàng xuống tàu[248]

1. Khái quát

Hiệp định về giám định hàng hoá trước khi xếp hàng xuống tàu (viết tắt là 'Hiệp định PSI') công nhận sự cần thiết phải giám định chất lượng, số lượng hoặc giá cả của hàng hoá nhập khẩu của các DCs trong thời hạn và mức độ những nước này thấy phù hợp; nhận thức rằng việc thực hiện những hoạt động giám định không được tạo thêm trì hoãn không cần thiết hoặc gây đối xử không công bằng. Vì vậy, Hiệp định đã xác lập khuôn khổ quốc tế thống nhất về quyền và nghĩa vụ của cả các thành viên sử dụng công cụ này và các thành viên xuất khẩu; mong muốn làm minh bạch hoá hoạt động của cơ quan giám định hàng hoá, pháp luật và các quy định liên quan về giám định hàng hoá (Lời nói đầu).

2. Phạm vi điều chỉnh và định nghĩa

Hiệp định điều chỉnh mọi hoạt động giám định hàng hoá được thực hiện trên lãnh thổ của các thành viên dưới hình thức kí hợp đồng hoặc uỷ quyền của chính phủ hoặc bất kì cơ quan chính phủ nào của thành viên (khoản 1 Điều 1).

Hoạt động giám định hàng hoá là mọi hoạt động liên quan đến việc thẩm định số lượng, chất lượng và giá cả, kể cả tỉ giá hối đoái và các điều kiện tài chính, và/hoặc phân loại hải quan của hàng hoá xuất khẩu đến lãnh thổ thành viên sử dụng (khoản 3 Điều 1).

3. Nội dung chủ yếu của Hiệp định[249]

Hiệp định này được các DCs áp dụng nhằm bảo hộ những lợi ích tài chính quốc gia (*ví dụ*: ngăn chặn thất thoát vốn và gian lận thương mại cũng như việc trốn thuế quan) và nhằm bù đắp cho những khó khăn về cơ sở hạ tầng hành chính.

Hiệp định thừa nhận rằng những nguyên tắc và nghĩa vụ của GATT sẽ được áp dụng cho những hoạt động của các cơ quan giám định hàng hoá trước khi xếp hàng do chính phủ ủy thác. Những nghĩa vụ quy định cho chính phủ thành viên giám định bao gồm nghĩa vụ không phân biệt đối xử, minh bạch, đảm bảo bí mật thông tin kinh doanh, tránh trì hoãn không có lí do chính đáng, sử dụng những hướng dẫn cụ thể để tiến hành thẩm định giá, và tránh xung đột lợi ích của các cơ quan giám định trước khi xếp hàng xuống tàu.

Nghĩa vụ của các bên trong hợp đồng xuất khẩu đối với thành viên sử dụng hoạt động giám định hàng hoá bao gồm: Không phân biệt đối xử trong việc áp dụng pháp luật quốc gia; Nhanh chóng công bố pháp luật và những quy định về trợ giúp kĩ thuật khi được yêu cầu. Hiệp định xác lập thủ tục rà soát độc lập - do cơ quan đại diện cho cơ quan giám định và cơ quan đại diện cho nhà xuất khẩu cùng nhau thực hiện và quản lí - để giải quyết tranh chấp giữa nhà nhập khẩu và cơ quan giám định.

D. *Quy tắc xuất xứ hàng hoá*

1. Khái quát

Mục đích của Hiệp định về quy tắc xuất xứ hàng hoá (viết tắt là 'Hiệp định RoO') là hướng tới sự hài hoà lâu dài những quy tắc xuất xứ hàng hoá, hơn là chỉ quan tâm tới các quy tắc xuất xứ hàng hoá nhằm mục đích trao ưu đãi thuế quan; và Hiệp định RoO nhằm đảm bảo rằng các quy tắc xuất xứ hàng hoá tự chúng không tạo ra trở ngại không cần

[248] WTO, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#gAgreement

[249] WTO, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#gAgreement.

thiết đối với thương mại; đảm bảo rằng các quy tắc xuất xứ phải được chuẩn bị và áp dụng một cách vô tư, công khai, có thể dự đoán được, nhất quán và trung lập (Lời nói đầu).

2. Phạm vi điều chỉnh và định nghĩa

Quy tắc xuất xứ được định nghĩa là những luật, quy định, quyết định hành chính chung do các thành viên áp dụng để xác định nước xuất xứ của hàng hoá, với điều kiện là quy tắc xuất xứ này không liên quan đến thoả thuận thương mại hoặc chế độ thương mại độc lập có áp dụng ưu đãi thuế quan ngoài phạm vi điều chỉnh của khoản 1 Điều I GATT.

3. Những nội dung chủ yếu của Hiệp định

Hiệp định xác lập chương trình hài hoà hoá được thực hiện ngay sau khi kết thúc Vòng đàm phán Uruguay và được hoàn thành trong vòng 3 năm (khoản 2 Điều 9). Chương trình hài hoà hóa dựa trên cơ sở một nhóm các nguyên tắc, bao gồm quy tắc xuất xứ khách quan, dễ hiểu và có thể dự đoán được (Phần IV Hiệp định).

Hiệp định xác lập những quy chế quản lí việc áp dụng quy tắc xuất xứ, được chia làm 2 giai đoạn như sau:

- Điều 2 - Quy tắc trong thời gian quá độ: cho đến khi hoàn thành chương trình hài hoà hoá quy tắc xuất xứ hàng hoá quy định tại Phần IV, các thành viên phải đảm bảo rằng:

(a) Khi ban hành quyết định hành chính để áp dụng chung cần phải định nghĩa rõ ràng các yêu cầu;

(b) Các quy tắc xuất xứ của chúng không được sử dụng để trực tiếp hay gián tiếp theo đuổi mục tiêu chính sách đó;

(c) Quy tắc xuất xứ bản thân nó không được tạo ra các tác động hạn chế, bóp méo hay làm rối loạn thương mại quốc tế;

(d) Quy tắc xuất xứ áp dụng đối với hàng hoá xuất khẩu và nhập khẩu không được chặt chẽ hơn quy tắc xuất xứ áp dụng để xác định xem một hàng hoá có phải là hàng nội địa hay không và không được phân biệt đối xử giữa các thành viên khác, bất kể đến mối liên hệ giữa công ty mẹ, công ty con hay chi nhánh;

(e) Quy tắc xuất xứ phải được quản lí nhất quán, thống nhất, vô tư và hợp lí;

(f) Quy tắc xuất xứ trong đó nêu những gì không tạo nên xuất xứ hàng hoá ('tiêu chuẩn phủ định') cũng được phép coi như một phần của phân loại 'tiêu chuẩn khẳng định', hoặc trong một số trường hợp cá biệt khi việc xác định các 'tiêu chuẩn khẳng định' của xuất xứ là không cần thiết;

(g) Các luật, quy định dưới luật, quyết định tư pháp và hành chính để áp dụng chung liên quan đến quy tắc xuất xứ sẽ được công bố;

(h) Khi có thay đổi trong quy tắc xuất xứ hoặc ban hành các quy tắc xuất xứ mới, các thành viên không được áp dụng hồi tố những thay đổi này, dù các luật, quy định dưới luật có thể quy định như vậy, và không vì thế làm tổn hại đến chúng;

(i) Bất kì một hành động hành chính nào liên quan đến xác định xuất xứ có thể được toà án, trọng tài hoặc toà án hành chính, độc lập với cơ quan đã ra quyết định xem xét lại một cách nhanh chóng, và có thể sửa đổi hoặc huỷ bỏ quyết định hành chính đó; và

(j) Tất cả các thông tin bí mật, hoặc được cung cấp trên cơ sở bí mật nhằm thực thi các quy tắc xuất xứ phải được các cơ quan có liên quan bảo đảm tuyệt mật.

- Điều 3 - Các quy tắc sau thời gian quá độ: Xét rằng mọi thành viên đều hướng tới lập ra các quy tắc xuất xứ hài hoà, sau khi có kết quả của chương trình hài hoà các quy tắc này, ngay khi triển khai kết quả của chương trình đó, các thành viên sẽ bảo đảm rằng:

(a) Áp dụng quy tắc xuất xứ như nhau cho tất cả các mục đích nêu tại Điều 1;

(b) Theo quy tắc xuất xứ của mình, một nước được xác định là nước xuất xứ của một hàng hoá cụ thể, nếu hàng hoá được hoàn toàn sản xuất ra ở nước đó; hoặc trong trường hợp nhiều nước cùng tham gia vào quá trình sản xuất ra hàng hoá đó, thì nước xuất xứ hàng hoá là nước thực hiện công đoạn chế biến cơ bản cuối cùng;

(c) Các nguyên tắc tương tự khác trong thời gian quá độ.

Bên cạnh đó, Hiệp định cũng xác lập những thủ tục thông báo, rà soát, tư vấn và giải quyết tranh chấp trong Phần III.

7. Các biện pháp đầu tư liên quan đến thương mại

Hiệp định về các biện pháp đầu tư liên quan đến thương mại (viết tắt là 'Hiệp định TRIMs') thừa nhận rằng một số biện pháp đầu tư có tác động làm hạn chế và bóp méo thương mại. Hiệp định quy định rằng các thành viên không được áp dụng bất cứ biện pháp đầu tư liên quan đến thương mại nào không phù hợp với Điều III ('NT') và Điều XI (cấm hạn chế số lượng) của GATT (khoản 1 Điều 2 Hiệp định TRIMs). Tóm lại, danh mục minh họa TRIMs không phù hợp với quy định tại các điều trên được nêu tại Phụ lục của Hiệp định như sau:

- TRIMs không phù hợp với các nghĩa vụ về NT được quy định tại Điều III GATT bao gồm những biện pháp mang tính bắt buộc, hoặc được thực thi thông qua luật trong nước và các quyết định mang tính hành chính, hoặc các điều kiện mà chỉ khi tuân thủ các điều kiện này mới được hưởng một ưu đãi nào đó, mà biện pháp này quy định:

(a) Doanh nghiệp phải mua hoặc sử dụng các sản phẩm có xuất xứ nội địa, hoặc từ một nguồn cung cấp nội địa, dù yêu cầu đó được xác định theo sản phẩm nhất định, theo số lượng hoặc giá trị sản phẩm hoặc theo tỉ lệ về số lượng hoặc giá trị của sản xuất nội địa; hoặc

(b) Doanh nghiệp chỉ được mua hoặc sử dụng các sản phẩm nhập khẩu bị giới hạn trong một tổng số tính theo số lượng hoặc giá trị sản phẩm nội địa mà doanh nghiệp này xuất khẩu.

- TRIMs không phù hợp với nghĩa vụ loại bỏ chung các biện pháp hạn chế số lượng được quy định tại khoản 1 Điều XI GATT bao gồm những biện pháp mang tính bắt buộc, hoặc được thực thi thông qua luật trong nước và các quyết định mang tính hành chính, hoặc các điều kiện mà chỉ khi tuân thủ các điều kiện này mới được hưởng một ưu đãi nào đó, và biện pháp này hạn chế:

(a) Việc doanh nghiệp nhập khẩu sản phẩm để sử dụng hoặc liên quan đến sản xuất nội địa dưới hình thức hạn chế chung hoặc hạn chế trong một tổng thể liên quan đến số lượng hoặc giá trị sản xuất nội địa mà doanh nghiệp đó xuất khẩu;

(b) Việc doanh nghiệp nhập khẩu sản phẩm để sử dụng hoặc liên quan đến sản xuất nội địa bằng cách hạn chế khả năng tiếp cận nguồn ngoại hối chỉ ở mức liên quan đến nguồn thu ngoại hối của doanh nghiệp này;

(c) Việc doanh nghiệp xuất khẩu hoặc bán để xuất khẩu các sản phẩm, cho dù được quy định dưới hình thức sản phẩm cụ thể hay dưới hình thức số lượng, hoặc giá trị sản phẩm hoặc theo một tỉ lệ về số lượng, hoặc giá trị sản xuất nội địa của doanh nghiệp.

Hiệp định TRIMs bắt buộc các bên phải thông báo những biện pháp đầu tư liên quan đến thương mại không phù hợp với Hiệp định trong thời hạn 5 năm đối với các DCs và 7 năm đối với các LDCs (Điều 5). Hiệp định thành lập một Hội đồng TRIMs có nhiệm vụ kiểm soát việc thực hiện những cam kết này. Hiệp định còn quy định xem xét liệu sau này có cần bổ sung thêm vào Hiệp định những quy định về đầu tư và chính sách cạnh tranh rộng hơn nữa hay không (Điều 9).[250]

Mục 4. THƯƠNG MẠI DỊCH VỤ VÀ HIỆP ĐỊNH GATS

1. Hoàn cảnh ra đời

Hiệp định chung về thương mại dịch vụ (viết tắt là 'GATS') là một hiệp định trong khuôn khổ WTO và điều chỉnh các vấn đề về thương mại dịch vụ giữa các thành viên WTO. Không giống những lĩnh vực thương mại khác, trong các cuộc đàm phán thương mại, thương mại dịch vụ chưa được định hình rõ rệt, cho đến những năm 80-90 của thế kỉ XX, khi các chuyên gia kinh tế và các nhà hoạch định chính sách bắt đầu phải đối mặt với nhu cầu cần có sự điều chỉnh một vấn đề ngày càng trở nên quan trọng trong hoạt động kinh tế. Thật vậy, ngày nay các ngành kinh tế dịch vụ chiếm 70-80% GDP trong các nền kinh tế phát triển và trên dưới 40% GDP ở các DCs. Không giống bất kì lĩnh vực nào khác, do việc thực hiện nhiều chức năng quan trọng khác nhau trong nền kinh tế, dịch vụ được coi như phương tiện thật sự của tăng trưởng kinh tế. Trước tiên, dịch vụ cung ứng đầu vào cho tất cả các lĩnh vực của nền kinh tế. *Ví dụ*, nếu không có dịch vụ tài chính, viễn thông, vận tải hay năng lượng, thì sẽ không thể có hệ thống các ngành kinh tế hiệu quả và vững mạnh. Như vậy, một lĩnh vực dịch vụ không hiệu quả cũng sẽ giống như một mức thuế nội địa cao, vì nó sẽ làm tăng giá cuối cùng của sản phẩm. Dịch vụ cũng thực hiện những chức năng quan trọng là phục vụ cộng đồng. *Ví dụ*: ngành giáo dục, chăm sóc sức khoẻ, năng lượng đã thực hiện chức năng cần thiết phục vụ cộng đồng. Các học thuyết kinh tế đã chứng minh rằng, ở đâu lợi thế so sánh của một nước được coi là hợp pháp, thì ở đó các ngành dịch vụ sẽ thúc đẩy tăng trưởng kinh tế.

[250] WTO, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#g1Agreement

Các ngành dịch vụ có một vài đặc điểm khiến cho việc điều chỉnh và tự do hoá gặp những khó khăn đặc biệt. Trước tiên, chức năng chiến lược của hầu hết các ngành kinh tế dịch vụ khiến cho dịch vụ thường trở thành đối tượng chịu sự chi phối độc quyền. Cho đến vài thập kỉ trở lại đây, thậm chí ở các nước phát triển, các ngành dịch vụ quan trọng như viễn thông, năng lượng hay vận tải vẫn thuộc về chính phủ. Ngày nay, các ngành dịch vụ khác, như chăm sóc sức khoẻ hay giáo dục, một phần lớn vẫn ở trong tay chính phủ. Khi vị trí của nhà nước trong các ngành kinh tế dịch vụ có thể đảm bảo dịch vụ được cung ứng ở mức giá thấp, thì đồng thời điều đó cũng có thể có tác động ngược lại về chất lượng dịch vụ, ảnh hưởng trực tiếp tới tất các các lĩnh vực của nền kinh tế. Đặc điểm khác của dịch vụ là sự phụ thuộc của chúng vào các yếu tố sản xuất như nhân công, vốn và công nghệ. Thông thường, sự tự do hoá các ngành kinh tế dịch vụ cần dựa vào sự tự do hoá các yếu tố sản xuất, mà trong một số trường hợp rất khó đạt được từ góc độ chính trị, như trường hợp dịch chuyển lao động. Từ góc độ kinh tế, dịch vụ phụ thuộc vào thị trường không hoàn hảo - nghĩa là thị trường cần có sự can thiệp của nhà nước. Từ góc độ kinh tế - chính trị, cường độ điều chỉnh của các ngành kinh tế dịch vụ thể hiện sự kết hợp đặc biệt, nhằm đạt được sự tự do hoá, khi mà sự tự do hóa này đòi hỏi loại bỏ những rào cản. Điểm khác biệt cơ bản giữa thương mại hàng hoá và thương mại dịch vụ dựa trên hình thức bảo hộ đối với các ngành kinh tế dịch vụ. Khi các rào cản trong thương mại hàng hoá bao gồm thuế nội địa hay hạn ngạch, dễ nhận ra và dễ định lượng, thì trong thương mại dịch vụ, các rào cản lại vô hình. Các rào cản này là các quy định, luật lệ, sự độc quyền mà việc nhận diện hay loại bỏ chúng đều khó khăn. Hơn nữa, không giống các ngành kinh tế khác, việc tự do hoá thương mại dịch vụ đòi hỏi phải có một khuôn khổ pháp luật tốt, giúp ngăn ngừa các tác động ngược, như trong trường hợp tự do hoá sớm các dịch vụ tài chính. Vì vậy, tự do hoá thương mại dịch vụ thường không phụ thuộc vào sự mặc cả có đi có lại như trong trường hợp thương mại hàng hoá, mà đúng hơn, kinh nghiệm cho thấy rằng tự do hóa thương mại dịch vụ được thực hiện chủ yếu như là kết quả của áp lực trong nước đối với việc nâng cao tính hiệu quả của nền kinh tế.

2. GATS và cấu trúc của GATS

GATS được coi là một trong những kết quả quan trọng nhất của Vòng đàm phán Uruguay. Khi các bên đàm phán bắt đầu thảo luận làm thế nào để điều chỉnh thương mại dịch vụ và đặt ra nguyên tắc cho vấn đề này, thì cũng ngay lập tức các bên thấy rõ rằng không thể coi dịch vụ giống như các lĩnh vực thương mại khác. Khó khăn thực chất để tạo ra cơ sở pháp luật cho thương mại dịch vụ và những đặc trưng của việc điều chỉnh đối với một số lĩnh vực dịch vụ đã thách thức các nhà đàm phán và các nhà hoạch định chính sách hơn một thập kỉ. Năm 1994, cuối cùng GATS đã phát sinh hiệu lực như một phụ lục độc lập của Hiệp định Marrakesh về thành lập WTO, và là một phần của 'Gói cam kết'. Điều này có nghĩa các thành viên khi gia nhập WTO phải có nghĩa vụ tuân thủ GATS.

Cấu trúc các quy định điều chỉnh thương mại dịch vụ trong GATS có thể chia thành 3 phần cơ bản. *Thứ nhất*, chính văn bản GATS, bao gồm 28 điều, đưa ra các nguyên tắc cơ bản trong thương mại dịch vụ. *Thứ hai*, đính kèm GATS có 8 phụ lục nêu ra hoặc làm rõ các điều khoản đặc biệt. *Thứ ba* là Biểu cam kết của các thành viên.

GATS là văn bản cung cấp một khuôn khổ pháp luật toàn diện cho giao dịch dịch vụ. Hiệp định được cấu trúc thành 6 phần. Phần I (bao gồm Điều I) định nghĩa phạm vi áp dụng của Hiệp định và cung cấp khái niệm chung về các phương thức cung ứng dịch vụ. Phần II (bao gồm các điều từ Điều II đến Điều XV), còn gọi là 'các nghĩa vụ và nguyên tắc chung', bao gồm 14 điều được áp dụng cho tất cả các ngành dịch vụ. Trái lại, Phần III (bao gồm các điều từ Điều XVI đến Điều XVIII) - 'các cam kết cụ thể' bao gồm 3 điều chỉ áp dụng cho các ngành dịch vụ cụ thể và những phương thức cung ứng mà các thành viên cam kết. Điều này có nghĩa là: trong khi các điều khoản của Phần II được áp dụng cho bất kì ngành dịch vụ nào, thì cho dù thành viên đã đưa ra cam kết cho ngành đó, cam kết này cũng vẫn không nằm trong nghĩa vụ của Phần III - phần chỉ được áp dụng nếu thành viên chấp thuận cam kết các nghĩa vụ. Phần IV (bao gồm các điều từ Điều XIX đến Điều XXI); và Phần V (bao gồm các điều từ Điều XXII đến Điều XXVI) bao gồm các điều khoản liên quan đến phương thức đàm phán và 'Những quy định về thể chế'. Cuối cùng, Phần VI - 'Điều khoản cuối cùng', liên quan đến khước từ quyền lợi, các định nghĩa và các phụ lục.

GATS được bổ sung 8 phụ lục, các phụ lục chia thành 3 nhóm chính tùy thuộc vào quan hệ pháp lí của mỗi nhóm. Tất cả phụ lục tạo thành bộ phận không thể tách rời của GATS. Phụ lục 1 bao gồm các nguyên tắc và quy định về điều kiện áp dụng ngoại lệ của Điều II (liên quan đến MFN). Nhóm Phụ lục 2 bao gồm những phụ lục điều chỉnh và làm rõ các định nghĩa về các ngành dịch vụ cụ thể. Trong nhóm này có Phụ lục về di chuyển thể nhân; Phụ lục về các dịch vụ tài chính; Phụ lục về vận tải hàng không; và Phụ lục về dịch vụ viễn thông. Nhóm 3 bao gồm Phụ lục 2 về dịch vụ

tài chính; Phụ lục về dịch vụ viễn thông cơ bản; và Phụ lục về vận tải hàng hải. Không giống những phụ lục khác, những văn bản này chỉ cung cấp các hướng dẫn và phương thức đàm phán, mà không chứa đựng bất kì điều khoản nào điều chỉnh về nội dung.

Tương tự như GATT, trong GATS, các thành viên có nghĩa vụ đưa ra các cam kết, tạo thành bộ phận không thể tách rời của Hiệp định. Biểu cam kết được chia thành các cam kết chung, - áp dụng đối với tất cả các ngành dịch vụ; và cam kết cụ thể - chỉ áp dụng cho dịch vụ và phương thức cung ứng dịch vụ đã được các thành viên chỉ rõ. Biểu cam kết cụ thể được thiết kế theo cách cho phép các thành viên chỉ rõ việc thành viên đó có tuân thủ hay không nghĩa vụ MA (Điều XVI), NT (Điều XVII) hay các cam kết bổ sung (Điều XVIII) đối với mỗi ngành dịch vụ và mỗi phương thức cung ứng dịch vụ. GATS đưa ra phương pháp tiếp cận đặc biệt cho phép các thành viên vẫn có được sự linh hoạt trong các cam kết, nhằm đảm bảo một không gian chính sách đối với các ngành kinh tế dịch vụ được tự do hoá.

Bảng 2.4.1. Thí dụ về cam kết của Việt Nam về dịch vụ lữ hành

Phương thức cung ứng: 1) Cung ứng qua biên giới; 2) Tiêu dùng ở nước ngoài; 3) Hiện diện thương mại; 4) Hiện diện thể nhân

Ngành và phân ngành	Hạn chế tiếp cận thị trường	Hạn chế đối xử quốc gia	Cam kết bổ sung
B. Dịch vụ đại lí lữ hành và điều hành tour du lịch (CPC 7471)	1) Không hạn chế. 2) Không hạn chế. 3) Không hạn chế, trừ việc: các nhà cung ứng dịch vụ nước ngoài được phép cung ứng dịch vụ dưới hình thức liên doanh với đối tác Việt Nam mà không bị hạn chế phần góp vốn của phía nước ngoài. 4) Chưa cam kết, trừ các cam kết chung.	1) Không hạn chế. 2) Không hạn chế. 3) Không hạn chế, trừ việc: hướng dẫn viên du lịch trong doanh nghiệp có vốn đầu tư nước ngoài phải là công dân Việt Nam. Các doanh nghiệp cung ứng dịch vụ có vốn đầu tư nước ngoài chỉ được phép cung ứng dịch vụ đưa khách vào Việt Nam du lịch và lữ hành nội địa đối với khách du lịch vào Việt Nam như là một phần của dịch vụ đưa khách vào du lịch Việt Nam. 4) Chưa cam kết, trừ các cam kết chung.	

Hướng dẫn đọc Biểu cam kết

Nếu không có hạn chế nào được đưa ra trong cột MA và cột NT đối với ngành dịch vụ và phương thức cung ứng dịch vụ, thì trong Biểu cam kết thể hiện không hạn chế ('None'). Tuy nhiên, cần lưu ý rằng khi mà thuật ngữ 'không hạn chế' được dùng trong Phần 2 hoặc trong phần các dịch vụ cụ thể của biểu cam kết, nó sẽ có nghĩa là không có hạn chế cụ thể nào cho ngành dịch vụ này. Nhưng phải ghi nhớ rằng, như đã lưu ý ở trên, có thể nó có liên quan đến các hạn chế chung ở phần đầu tiên của biểu cam kết.

Tất cả các cam kết trong Biểu đều phải được thành viên tuân thủ, trừ khi có quy định khác. Trong trường hợp thành viên không muốn thực hiện tự do hóa một ngành dịch vụ và phương thức cung ứng dịch vụ nào đó, nhằm thiết lập hay duy trì các biện pháp đi ngược lại với nguyên tắc MA và nguyên tắc NT, thì thành viên đó sẽ đưa vào khung tương ứng thuật ngữ 'chưa cam kết' ('Unbound').

3. Dịch vụ và phương thức cung ứng dịch vụ

Một trong những thách thức lớn nhất mà các nhà đám phán phải đối mặt khi soạn thảo các điều khoản của GATS là định nghĩa dịch vụ. Đáng ngạc nhiên là GATS không đưa ra bất kì định nghĩa nào về dịch vụ. Điều I nêu ra phạm vi áp dụng của GATS, theo đó GATS 'áp dụng cho các biện pháp tác động đến thương mại dịch vụ của các thành viên'.[251] Điều này cho thấy rõ là: dịch vụ - đối tượng điều chỉnh của GATS - chỉ là các dịch vụ được đưa ra trên cơ sở cạnh tranh. Thật vậy, khoản 3 Điều I nói rõ GATS loại trừ khỏi phạm vi áp dụng của mình những dịch vụ 'được cung ứng để thi hành thẩm quyền của chính phủ'.[252] Bởi vậy, quy định này đã loại trừ khỏi phạm vi áp dụng của Hiệp định tất cả những dịch vụ công mà chính phủ cung ứng nhằm thực hiện chức năng công, đó là các dịch vụ 'được cung ứng không trên cơ sở thương mại và cũng không trên cơ sở cạnh tranh với một hoặc nhiều nhà cung ứng dịch vụ',[253] như dịch vụ chăm sóc sức khoẻ, giáo dục, viễn thông hay năng lượng.

Hiệp định không đưa ra khái niệm dịch vụ, nhưng ngược lại, Hiệp định lại mô tả dịch vụ theo phương thức cung ứng dịch vụ. Các phương thức cung ứng dịch vụ là một trong những trụ cột của GATS, và một

[251] Khoản 1 Điều I GATS.

[252] Khoản 3(b) Điều I GATS.

[253] Khoản 3(c) Điều I GATS.

dịch vụ tương tự có thể được cam kết và đối xử khác nhau phụ thuộc vào phương thức mà nó được cung ứng. GATS phân biệt 4 phương thức cung ứng dịch vụ. Các phương thức khác nhau tùy thuộc vào quy chế pháp lí của nhà cung ứng dịch vụ (pháp nhân hoặc thể nhân), và dựa trên sự dịch chuyển của người tiêu dùng hoặc người cung ứng dịch vụ.

A. *Cung ứng dịch vụ qua biên giới*

Đây là dịch vụ được cung ứng từ lãnh thổ của một thành viên vào lãnh thổ một thành viên khác. Phương thức cung ứng này là việc cung ứng những dịch vụ không đòi hỏi sự dịch chuyển vật lí của cả người tiêu dùng và người cung ứng dịch vụ. *Ví dụ*, một kiến trúc sư hay một luật sư ở nước A cung ứng dịch vụ theo yêu cầu của người tiêu dùng ở nước B, theo đó họ cung ứng một bản báo cáo nghiên cứu pháp luật (legal memorandum), hoặc một bản kế hoạch cho khách hàng, mà không phải rời khỏi văn phòng của mình. Một ví dụ khác, một trung tâm điện thoại đặt tại nước A cung ứng sự hỗ trợ qua điện thoại cho khách hàng ở các nước khác. Trong cả hai ví dụ trên, khách hàng và nhà cung ứng dịch vụ đều không phải dịch chuyển, trong khi dịch vụ vẫn được cung ứng qua biên giới.

B. *Tiêu dùng dịch vụ ở nước ngoài*

Đây là dịch vụ được cung ứng trên lãnh thổ một thành viên cho người tiêu dùng dịch vụ của bất kì thành viên nào khác. Phương thức cung ứng này là đặc trưng của một số ngành dịch vụ, như dịch vụ du lịch, hay dịch vụ chăm sóc sức khoẻ. Trong phương thức cung ứng này, nhà cung ứng dịch vụ vẫn ở tại nước của mình và họ cung ứng dịch vụ cho người tiêu dùng đã dịch chuyển đến nước của người cung ứng dịch vụ để nhận dịch vụ. Vì vậy, trong 'tiêu dùng dịch vụ ở nước ngoài', người tiêu dùng dịch vụ phải dịch chuyển để nhận một dịch vụ. *Ví dụ*, một khách du lịch dịch chuyển từ nước của họ sang một khách sạn hoặc một khu nghỉ dưỡng đặt tại một nước khác.

C. *Hiện diện thương mại*

Đây là phương thức cung ứng dịch vụ, theo đó dịch vụ được cung ứng bởi một nhà cung ứng dịch vụ của một thành viên, thông qua việc thành lập một hiện diện thương mại ở lãnh thổ một thành viên khác. Phương thức cung ứng này là hoạt động đầu tư và nó tạo thành phần cốt yếu của thương mại dịch vụ. Trong phương thức này, một công ty dịch chuyển đến một nước khác để cung ứng dịch vụ thông qua việc thành lập một hiện diện thương mại. *Ví dụ*, một ngân hàng hoặc công ty viễn thông di chuyển từ nước A đến nước B, nơi mà họ sẽ thành lập chi nhánh hoặc công ty con. Trong trường hợp này, người tiêu dùng không dịch chuyển mà nhà cung ứng dịch vụ phải dịch chuyển.

D. *Hiện diện thể nhân*

Đây là phương thức cung ứng dịch vụ, theo đó dịch vụ được cung ứng bởi nhà cung ứng của một thành viên, thông qua hiện diện của nhà cung ứng này ở lãnh thổ một thành viên khác. Trong phương thức cung ứng này, nhà cung ứng dịch vụ không phải là một doanh nghiệp, mà là một thể nhân. Giống như trường hợp trước, người tiêu dùng vẫn ở tại lãnh thổ của mình, chỉ có người cung ứng dịch vụ dịch chuyển đến với người tiêu dùng để cung ứng dịch vụ. *Ví dụ*, một bác sĩ hoặc một y tá dịch chuyển đến một nước khác để cung ứng dịch vụ y tế chuyên môn.

4. Nguyên tắc chủ yếu

Nguyên tắc chủ yếu trong thương mại dịch vụ được quy định tại 14 điều - từ Điều II đến Điều XV GATS. Những điều khoản này quy định các nghĩa vụ chung trong GATS, và không giống như những điều khoản về MA và NT, các điều khoản này áp dụng cho tất cả các ngành dịch vụ, bất kể các ngành này đã được tất cả các thành viên cam kết hay chưa.

A. *Tối huệ quốc (MFN) (Điều II)*

Tương tự GATT, điều khoản đầu tiên của GATS là MFN. Điều khoản này, giống với Điều I GATT, chủ yếu quy định nghĩa vụ của thành viên nhằm thống nhất sự đối xử giống nhau dành cho các nhà cung ứng dịch vụ tương tự của bất kì thành viên nào khác. Phần nội dung chính của điều khoản như sau:

> … Đối với bất kì biện pháp nào thuộc phạm vi điều chỉnh của Hiệp định này, mỗi thành viên phải ngay lập tức và vô điều kiện dành cho dịch vụ và các nhà cung ứng dịch vụ của bất kì thành viên nào khác, sự đối xử không kém thuận lợi hơn sự đối xử mà thành viên đó dành cho dịch vụ và các nhà cung ứng dịch vụ tương tự của bất kì nước nào khác.[254]

[254] Khoản 1 Điều II GATS.

Như lưu ý của Cơ quan phúc thẩm trong vụ *EC-Bananas*[255], đối xử MFN buộc các thành viên thống nhất sự đối xử 'de jure' hoặc 'de facto' cho các nhà cung ứng dịch vụ tương tự, bất kể trên thực tế họ đã cam kết các nhượng bộ có đi có lại với thành viên khác hay chưa. Tương tự GATT, MFN trong GATS cấm sự phân biệt đối xử dựa trên quốc tịch của các nhà cung ứng dịch vụ. Theo quy định này, một thành viên sẽ không được chỉ cho phép các công ty đến từ một nước cụ thể thành lập văn phòng, hoặc chỉ từ chối các lao động nước ngoài đến từ một nước cụ thể.

Nhưng không giống GATT, theo GATS, các thành viên được đưa vào biểu cam kết những ngoại lệ nhằm phân biệt đối xử giữa các thành viên. Điều này được quy định đặc biệt tại Phụ lục ngoại lệ của Điều II. Sự phân biệt này mang tính đơn phương, có nghĩa là các thành viên không cần phải biện minh hay được chấp thuận bằng bất kì cam kết nào. Tuy nhiên, ngoại lệ không được mở rộng đối với toàn bộ một ngành dịch vụ, mà phải cụ thể tới từng biện pháp riêng biệt. Hơn nữa, Phụ lục của Điều II ghi rõ rằng sự hạn chế chỉ mang tính tạm thời và nó phải được đưa ra tại thời điểm gia nhập.

B. *Minh bạch (Điều III)*

Điều III GATS đặt ra nghĩa vụ cho các thành viên phải công bố 'tất cả các biện pháp chung được áp dụng chung, gắn liền hoặc có ảnh hưởng đến sự áp dụng của GATS'. Trừ tình huống khẩn cấp,các thành viên có nghĩa vụ công bố tất cả các luật, quy định, văn bản hướng dẫn hay thậm chí các thoả thuận quốc tế có ảnh hưởng đến hoạt động của GATS. Vào thời điểm gia nhập, các thành viên phải công bố tất cả luật và quy định liên quan đến thương mại dịch vụ và phải trả lời chất vấn từ các thành viên khác. Để các cuộc đối thoại về pháp luật thương mại dịch vụ thuận tiện hơn, trong vòng 2 năm kể từ khi gia nhập, các thành viên phải lập ra một cơ quan thông tin về GATS. Hơn nữa, các thành viên cũng cam kết hàng năm sẽ thông báo cho Uỷ ban GATS về bất cứ thay đổi nào về luật hay quy định liên quan đến thương mại dịch vụ. Đối với một số ngành dịch vụ giữ vị trí quan trọng chiến lược đối với an ninh quốc gia, các thành viên có thể không có nghĩa vụ công bố các thông tin (i) Cản trở việc thi hành pháp luật; (ii) Chống lại lợi ích cộng đồng; hoặc (iii) Xâm hại lợi ích chính đáng của một doanh nghiệp tư nhân hay doanh nghiệp nhà nước cụ thể.

[255] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *European Communities-Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas)*, WT/DS27/AB/R, ngày 09/9/1997, đoạn 220.

Nghĩa vụ minh bạch mang tầm quan trọng lâu dài trong quá trình tự do hoá thương mại dịch vụ. Không giống như thương mại hàng hoá, rào cản cơ bản của dịch vụ bao gồm các quy định có thể xuất hiện ở tất cả các cấp độ lập pháp. Vì vậy, một sự thay đổi trong lập pháp có thể hủy hoại nghiêm trọng các nhượng bộ thương mại về NT và MA. Vì vậy, các thành viên cần thường xuyên cung cấp thông tin cho cơ quan có thẩm quyền của các thành viên khác biết về quá trình điều chỉnh chính sách, nhằm ngăn chặn việc những biện pháp trong nước có thể hủy hoại các nhượng bộ thương mại.

C. *Các quy định pháp luật trong nước (Điều VI)*

Nhìn chung, các ngành kinh tế dịch vụ chịu sự điều chỉnh lớn của nhà nước. Điều này đúng với các ngành dịch vụ như năng lượng, viễn thông hoặc các dịch vụ tài chính, ở đó sự điều chỉnh thường theo hướng khắc phục sự không hiệu quả của thị trường tự do trong việc phân bố hàng hóa và dịch vụ ('market failures'). Như đã nêu trên, các quy định pháp luật trong nước là công cụ nền tảng trong việc xây dựng chính sách kinh tế, nhưng đôi khi các quy định này cũng đặt ra các rào cản không thể coi thường cho các nhà đầu tư nước ngoài. Các rào cản đó thường liên quan đến nghĩa vụ NT (Điều XVII), hay MA (Điều XVI). Tuy nhiên, trong vài trường hợp, các quy định về dịch vụ cũng khắt khe đến nỗi chúng có thể trở thành một rào cản thương mại, ngay cả khi nó không mang tính phân biệt đối xử. Điều VI GATS đảm bảo rằng các quy định pháp luật trong nước không tạo ra những rào cản thương mại không cần thiết. Để làm được việc này, Điều VI đã đưa ra một số nguyên tắc quan trọng sau đây:

Khoản 1 đặt ra cho các thành viên nghĩa vụ quản lí các biện pháp tác động đến thương mại dịch vụ một cách hợp lí, khách quan và bình đẳng. Không giống nghĩa vụ về MA và NT - quan tâm đến việc điều chỉnh nội dung các quy định cụ thể, Điều VI điều chỉnh việc áp dụng và thực thi các quy định.

Khoản 2 yêu cầu các thành viên phải thiết lập các tòa án hoặc thủ tục để rà soát khách quan và vô tư các quyết định hành chính tác động đến thương mại dịch vụ, nhằm hạn chế việc đưa ra các quyết định tùy tiện mà nó có thể hủy hoại thương mại dịch vụ.

Khoản 3 thừa nhận rằng các thủ tục cấp phép có thể được áp dụng để trì hoãn các nhượng bộ MA. Do đó, Khoản 3 quy định rằng tất cả các thủ tục cấp phép nên được thực hiện trong một khoảng thời gian

hợp lí và buộc các thành viên cung cấp mọi thông tin về hiện trạng của đơn xin phép.

Khoản 4 đề ra ba dạng quy định (về yêu cầu cấp phép; yêu cầu và thủ tục chuyên môn; và tiêu chuẩn kĩ thuật) có liên quan cụ thể đến rào cản trong thương mại dịch vụ, do sự áp dụng phổ biến và tầm quan trọng của các quy định này trong việc điều chỉnh thương mại dịch vụ. Cụ thể như sau:

> Nhằm đảm bảo để các biện pháp liên quan tới yêu cầu chuyên môn, thủ tục, tiêu chuẩn kĩ thuật và yêu cầu cấp phép không tạo ra những rào cản không cần thiết cho thương mại dịch vụ, thông qua những cơ quan thích hợp có thể được thành lập, Hội đồng thương mại dịch vụ sẽ phát triển bất kì nguyên tắc cần thiết nào. Những nguyên tắc đó nhằm đảm bảo rằng các yêu cầu sau đây:

(a) Dựa trên những tiêu chí khách quan và minh bạch, như năng lực và khả năng cung ứng dịch vụ;

(b) Không phiền hà hơn mức cần thiết để đảm bảo chất lượng dịch vụ;

(c) Trong trường hợp áp dụng thủ tục cấp phép, không trở thành hạn chế về cung ứng dịch vụ.

Mặt khác, Khoản 5 lại chỉ áp dụng cho các ngành dịch vụ có cam kết, và nó buộc các thành viên không được áp dụng giấy phép, yêu cầu chuyên môn và tiêu chuẩn kĩ thuật, nếu nó làm giảm bớt hoặc vô hiệu hóa các cam kết cụ thể theo cách thức không phù hợp với các tiêu chí đã nêu ra tại Khoản 4, và theo cách mà tại thời điểm các cam kết cụ thể được đưa ra, thành viên không có ý định áp dụng các biện pháp này. Để xác định xem các tiêu chí này có được đáp ứng hay không, cần tính đến các tiêu chuẩn của các tổ chức quốc tế liên quan được thành viên đó áp dụng.

D. *Công nhận (Điều VII)*

Trong các ngành dịch vụ mà phương thức cung ứng dịch vụ dựa vào sự dịch chuyển của thể nhân, như các dịch vụ chuyên môn, các dịch vụ y tế hay các dịch vụ tư vấn kĩ thuật, việc các nhà cung ứng dịch vụ được công nhận như một chuyên gia hợp pháp có tầm quan trọng chủ chốt. Sự công nhận này thường dựa trên trình độ hoặc một cuộc sát hạch tại nước xuất xứ. Hầu hết các nước đều không có các tiêu chuẩn đồng nhất đối với việc tiếp cận một nghề nghiệp. Do đó, việc không công nhận trình độ nước ngoài, kinh nghiệm hay trình độ chuyên môn nào đó có thể trở thành một rào cản đối với thương mại dịch vụ. Điều VII đề cập vấn đề này và đưa ra các hướng dẫn cho các thành viên về việc làm thế nào để xây dựng và thực thi các thoả thuận công nhận.

Để khắc phục sự không thống nhất về công nhận, các thành viên được khuyến khích hài hòa hóa pháp luật hoặc kí kết các hiệp định song phương.[256] Để ngăn chặn việc các hiệp định trên có thể dẫn đến kết quả là sự phân biệt đối xử đối với các thành viên không tham gia hiệp định hoặc các quy định không được hài hòa hóa, Điều VII buộc các thành viên không được đưa ra sự công nhận theo cách mà nó có thể tạo ra sự phân biệt đối xử, hoặc hạn chế trá hình đối với thương mại dịch vụ trong việc áp dụng các tiêu chuẩn, tiêu chí để cấp phép hoặc chứng nhận cho nhà cung ứng dịch vụ.[257]

Trong trường hợp các thành viên tuân thủ các tiêu chí đã giải thích rõ ở quy định này, việc công nhận được coi như phù hợp với đòi hỏi của Điều II (MFN) mà Điều VII là một ngoại lệ.

5. Cam kết cụ thể

A. *Tiếp cận thị trường (MA) (Điều XVI)*

Cùng với nguyên tắc NT quy định tại Điều XVII, quy định về MA là nền tảng của GATS. Bởi vì theo Điều XVI, các nhà cung ứng dịch vụ của các thành viên được trao quyền tiếp cận vào thị trường nội địa, dựa trên các cam kết trong Biểu cam kết đã được các thành viên đàm phán. Các nguyên tắc và quy định tại Điều XVI chỉ áp dụng trong phạm vi mà một thành viên đã ghi các cam kết cụ thể vào cột Tiếp cận thị trường.

Đối với một ngành dịch vụ có đưa ra các cam kết về MA, thành viên có nghĩa vụ: 'Dành cho dịch vụ hoặc người cung ứng dịch vụ của các thành viên khác sự đối xử không kém thuận lợi hơn sự đối xử theo những điều kiện, điều khoản và hạn chế đã được thoả thuận và quy định tại Danh mục cam kết cụ thể.'[258]

Nghĩa vụ đảm bảo MA không chỉ không bắt buộc đối với các thành viên, mà còn có thể thích hợp với các phương thức cung ứng cụ

[256] Khoản 1 Điều VII GATS.

[257] Khoản 3 Điều VII GATS.

[258] Khoản 1 Điều XVI GATS.

thể bất kì một dịch vụ nào. Điều này có nghĩa rằng: nếu các thành viên muốn mở cửa thị trường đối với các dịch vụ ngân hàng, thì có thể chọn lựa tự do hoá thị trường giới hạn chỉ ở phương thức 1 (Cung ứng dịch vụ qua biên giới), hoặc chỉ ở phương thức 3 (Hiện diện thương mại), và đóng cửa các phương thức cung ứng khác nhằm hạn chế cạnh tranh nước ngoài. Trong phạm vi tự do hóa một ngành dịch vụ, các thành viên không được ban hành bất kì biện pháp nào có thể hủy hoại các nhượng bộ về MA. Không giống thương mại hàng hoá, các hạn chế về MA không dễ nhận dạng và có thể tồn tại dưới nhiều hình thức khác nhau. Khoản 2 Điều XVI đưa ra danh sách các biện pháp, về nguyên tắc, không được áp dụng:

(a) Hạn chế số lượng nhà cung ứng dịch vụ dù dưới hình thức hạn ngạch theo số lượng, độc quyền, đặc quyền cung ứng dịch vụ hoặc yêu cầu đáp ứng nhu cầu kinh tế;

(b) Hạn chế tổng trị giá các giao dịch về dịch vụ hoặc tài sản dưới hình thức hạn ngạch theo số lượng, hoặc yêu cầu phải đáp ứng nhu cầu kinh tế;

(c) Hạn chế tổng số các hoạt động dịch vụ hoặc tổng số lượng dịch vụ đầu ra tính theo số lượng đơn vị dưới hình thức hạn ngạch hoặc yêu cầu về nhu cầu kinh tế;

(d) Hạn chế về tổng số thể nhân có thể được tuyển dụng trong một ngành dịch vụ cụ thể, hoặc một nhà cung ứng dịch vụ được phép tuyển dụng cần thiết hoặc trực tiếp liên quan tới việc cung ứng một dịch vụ cụ thể dưới hình thức hạn ngạch hoặc yêu cầu về nhu cầu kinh tế;

(e) Các biện pháp hạn chế hoặc yêu cầu các hình thức pháp nhân cụ thể hoặc liên doanh, thông qua đó nhà cung ứng dịch vụ có thể cung ứng dịch vụ;

(f) Hạn chế về tỉ lệ vốn góp của bên nước ngoài bằng việc quy định tỉ lệ phần trăm tối đa cổ phần của bên nước ngoài, hoặc tổng trị giá đầu tư nước ngoài tính đơn lẻ hoặc tính gộp.

Có một vài điểm cần lưu ý khi giải thích các yêu cầu trên. *Thứ nhất*, các yêu cầu đặt ra cho các thành viên có ý nghĩa như những yêu cầu tối thiểu. Do đó, không hạn chế một thành viên đưa ra các đối xử ưu đãi hơn, nếu thành viên đó mong muốn. *Ví dụ*, mặc dù Danh mục cam kết chỉ cho phép tối đa 3 nhà cung ứng dịch vụ tham gia khai thác thị

trường, nhưng thành viên đó vẫn luôn luôn được tự do cho phép 5 hay nhiều hơn nữa các nhà cung ứng dịch vụ tham gia. *Thứ hai*, các quy định tại Khoản 2 khá thấu đáo, theo đó một thành viên được phép đưa ra hạn chế MA, nếu nó không thuộc phạm vi 6 hạn chế nêu trên. *Ví dụ*: một thành viên có thể được phép đưa ra chế độ thuế cao đối một ngành dịch vụ nào đó, mà thực tế có thể dẫn đến việc ngăn cản hoặc không khuyến khích gia nhập thị trường. Trong trường hợp này, biện pháp thuế có thể phù hợp với Điều XVI. Tuy nhiên, như đã giải thích, quy định tại Điều VI (về quy định pháp luật trong nước) đóng vai trò như một nghĩa vụ bao quát đảm bảo rằng, mặc dù không có các cam kết cụ thể, thì việc áp dụng một biện pháp cũng không được nhằm tạo ra một rào cản thương mại phiền toái không cần thiết.

B. *Đối xử quốc gia (NT) (Điều XVII)*

NT là một trụ cột nữa của GATS, và tương tự như Điều XVI, chỉ được áp dụng đối với các dịch vụ và phương thức cung ứng đã được thành viên đưa vào danh mục. Cũng như Điều III GATT, Điều XVII GATS đưa ra nghĩa vụ cho các thành viên đảm bảo cho các nhà cung ứng dịch vụ của một thành viên khác các điều kiện cạnh tranh bình đẳng với các nhà cung ứng dịch vụ nội địa. Không giống Điều III GATT, chỉ áp dụng cho sản phẩm, quy định này không chỉ áp dụng đối với nhà cung ứng dịch vụ, mà còn mở rộng tới người tiêu dùng. Tuy nhiên, phạm vi áp dụng thực sự của quy định này hạn chế hơn GATT, do nó chỉ áp dụng với các biện pháp 'gây tác động tới việc cung ứng dịch vụ'. Các biện pháp nội địa mà thực chất không gây tác động tới việc cung ứng dịch vụ được loại trừ khỏi phạm vi áp dụng của quy định này. Điều XVII được quy định cụ thể như sau:

1. Trong những lĩnh vực được nêu trong Danh mục cam kết, tùy thuộc vào các điều kiện và tiêu chuẩn được quy định trong Danh mục đó, liên quan tới tất cả các biện pháp có tác động đến việc cung ứng dịch vụ, mỗi thành viên phải dành cho dịch vụ và nhà cung ứng dịch vụ của bất kì thành viên nào khác sự đối xử không kém thuận lợi hơn sự đối xử mà thành viên đó dành cho dịch vụ và nhà cung ứng dịch vụ của mình.

2. Một thành viên có thể đáp ứng những yêu cầu quy định tại khoản 1 bằng cách dành cho dịch vụ hoặc nhà cung ứng dịch vụ của bất kì một thành viên nào khác một sự đối xử tương tự về hình thức hoặc sự đối xử khác biệt về hình thức mà thành viên đó dành cho dịch vụ hoặc nhà cung ứng dịch vụ của mình.

3. Sự đối xử tương tự hoặc khác biệt về hình thức được coi là kém thuận lợi hơn, nếu nó làm thay đổi điều kiện cạnh tranh có lợi cho dịch vụ hay nhà cung ứng dịch vụ của thành viên đó so với dịch vụ hoặc nhà cung ứng dịch vụ tương tự của bất kì thành viên nào khác.

6. Tự vệ và ngoại lệ

A. *Cán cân thanh toán (BoP) (Điều XII)*

Điều XII của GATS đưa ra các điều kiện theo đó một thành viên có thể không phải thực hiện nghĩa vụ thành viên trong trường hợp gặp khó khăn về BoP. Quy định này, cùng với những loại trừ khỏi quy định của Điều 2 tại Phụ lục về các dịch vụ tài chính, đã quy định quyền của thành viên trong việc tạm dừng những nhượng bộ thương mại để bảo vệ sự ổn định tài chính và tiền tệ nước mình.

Trong trường hợp BoP và tài chính đối ngoại gặp khó khăn nghiêm trọng hoặc bị đe dọa gặp khó khăn nghiêm trọng, một thành viên có thể thông qua hoặc duy trì các hạn chế về thương mại dịch vụ trong những lĩnh vực đã cam kết cụ thể, bao gồm cả việc thanh toán hoặc chuyển tiền trong các giao dịch liên quan đến các cam kết cụ thể đó. Thừa nhận rằng trong quá trình phát triển hoặc chuyển đổi kinh tế, những sức ép nhất định đối với BoP có thể dẫn tới sự cần thiết phải sử dụng các hạn chế để đảm bảo việc duy trì mức độ dự trữ tài chính phù hợp với yêu cầu thực hiện các chương trình phát triển kinh tế hoặc chuyển đổi kinh tế.

Quy định này cho phép các thành viên tránh thực hiện các cam kết về thương mại dịch vụ trong trường hợp cả BoP và tài chính đối ngoại đều gặp khó khăn và cả trong trường hợp có đe dọa khủng hoảng. Tình huống đặc biệt trong quy định này xuất hiện khi dự trữ ngoại tệ của một thành viên ở mức thấp đến nỗi thành viên đó không thể thanh toán cho hoạt động nhập khẩu. Trong trường hợp này, Điều XII cho phép tạm ngừng các nhượng bộ thương mại, và đặc biệt tạm ngừng nghĩa vụ thực hiện tự do thanh toán hoặc chuyển tiền đối với các giao dịch dịch vụ. Sự chiếu cố đặc biệt này dành cho các DCs, những nước được coi là có xu hướng không ổn định tiền tệ do việc mở tài khoản vốn. Để viện dẫn Điều XII, các thành viên phải chứng minh rằng:

(i) Biện pháp không tạo ra sự phân biệt đối xử giữa các thành viên;

(ii) Phù hợp với Điều lệ của Quỹ tiền tệ quốc tế (IMF) (theo đó IMF cho phép hạn chế các điểm mở về chính sách chỉ đối với những hạn chế tài khoản vốn) và những hạn chế tài khoản vãng lai, nếu có sự chấp thuận của IMF[259];

(iii) Không gây thiệt hại không cần thiết cho các thành viên khác;

(iv) Không vượt quá mức cần thiết để giải quyết những trường hợp mô tả ở trên, và chỉ mang tính tạm thời.

Nếu đáp ứng tất cả các điều kiện trên, Uỷ ban BoP cho phép thành viên duy trì việc tạm ngừng thực hiện nhượng bộ thương mại, và việc này sẽ chấm dứt khi tình hình được cải thiện.

B. *Ngoại lệ chung và ngoại lệ về an ninh (Điều XIV và Điều XIVbis)*

Ngoài trường hợp khẩn cấp về kinh tế, các thành viên còn có quyền tạm ngừng nghĩa vụ nếu viện dẫn được các lí do liên quan đến ngoại lệ chung và lí do an ninh. Điều XIV đưa ra danh sách các lí do liên quan đến ngoại lệ chung mà về nguyên tắc, có thể biện minh cho việc không thực hiện các cam kết và nghĩa vụ. Đó là, bảo vệ đạo đức công cộng và duy trì trật tự công cộng; bảo vệ cuộc sống và sức khoẻ con người, động vật, thực vật; bí mật đời tư; lí do an toàn; hay chính sách thuế. Hơn nữa, Điều XIVbis đưa ra danh sách các ngoại lệ đối với nghĩa vụ minh bạch và các nguyên tắc cơ bản khác nhằm bảo vệ an ninh quốc gia. *Ví dụ,* Khoản 1 Điều XIVbis cho phép không thực hiện nghĩa vụ minh bạch nhằm tránh tiết lộ các thông tin thiết yếu về an ninh quốc gia. Thêm vào đó, Khoản 2 cho phép thành viên có thể có bất kì hành động cần thiết nào để bảo vệ lợi ích an ninh quốc gia.

Để chứng minh rằng các biện pháp cần áp dụng phù hợp với những đòi hỏi của Điều XIV và Điều XIVbis, các thành viên cần vượt qua một phép thử bao gồm hai nội dung. *Thứ nhất*, cần chứng minh rằng biện pháp đặc biệt được viện dẫn từ một trong các ngoại lệ nêu trên. *Thứ hai*, phải chứng minh rằng các biện pháp này '… [k]hông hề được áp dụng theo cách có thể tạo ra một công cụ phân biệt đối xử tùy tiện và vô căn cứ giữa các nước hoặc một hạn chế trá hình trong thương mại dịch vụ'.[260]

[259] Điển hình là những hạn chế tài khoản vốn và tài khoản vãng lai đã được IMF chấp thuận ở Iceland trong suốt thời gian khủng hoảng tài chính năm 2008. Để được chấp thuận, Iceland phải tuân thủ các khuyến cáo của IMF.

[260] Khoản 1 Điều XIV GATS.

7. Chương trình nghị sự không trọn vẹn: Các quy định thiếu thiện chí về thương mại dịch vụ

A. *Tự vệ trong thương mại dịch vụ (Điều X)*

Điều XIX GATT cho phép các thành viên đưa ra các hạn chế nhập khẩu tạm thời trong trường hợp có sự gia tăng hàng nhập khẩu không lường trước được, gây ra khó khăn nghiêm trọng cho các ngành kinh tế nội địa sản xuất sản phẩm tương tự. Khi tình huống trên xuất hiện, thành viên có quyền tạm dừng nhượng bộ thương mại đối với các ngành sản xuất chịu tác động, đổi lại là phải thực hiện nghĩa vụ bồi thường. Cơ sở của biện pháp tự vệ là nhằm thực hiện chức năng của 'van an toàn' cho các ngành sản xuất chịu tác động nghiêm trọng do bất cứ hậu quả không lường trước được nào của việc tự do hoá thương mại. Trong khi tầm quan trọng của các biện pháp tự vệ trong thương mại dịch vụ cũng đã rõ ràng, thì Điều X GATS lại không đưa ra bất kì nguyên tắc nào. Ngược lại, Điều X chỉ quy định: 'Sẽ có các cuộc đàm phán đa phương về các biện pháp tự vệ khẩn cấp được tiến hành dựa trên nguyên tắc không phân biệt đối xử'.[261] Do không có định nghĩa cụ thể về tự vệ trong GATS, tương tự như trong thương mại hàng hoá, tự vệ trong dịch vụ nên được xây dựng như: 'Một cơ chế mà các chính phủ có thể viện dẫn, theo các điều kiện đặc biệt, để áp đặt hoặc gia tăng sự bảo hộ tạm thời, nhằm giảm bớt khó khăn hay sức ép phát sinh do các cam kết tự do hoá và do việc thực hiện nghĩa vụ theo các hiệp định thương mại'.[262]

Cho đến năm 2012, không có một cố gắng nào được thực hiện nhằm tạo ra một khuôn khổ pháp luật về tự vệ trong thương mại dịch vụ.

B. *Trợ cấp trong thương mại dịch vụ (Điều XV)*

Trong khuôn khổ WTO, một biện pháp của chính phủ đem lại sự hỗ trợ tài chính từ bên ngoài cho một ngành kinh tế tư nhân được coi là trợ cấp. Bất kể sự can thiệp nào của chính phủ mang đến cho các doanh nghiệp tư nhân lợi ích một cách không bình thường trong thị trường tự do, thì bị coi là đã tạo ra sự xâm phạm làm biến đổi các điều kiện cạnh tranh thông thường giữa các doanh nghiệp. Trong thương mại quốc tế, mặc dù trợ cấp được các nước trên thế giới áp dụng rộng rãi và có thể là một công cụ hữu ích nhằm tăng các ảnh hưởng ngoại lai có lợi, hoặc điều chỉnh sự không hiệu quả trong việc phân bố hàng hóa và dịch vụ trong thị trường tự do ('market failures'), nhưng nó lại gây tác động bóp méo thương mại, và điều này giải thích tại sao những hình thức can thiệp đặc biệt này của chính phủ lại không nhận được sự khoan dung.[263] Trong GATS, Điều XV là quy định cụ thể duy nhất đề cập đến vấn đề trợ cấp. Quy định này không đưa ra khái niệm rõ ràng trợ cấp là gì. Quả thực, sự nguỵ biện trong các quy định của GATS và đặc điểm lai tạp của dịch vụ đã tạo ra khó khăn cho việc hạn chế trợ cấp trong các dịch vụ, hoặc chỉ trong một dạng can thiệp tài chính cụ thể. Hơn nữa, sự khác biệt đặc thù của các dịch vụ theo 4 phương thức cung ứng dịch vụ và ý nghĩa của việc xác định tác động thương mại của trợ cấp lên các thành viên khác, đã đặt ra nhiều thách thức hơn trong việc tạo ra một khái niệm chuẩn xác về các ngành dịch vụ, mà nó phải thể hiện được tất cả các yếu tố kinh tế và chính trị của trợ cấp.[264] Tuy nhiên, dù không đưa ra định nghĩa trợ cấp, song Hiệp định cũng thừa nhận rằng: 'Trong những tình huống nhất định, trợ cấp có thể gây tác động bóp méo thương mại dịch vụ'.[265] Đáng tiếc, tương tự như tự vệ, Điều XV không đưa ra bất kì nguyên tắc nào về vấn đề này, mà chỉ hô hào các thành viên 'tham gia vào các cuộc đàm phán nhằm phát triển nguyên tắc đa phương cần thiết để ngăn ngừa những tác động bóp méo thương mại'.[266] Ngay cả trong trường hợp này, cho đến năm 2012, các thành viên cũng chưa thể đưa ra bất kì cam kết nào về bất kì nguyên tắc nào liên quan đến trợ cấp trong thương mại dịch vụ.

8. Ngành dịch vụ cụ thể - GATS và các dịch vụ tài chính

Phụ lục về các dịch vụ tài chính là một thoả thuận cụ thể trong GATS với mục đích làm rõ hơn các quy định của GATS khi chúng được áp dụng cho những đặc trưng của ngành dịch vụ tài chính. Không giống như các ngành khác, các quy định tài chính là công cụ thiết yếu để duy trì sự

[261] Khoản 1 Điều X GATS.

[262] Pierre Sauvé, 'Completing the GATS Framework: Addressing the Uruguay Round Leftovers', *Aussenwirtschaft, Vol. 57, No 3,* (2002). Available at SSRN: http://ssrn.com/abstract=350840 or doi:10.2139/ssrn.350840.

[263] John Jackson nói về 'sự phức tạp của trợ cấp trong thương mại quốc tế'. *Xem* J. J. Jackson, Sđd, Chương 11.

[264] Mark Benitah đưa ra khái niệm trợ cấp cho nhà cung ứng dịch vụ là:

Một sự đóng góp cụ thể do chính phủ thực hiện, dành cho một công ty có trụ sở hoặc không có trụ sở trên lãnh thổ của chính phủ đó, và cung cấp lợi ích trong thị trường tự do của một trong những nước liên quan đến dây chuyền sản xuất dịch vụ.

Để có một cái nhìn tổng thể về vấn đề này, *xem* M. Benitah, 'Subsidies, Services and Sustainable Development', *The International Centre for Sustainable Development (ICTSD)*, Geneva, (2004).

[265] Khoản 1 Điều XV GATS.

[266] Khoản 1 Điều XV GATS.

ổn định tài chính. Đôi lúc, việc ban hành các quy định trên có thể mâu thuẫn với nghĩa vụ của GATS. Điều 2 của Phụ lục, được biết đến như 'sự loại trừ thận trọng', đảm bảo cho các thành viên được tự do đưa ra bất kì biện pháp nào nhằm mục đích duy trì sự vững mạnh của hệ thống tài chính. Đây là một trong những điều khoản quan trọng của GATS và được thể hiện như sau:

> Dù có các quy định khác trong Hiệp định này, một thành viên không bị cản trở trong việc thực hiện những biện pháp vì lí do thận trọng, bao gồm các biện pháp để bảo hộ nhà đầu tư, người gửi tiền, người nắm giữ hợp đồng bảo hiểm hoặc những người nắm chứng từ tài chính đáo hạn thuộc sở hữu của một nhà cung ứng dịch vụ tài chính, hoặc để đảm bảo tính thống nhất và ổn định của hệ thống tài chính. Khi các biện pháp nói trên trái với các quy định của Hiệp định này, thì các biện pháp đó không được sử dụng như một phương tiện để lẩn tránh các cam kết hoặc nghĩa vụ theo Hiệp định này.[267]

Trên cơ sở Điều 2, bất cứ biện pháp trong nước nào không phù hợp với Điều XVI hoặc Điều VI GATS, như trong trường hợp các biện pháp an toàn tài chính, vẫn có thể được viện dẫn vì lí do 'thận trọng', khi chứng minh biện pháp được đưa ra nhằm hướng tới mục tiêu 'thận trọng' và ổn định tài chính. Tóm lại, trên cơ sở giữ ổn định kinh tế vĩ mô, chống lại những tác động của tự do hoá thương mại, điều khoản này có tác dụng như một 'điều khoản giải thoát' khỏi các nghĩa vụ chung của GATS.

Mục 5. QUYỀN SỞ HỮU TRÍ TUỆ VÀ HIỆP ĐỊNH TRIPS

Xuất phát từ đặc tính vô hình và khía cạnh thương mại, tài sản trí tuệ dễ dàng vượt qua biên giới quốc gia và là thành tố gắn bó mật thiết với hoạt động thương mại quốc tế.[268] Quyền sở hữu trí tuệ (viết tắt là IPRs) có mối quan hệ chặt chẽ với thương mại quốc tế, cho dù IPRs có tính lãnh thổ. IPRs có thể tham gia vào các giao dịch thương mại quốc tế dưới hai dạng: (i) Gắn với hàng hoá xuất nhập khẩu được bảo hộ IPRs (bao gồm hàng hoá xuất khẩu/nhập khẩu theo các kênh phân phối chính thức được sự cho phép của chủ thể nắm giữ IPRs và hàng hoá xuất khẩu/nhập khẩu song song theo các kênh nhập khẩu/xuất khẩu song song);[269] và (ii) Là đối tượng trực tiếp trong các giao dịch thương mại quốc tế liên quan đến IPRs như chuyển nhượng IPRs, chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ, nhượng quyền thương mại và chuyển giao công nghệ. Mối quan hệ giữa IPRs và thương mại quốc tế rất rõ ràng trong một số lĩnh vực. *Ví dụ*, kiểu dáng công nghiệp có mối quan hệ không thể phủ nhận với lĩnh vực dệt may, và chỉ dẫn địa lí có mối quan hệ chặt chẽ với hoạt động thương mại liên quan đến các sản phẩm nông nghiệp.

Trong bối cảnh hội nhập quốc tế và toàn cầu hoá, tài sản trí tuệ đóng vai trò quan trọng hơn bao giờ hết trong các giao dịch thương mại quốc tế.[270] Thực tế chỉ ra rằng thực thi IPRs có thể thúc đẩy hoặc tạo ra những rào cản cho thương mại quốc tế.

1. Tổng quan về Hiệp định TRIPS

A. *Lịch sử của Hiệp định TRIPS*

Hiệp định TRIPS được thiết lập với ý nghĩa là một phần của những thoả thuận thương mại đa phương trong Vòng đàm phán Uruguay. Đây là lần đầu tiên các khía cạnh thương mại của IPRs được đàm phán.[271] Kết quả của các cuộc đàm phán đó được thể hiện trong Phụ lục 1C của Hiệp định thành lập WTO, được thông qua tại Marrakesh ngày 15/4/1994 và có hiệu lực bắt buộc đối với tất cả các thành viên WTO từ ngày 01/01/1995. Hiệp định TRIPS là một trong những trụ cột quan trọng nhất của WTO và bảo

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267 Điểm 2(a) Phụ lục về các dịch vụ tài chính.

268 Bàn về mối quan hệ giữa tài sản trí tuệ và thương mại quốc tế, Daniel C. K Chow và Edward Lee cho rằng:

Tài sản trí tuệ liên quan đến hoạt động ngoại thương, ở thời kì Phục hưng, Venice ban hành đạo luật sáng chế đầu tiên nhằm mục đích thu hút các nhà đầu tư nước ngoài đến thành phố. Sự thật là bảo hộ tài sản trí tuệ và mở rộng thị trường nước ngoài là yếu tố thúc đẩy sự ra đời của nhiều điều ước quốc tế cơ bản đầu tiên về sở hữu trí tuệ, ví dụ như Công ước Paris và Công ước Bern.

Xem: Daniel C. K. Chow và Edward Lee, *International Intellectual Property: Problems, Cases, and Materials*, Thomson West, (2006), tr. 4.

269 Để hiểu thêm về nhập khẩu song song và xuất khẩu song song, *xem:* Mattias Ganslandt và Keith E. Maskus, *IPRs, Parallel Imports and Strategic Behavior*, IFN Working Paper No 704, (2007), Research Institute of Industrial Economics, Sweden; Carsten Fink và Keith E. Maskus (chủ biên), *Intellectual Property and Development: Lessons from Recent Economic Research*, A co-publication of the World Bank and Oxford University Press, (2005); Christopher Heath, *Parallel Imports and International Trade,* nguồn: http://www.wipo.int/edocs/mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf; Christopher Heath (chủ biên), *Parallel Imports in Asia*, Kluwer Law International, (2004); Frederik M. Abbott, *Parallel Importation: Economic and Social Welfare Dimensions*, the International Institute of Sustainable Development (2007), nguồn: http://www.iisd.org/pdf/2007/parallel_importation.pdf; Tomasso Valetti và Stefan Szymanski, 'Parallel Trade, International Exhaustion and IPRs: A welfare Analysis', *Journal of Industrial Economics*, (2006), 54: 499-526.

270 Daniel C. K. Chow và Edward Lee, Sđd, tr. 4.

271 WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use,* WIPO Publication No 489, (2004), tr. 345, nguồn: http://www.wipo.int/about-ip/en/iprm/; Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs*, Kluwer Law International, (2006), tr. 36.

hộ sở hữu trí tuệ trở thành một phần không thể tách rời trong hệ thống thương mại đa phương của WTO.

B. *Hiệp định TRIPS: Quyền sở hữu trí tuệ và thương mại quốc tế*

1. Hiệp định TRIPS: Hiệp định đa phương toàn diện nhất về sở hữu trí tuệ cho đến nay

Trong mối tương quan với các thoả thuận quốc tế khác về IPRs, Hiệp định TRIPS được coi là toàn diện nhất xuất phát từ những đặc điểm sau đây của Hiệp định: (i) Là kết quả của sự kết hợp một số công ước quốc tế ra đời trước đó; (ii) Thiết lập các tiêu chuẩn bảo hộ tối thiểu trong thời hạn cụ thể cho hầu hết các đối tượng sở hữu trí tuệ, đó là quyền tác giả và quyền liên quan, nhãn hiệu, chỉ dẫn địa lí, kiểu dáng công nghiệp, sáng chế (bao gồm giống cây trồng), thiết kế bố trí mạch tích hợp, thông tin bí mật; (iii) Chứa đựng những quy định mở; và (iv) Thiết lập những quy định thực thi IPRs.

Thứ nhất, Hiệp định TRIPS là kết quả của sự kết hợp những điều ước quốc tế quan trọng nhất trong lĩnh vực sở hữu trí tuệ. Những điều ước quốc tế này là Công ước Paris, Công ước Bern, Công ước Rome, Công ước Washington. Quy định của những điều ước quốc tế này có hiệu lực bắt buộc thậm chí đối với những nước chưa phê chuẩn điều ước, trừ Công ước Rome có hiệu lực bắt buộc với những nước đã là thành viên của Công ước.

Sự kết hợp của các công ước quốc tế về sở hữu trí tuệ nêu trên trong Hiệp định TRIPS được xem xét và giải thích trong khuôn khổ cơ chế giải quyết tranh chấp của WTO trong các vụ *US-Section 211 Appropriations Act (US-Havana Club)*[272] *và EC-Bananas (Article 22.6-Ecuador)*.[273] Trong vụ *US-Section 211 Appropriations Act (US-Havana Club)*, Cơ quan phúc thẩm (viết tắt là 'AB') chỉ ra rằng các thành viên có nghĩa vụ bảo hộ tên thương mại theo Điều 8 Công ước Paris (1967), bởi vì quy định này đã được chuyển tải vào Điều 2 Hiệp định TRIPS.[274]

Thứ hai, Hiệp định TRIPS thiết lập các tiêu chuẩn tối thiểu về bảo hộ IPRs cho tất cả các thành viên WTO, bất kể trình độ phát triển. Đối với mỗi đối tượng sở hữu trí tuệ, Hiệp định TRIPS thiết lập những tiêu chuẩn bảo hộ tối thiểu mà các thành viên phải tuân thủ. Nội dung chính của những tiêu chuẩn này là đối tượng được bảo hộ, đối tượng không được bảo hộ, quyền (bao gồm thời hạn bảo hộ tối thiểu), những trường hợp ngoại lệ của những tiêu chuẩn bảo hộ tối thiểu. Những tiêu chuẩn này được thể hiện trong Hiệp định TRIPS dưới hai dạng. *Thứ nhất*, Hiệp định TRIPS đòi hỏi các thành viên WTO tuân thủ những quy định cơ bản và quan trọng của Công ước Paris và Công ước Bern đã được chuyển tải vào Hiệp định TRIPS. *Thứ hai*, Hiệp định TRIPS quy định thêm một số nghĩa vụ cho các thành viên WTO mà những nghĩa vụ này không quy định trong Công ước Paris và Công ước Bern.

Các thành viên WTO có nghĩa vụ tuân thủ và áp dụng các tiêu chuẩn bảo hộ do Hiệp định TRIPS thiết lập. Đối với những vấn đề Hiệp định TRIPS đã thiết lập tiêu chuẩn tối thiểu, các thành viên không thể áp dụng tiêu chuẩn bảo hộ ở mức thấp hơn mức do Hiệp định TRIPS thiết lập. Đồng thời, các thành viên không có nghĩa vụ đưa ra mức bảo hộ cao hơn. 'Thực tế là Hiệp định đã thiết lập cái mà các thành viên cho là nguyên tắc và tiêu chuẩn "thích hợp" trong lĩnh vực này.'[275] Hiệp định TRIPS không có quy chế đặc biệt nào dành cho các DCs và LDCs, trừ các quy định từ Điều 65 đến Điều 67 về giai đoạn chuyển đổi.[276]

Những tiêu chuẩn bảo hộ tối thiểu được thiết lập trong Hiệp định TRIPS loại bỏ sự không đối xứng mà khoản 1 Điều 2 Công ước Paris tạo ra khi quy định về nguyên tắc NT.[277] Cụ thể, theo khoản 1 Điều 2 Công ước Paris, trong trường hợp Công ước Paris không thiết lập các tiêu chuẩn bảo hộ tối thiểu, thì các nước thành viên của Liên minh được tự do dành sự bảo hộ cho công dân của các nước thành viên khác mà không dành cho công dân của nước mình. Sự tự do này làm phát sinh những khác biệt về mức độ bảo hộ giữa các nước thành viên của Liên minh, và đôi

[272] WTO, Báo cáo của Ban hội thẩm, vụ *United States-Section 211 Omnibus Appropriations Acts of 1988 (US-Havana Club),* WT/DS176/R, ngày 6/8/2001.

[273] WTO, vụ *EC-Bananas (Article 22.6-Ecuador), WT/DS27/ARB/ECU,* ngày 24/3/2000.

[274] WTO, Báo cáo của Ban hội thẩm, vụ *United States-Section 211 Omnibus Appropriation Acts of 1988 (US-Havana Club),* WT/DS176/R, ngày 06/8/2001, các đoạn 336, 337, và 341.

[275] Carlos M. Correa, *Trade Related Aspects of IPRs - A Commentary on the TRIPS Agreement,* Oxford University Press, (2007), tr. 8.

[276] Ngân hàng thế giới chỉ trích rằng: 'Một cỡ không thể vừa với tất cả'. *Xem*: World Bank, *Global Economic Prospects and the Developing Countries*, Washington DC, (2001), tr. 129.

[277] Khoản 1 Điều 2 Công ước Paris quy định:

Trong lĩnh vực bảo hộ quyền sở hữu công nghiệp, công dân của bất kì nước thành viên nào cũng đều được hưởng những điều kiện thuận lợi như công dân của tất cả các nước thành viên khác mà luật tương ứng của các nước đó quy định hoặc sẽ quy định; hoàn toàn không ảnh hưởng đến các quyền được quy định riêng trong Công ước này. Do đó, họ được hưởng sự bảo hộ và công cụ bảo hộ của pháp luật chống mọi hành vi xâm phạm quyền của mình như những công dân của nước thành viên khác, miễn là tuân thủ các điều kiện và thủ tục quy định đối với công dân nước đó.

khi sự khác biệt được coi là không tương xứng.[278]

Thứ ba, Hiệp định TRIPS trao cho các thành viên WTO quyền tự quyết nhất định. Bên cạnh những tiêu chuẩn bảo hộ tối thiểu, Hiệp định TRIPS dành quyền tự quyết cho các thành viên trong một số lĩnh vực, nhằm giúp các thành viên thiết lập tiêu chuẩn quốc gia về bảo hộ IPRs theo chính sách của các thành viên này trên cơ sở các 'quy định linh hoạt' ('*flexible provisions*').

Theo giải thích của Tổ chức sở hữu trí tuệ thế giới ('WIPO'), các 'quy định linh hoạt' là những cách thức khác nhau mà thông qua đó các nghĩa vụ do Hiệp định TRIPS thiết lập sẽ được chuyển tải vào pháp luật quốc gia sao cho phù hợp với lợi ích quốc gia, nhưng vẫn tương thích với các quy định và nguyên tắc của Hiệp định TRIPS.[279] Từ 'linh hoạt' được nhấn mạnh trong đoạn 6 Lời nói đầu của Hiệp định TRIPS và ý nghĩa của từ này được tìm thấy trong nhiều quy định của Hiệp định TRIPS. Những 'quy định linh hoạt' của Hiệp định TRIPS được chia thành bốn nhóm,[280] bao gồm: (i) Những quy định linh hoạt tại đoạn 6 Lời nói đầu về giai đoạn chuyển đổi; (ii) Những quy định linh hoạt tại khoản 1 Điều 1 về cách thức thi hành các nghĩa vụ trong Hiệp định TRIPS; (iii) Những quy định linh hoạt tại Điều 6, khoản 1 Điều 8, Điều 17, Điều 18, Điều 20, khoản 4 Điều 23, khoản 5 Điều 23, khoản 9 Điều 23, khoản 8 Điều 24, khoản 2 Điều 26, khoản 3 Điều 26, Điều 30, Điều 31, Điều 33, Điều 37, và Điều 38 về tiêu chuẩn bảo hộ; và (iv) Các quy định linh hoạt tại khoản 5 Điều 41 về vấn đề thực thi.[281]

Thứ tư, lần đầu tiên Hiệp định TRIPS thiết lập cơ chế thực thi IPRs hiệu quả. Một trong những khác biệt lớn nhất giữa Hiệp định TRIPS và các điều ước quốc tế đa phương về sở hữu trí tuệ được ban hành trước

[278] WIPO, *Patent Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels CDIP/5/4*, Committee on Development and IP, Fifth Session, Geneva, 26-30/4/2010, đoạn 6(ii), http://www.wipo.int/meetings/en/doc_ details.jsp?doc_id=131629.

[279] WIPO, *Patent Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels CDIP/5/4*, Committee on Development and IP, Fifth Session, Geneva, 26-30/4/2010, đoạn 34, nguồn: http://www.wipo.int/meetings/en/doc_ details.jsp?doc_id=131629.

[280] Nuno Pires de Carvalho, *WIPO Seminar for Certain Asia Countries on Flexible Implematation of TRIPS Provisions,* Singapore, ngày 28-30/7/2008.

[281] Theo WIPO, có thể phân loại các điều khoản linh hoạt của Hiệp định TRIPS theo một cách khác, theo đó các điều khoản này được chia thành ba loại, căn cứ vào các thời điểm nối tiếp nhau: xác lập quyền; quyền đã được xác lập; sử dụng và thực thi quyền. *Xem:* WIPO, *Patent Related Flexibilities in the Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels CDIP/5/4*, Committee on Development and IP Fifth Session, Geneva, 26-30/4/2010, đoạn 35, nguồn: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=131629.

Hiệp định là: Hiệp định bao gồm các quy định chi tiết hơn nhằm đảm bảo thực thi những cam kết của Hiệp định. Những tranh chấp sở hữu trí tuệ thuộc phạm vi điều chỉnh của Hiệp định TRIPS có thể được giải quyết bằng nhiều biện pháp khác nhau như dân sự, hành chính, biện pháp tạm thời, biện pháp kiểm soát biên giới và biện pháp hình sự.[282] Những tranh chấp phát sinh thuộc phạm vi điều chỉnh của Hiệp định TRIPS được giải quyết theo thủ tục giải quyết tranh chấp của WTO. Tức là, về nguyên tắc, các nguyên tắc của WTO được quy định trong GATT cũng như cơ chế giải quyết tranh chấp của WTO được áp dụng.

Với những đổi mới nêu trên, cho đến nay, Hiệp định TRIPS được đánh giá là thoả thuận toàn cầu về sở hữu trí tuệ toàn diện nhất.[283] Hiệp định là sự củng cố có ý nghĩa quan trọng nhất đối với những tiêu chuẩn toàn cầu trong lĩnh vực sở hữu trí tuệ.[284]

2. Hiệp định TRIPS: Mục tiêu cơ bản nhất là thúc đẩy thương mại quốc tế

Phù hợp với mục tiêu của WTO, mục tiêu của Hiệp định TRIPS là thúc đẩy thương mại quốc tế bằng cách bảo hộ IPRs, đồng thời ngăn chặn các thành viên sử dụng IPRs như những rào cản trong thương mại quốc tế.[285] Theo Lời nói đầu của Hiệp định TRIPS:

> … Một trong những hiểu lầm phổ biến nhất về Hiệp định TRIPS là mục tiêu chính của Hiệp định là đề cao bảo hộ IPRs. Tuy nhiên, điều này không đúng. Mục tiêu chính - nếu không phải là mục tiêu duy nhất - của Hiệp định TRIPS, cũng như mục tiêu của toàn bộ Hiệp định thành lập WTO, là thúc đẩy thương mại tự do.[286]

Như đã nhấn mạnh trong Lời nói đầu của Hiệp định TRIPS, mục tiêu cơ bản đầu tiên của Hiệp định là: 'Giảm sự bóp méo và rào cản trong

[282] Từ Điều 41 đến Điều 61 Hiệp định TRIPS.

[283] Về vai trò của Hiệp định TRIPS, *xem:* Carlos M. Correa, *IPRs, the WTO and Developing Countries: The TRIPS Agreement and Policy Options,* Zed Books Ltd. (2000); Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford University Press, (2009); Gary W. Smith, 'IPRs, Developing Countries, and TRIPS: An Overview of Issues of Consideration during the Millennium Round of Multilateral Trade Negotiations', *Journal of World Intellectual Property*, Vol. 2, Issue 6, (1999); WTO, *Overview: the TRIPS Agreement,* nguồn: http://www.wto.org/english/tratop_e/TRIPS_e/intel2_e.htm.

[284] Keith E. Maskus, *IPRs in the Global Economy,* Institute for International Economics, Washington DC, (2000), tr. 16.

[285] Lời nói đầu của Hiệp định TRIPS.

[286] Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs,* Kluwer Law International, (2006), tr. 47.

thương mại quốc tế… và bảo đảm rằng các biện pháp và thủ tục thực thi IPRs không tự chúng tạo thành những rào cản cho thương mại hợp pháp'.[287]

Mục tiêu này nên được đặt trong mối quan hệ với Điều 7 và Điều 8 của Hiệp định TRIPS. Theo đó, bảo hộ và thực thi IPRs phải góp phần thúc đẩy đổi mới công nghệ, chuyển giao và phổ biến công nghệ, đem lại lợi ích chung cho người tạo ra và người sử dụng kiến thức công nghệ, đem lại lợi ích xã hội và lợi ích kinh tế, tạo ra sự cân bằng giữa quyền và nghĩa vụ (Điều 7). Các thành viên WTO được phép áp dụng các biện pháp bảo vệ sức khoẻ cộng đồng cũng như những lợi ích công cộng khác, và được phép ngăn chặn lạm dụng IPRs hoặc những hành vi cản trở thương mại bất hợp lí hoặc ảnh hưởng xấu đến chuyển giao công nghệ quốc tế (Điều 8).

Ngoài Lời nói đầu, nhiều quy định của Hiệp định TRIPS cũng thể hiện mục tiêu thúc đẩy thương mại tự do. *Ví dụ*: Hiệp định TRIPS yêu cầu các thành viên WTO áp dụng các biện pháp thực thi 'sao cho tránh tạo ra những rào cản cho thương mại hợp pháp' theo quy định tại Điều 41. Điều 48, khoản 3 Điều 50, khoản 7 Điều 50 và Điều 56 là những ví dụ khác về các quy định nhằm ngăn chặn và xử lí việc lạm dụng các biện pháp thực thi của chủ thể nắm giữ quyền (hoặc người được cho là chủ thể nắm giữ quyền) có thể cản trở thương mại quốc tế hợp pháp.[288]

C. *Các nguyên tắc của Hiệp định TRIPS*

Tương tự như các hiệp định khác của WTO, như GATT và GATS, Hiệp định TRIPS có quy định về ba nguyên tắc cơ bản. Đó là nguyên tắc NT, nguyên tắc MFN, và nguyên tắc minh bạch.[289] Các vấn đề liên quan đến khả năng đạt được, phạm vi, sử dụng và thực thi IPRs liên quan đến thương mại trong Hiệp định TRIPS là đối tượng của hai nguyên tắc đầu tiên.[290] Nguyên tắc thứ ba nhằm duy trì tính công khai, ổn định, dự báo của pháp luật sở hữu trí tuệ.

[287] Đoạn đầu tiên trong Lời nói đầu của Hiệp định TRIPS (một số từ được tác giả lược bỏ).

[288] Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs,* Sđd, tr. 44.

[289] Điều 3, Điều 4, Điều 63 Hiệp định TRIPS; Điều III, Điều I, Điều X GATT; Điều 17, Điều 2, Điều 3 GATS.

[290] Chú thích 3 của Hiệp định TRIPS; Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis,* Sweet and Maxwell, (1998), tr. 45-59; UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), tr. 61-91.

1. Nguyên tắc đối xử quốc gia (NT)

Nguyên tắc NT về sở hữu trí tuệ được quy định lần đầu tiên trong Công ước Paris (Điều 2). Tuy nhiên, việc áp dụng nguyên tắc này theo Công ước Paris làm phát sinh những khác biệt về mức độ bảo hộ quyền sở hữu công nghiệp giữa các nước thành viên của Liên minh và hệ quả là tạo ra những rào cản cho xuất khẩu hàng hoá, dịch vụ mang đối tượng sở hữu trí tuệ được bảo hộ. Do đó, các nước thành viên ở Vòng đàm phán Uruguay đã nhất trí thiết lập một công thức mới cho nguyên tắc NT tại Điều 3 Hiệp định TRIPS.

Nguyên tắc NT trong Hiệp định TRIPS được Cơ quan giải quyết tranh chấp của WTO (DSB) xem xét và giải thích kỹ lưỡng. Nguyên tắc này đã được làm rõ trong một số vụ sau đây: *European Communities - Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs* do Hoa Kỳ khởi kiện; *European Communities - Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs* do Australia khởi kiện; *Indonesia - Autos*; và *US - Section 211 Appropriations Act (US - Havana Club)*.[291] Theo đó, không còn tồn tại sự bảo hộ mà một thành viên dành cho công dân của các thành viên khác không giống với sự bảo hộ dành cho công dân của mình (như quy định trong Công ước Paris); Hiệp định TRIPS đòi hỏi mỗi thành viên WTO dành sự bảo hộ cho công dân các thành viên khác 'không kém thuận lợi hơn' sự bảo hộ dành cho công dân của mình. Nói cách khác, bất kể mức độ bảo hộ nào một thành viên dành cho công dân của mình, thành viên này buộc phải áp dụng tiêu chuẩn bảo hộ tối thiểu do Hiệp định TRIPS thiết lập cho công dân của các thành viên khác. Nếu mức độ bảo hộ của thành viên đó thấp hơn hoặc ngang bằng với mức độ bảo hộ do Hiệp định TRIPS thiết lập, thì thành viên đó có thể giới hạn mức độ bảo hộ cho công dân của các thành viên theo tiêu chuẩn bảo hộ của Hiệp định TRIPS. Nếu mức độ bảo hộ của thành viên đó cao hơn mức độ bảo hộ do Hiệp định TRIPS thiết lập, thì thành viên đó phải dành mức độ bảo hộ cao tương tự cho công dân của các thành viên khác.[292]

[291] WTO, vụ *European Communities - Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs* (khiếu kiện của Hoa Kỳ), WT/DS174/R, ngày 15/3/2005; và WT/DS174/23, ngày 25/4/2005; WTO, vụ *European Communities - Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuff* (khiếu kiện của Australia), WT/DS290/R, ngày 15/3/2005; và WT/DS290/21, ngày 25/4/2005; WTO, Báo cáo của Ban hội thẩm, vụ *Indonesia - Autos*, WT/DS54/R, WT/DS55R/, WT/DS59/R, WT/DS64/R, ngày 2/7/1998; WTO, Báo cáo của Ban hội thẩm, vụ *United States - Section 211 Omnibus Appropriations Acts of 1988 (US - Havana Club)*, WT/DS176/R, ngày 06/8/2001.

[292] WTO, *Principles of Trading System,* nguồn: http://www.wto.org/english/theWTO_e/whatis_e/tif_e / fact2_e.htm#national.

2. Nguyên tắc đối xử tối huệ quốc (MFN)

Nguyên tắc MFN được quy định tại Điều 4 Hiệp định TRIPS. Nguyên tắc này không được đề cập trong những điều ước về sở hữu trí tuệ được thiết lập trước Hiệp định TRIPS, nhưng được quy định trong các hiệp định khác của WTO, như GATT (Điều I) và GATS (Điều II). Trong khi nguyên tắc NT cấm một thành viên phân biệt đối xử giữa công dân của mình và công dân của các thành viên khác, thì nguyên tắc MFN cấm một thành viên phân biệt đối xử giữa công dân của hai thành viên khác. Đối với bảo hộ IPRs, Điều 4 Hiệp định TRIPS đòi hỏi các thành viên của WTO dành sự bảo hộ 'ngay lập tức và vô điều kiện', 'ưu tiên, chiếu cố, đặc quyền hoặc miễn trừ cho 'công dân của bất kì nước nào khác' (bao gồm cả công dân của nước không phải là thành viên của WTO) như sự bảo hộ dành cho công dân của mình. Nguyên tắc MFN được làm rõ trong một số vụ sau đây: *European Communities - Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs* (khiếu kiện của Hoa Kỳ); và *US - Section 211 Appropriations Act (US - Havana Club)*.[293]

3. Nguyên tắc minh bạch

Nguyên tắc minh bạch được biết đến lần đầu tiên trong Điều X GATT 1947. Trong Hiệp định TRIPS, nguyên tắc này được quy định tại Điều 63. Điều 63 yêu cầu các thành viên của WTO công bố các nguyên tắc liên quan đến IPRs. Theo khoản 1 Điều 63, các nguyên tắc liên quan đến IPRs bao gồm các luật, quy định, quyết định xét xử cuối cùng, quyết định hành chính, thoả thuận giữa chính phủ của thành viên hoặc cơ quan chính phủ với chính phủ hoặc cơ quan chính phủ của thành viên khác. Nghĩa vụ công bố này được thực hiện thông qua ba phương thức, đó là: (i) Công bố chính thức (khoản 1 Điều 63); (ii) Thông báo cho Hội đồng TRIPS (khoản 2 Điều 63); và (iii) Yêu cầu thành viên khác cung cấp thông tin và cho phép tiếp cận thông tin (khoản 3 Điều 63). Mục đích của nguyên tắc minh bạch là: 'Giúp cho chính phủ và các chủ thể khác được thông báo về khả năng thay đổi của pháp luật sở hữu trí tuệ của thành viên nhằm góp phần đảm bảo môi trường pháp lí ổn định và có thể dự đoán được'.[294]

[293] WTO, *European Communities - Protection of Trademark and Geographical Indications for Agricultural Products and Foodstuffs* (khiếu kiện của Hoa Kỳ), WT/DS174/R, ngày 15/3/2005; WTO, Báo cáo của Ban hội thẩm, vụ *United States - Section 211 Omnibus Appropriations Acts of 1988 (US - Havana Club)*, WT/DS176/R, ngày 06/8/2001.

[294] UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), tr. 641. Để có thêm chi tiết về nguyên tắc minh bạch, *xem:* UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), tr. 637-650; WTO, *Transparency,* Working Group on the Relationship between Trade and Investment, Noted by the WTO Secretariat, WT/WGTI/W/109, ngày 27/3/2002.

Cần lưu ý rằng Hiệp định TRIPS cũng quy định một số ngoại lệ đối với ba nguyên tắc nêu trên. Ngoại lệ đối với nguyên tắc NT được quy định tại khoản 2 Điều 3; ngoại lệ đối với nguyên tắc MFN được quy định tại Điều 4(a), (b), (c), (d); ngoại lệ đối với nguyên tắc minh bạch được quy định tại khoản 4 Điều 63.[295]

2. Nội dung chính của Hiệp định TRIPS

Bên cạnh những quy định chung và những nguyên tắc cơ bản (quy định tại Phần I Hiệp định TRIPS),[296] Hiệp định TRIPS bao gồm những nội dung chính sau đây: (A) Các tiêu chuẩn liên quan đến khả năng đạt được, phạm vi và sử dụng IPRs đối với bảy đối tượng sở hữu trí tuệ, bao gồm quyền tác giả và quyền liên quan, nhãn hiệu, chỉ dẫn địa lí, kiểu dáng công nghiệp, sáng chế (bao gồm giống cây trồng), thiết kế bố trí mạch tích hợp và thông tin bí mật; (B) Hiệp định TRIPS bao gồm những quy định về kiểm soát hành vi hạn chế cạnh tranh liên quan đến IPRs; (C) Hiệp định TRIPS quy định chi tiết về thực thi IPRs; (D) Quy định về giải quyết tranh chấp liên quan đến sở hữu trí tuệ theo cơ chế giải quyết tranh chấp của WTO.[297]

A. *Các tiêu chuẩn liên quan đến khả năng đạt được, phạm vi và sử dụng IPRs*

1. Quyền tác giả và quyền liên quan

(a) Quyền tác giả

Hiệp định TRIPS khẳng định phạm vi bảo hộ quyền tác giả bao gồm sự thể hiện và không bao gồm các ý tưởng, trình tự, phương pháp tính toán hoặc các khái niệm toán học (khoản 2 Điều 9). Các chương trình máy tính, dù dưới dạng mã nguồn hay mã máy, đều phải được bảo hộ quyền tác giả như những tác phẩm văn học (khoản 1 Điều 10). Các cơ sở dữ liệu, bộ sưu tập dữ liệu hoặc tư liệu khác đều phải được bảo hộ quyền tác giả thậm chí cả cơ sở dữ liệu chứa đựng dữ liệu không được bảo hộ quyền tác giả (khoản 2 Điều 10).

Ít nhất là đối với chương trình máy tính và tác phẩm điện ảnh,

[295] Để có thêm chi tiết, *xem*: UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), tr. 75 (nguyên tắc NT); tr. 78-82 (nguyên tắc MFN); tr. 646 (nguyên tắc minh bạch).

[296] Những nội dung của Phần I đã được đề cập trong mục '2. Tổng quan về Hiệp định TRIPS'.

[297] Cần lưu ý rằng, còn một số nội dung khác trong Hiệp định TRIPS, đó là: (i) Các thủ tục để đạt được và duy trì IPRs và các thủ tục liên quan (Phần IV); (ii) Các điều khoản chuyển tiếp (Phần VI); (iii) Các quy định về cơ chế; điều khoản cuối cùng (Phần VII). Tuy nhiên, trong phạm vi và mục tiêu của Giáo trình, những nội dung này không phải là nội dung chính.

các thành viên phải dành cho tác giả và người thừa kế hợp pháp của họ quyền cho phép hoặc cấm việc cho công chúng thuê bản gốc hoặc bản sao các tác phẩm của họ nhằm mục đích thương mại (Điều 11).

Theo quy định tại Điều 12, nếu thời hạn bảo hộ tác phẩm (trừ tác phẩm nhiếp ảnh và tác phẩm nghệ thuật ứng dụng) không được tính theo đời người, thì thời hạn đó không được dưới 50 năm kể từ khi kết thúc năm dương lịch mà tác phẩm được công bố một cách hợp pháp, hoặc 50 năm tính từ khi kết thúc năm dương lịch mà tác phẩm được tạo ra nếu tác phẩm không được công bố một cách hợp pháp trong vòng 50 năm từ ngày tạo ra tác phẩm. Hiệp định TRIPS yêu cầu các thành viên WTO giới hạn những hạn chế và ngoại lệ đối với các độc quyền trong những trường hợp đặc biệt nhất định, nhưng với điều kiện không được mâu thuẫn với việc khai thác bình thường tác phẩm và không làm tổn hại một cách bất hợp lí đến lợi ích hợp pháp của chủ thể nắm giữ quyền (Điều 13). Trong vụ *US - Section 110(5) Copyright Act*,[298] Ban hội thẩm đã giải thích Điều 13 Hiệp định TRIPS, cụ thể về các nội dung: phạm vi,[299] mối quan hệ với các quy định khác[300] và điều kiện áp dụng.[301]

(b) Quyền liên quan đến quyền tác giả

Hiệp định TRIPS bao gồm những quy định về bảo hộ người biểu diễn, nhà sản xuất bản ghi âm và các tổ chức phát thanh, truyền hình. Theo Hiệp định, người biểu diễn có quyền ngăn cấm ghi thu cuộc biểu diễn bằng phương tiện ghi âm. Quyền ghi thu của người biểu diễn chỉ liên quan đến âm thanh chứ không liên quan đến cả âm thanh và hình ảnh. Người biểu diễn còn có quyền ngăn cấm tái tạo, nhân bản bản ghi âm. Người biểu diễn cũng có quyền ngăn cấm phát qua phương tiện vô tuyến và truyền cho công chúng buổi biểu diễn trực tiếp của họ (khoản 1 Điều 14). Hiệp định TRIPS yêu cầu các thành viên WTO cho phép nhà sản xuất bản ghi âm độc quyền sao chép các bản ghi âm của họ (khoản 2 Điều 14). Thêm vào đó, theo khoản 4 Điều 14, nhà sản xuất bản ghi âm còn có độc quyền cho thuê bản ghi âm. Các tổ chức phát thanh, truyền hình phải có quyền ngăn cấm các hành vi sau đây nếu thực hiện mà không được họ cho phép: ghi, sao chép bản ghi, phát lại qua phương tiện vô tuyến chương trình, cũng như truyền hình cho công chúng các chương trình (khoản 2 Điều 14).

Thời hạn bảo hộ người biểu diễn và nhà sản xuất bản ghi âm ít nhất là 50 năm tính từ khi kết thúc năm dương lịch mà việc ghi âm hoặc buổi biểu diễn được tiến hành, và thời hạn bảo hộ tổ chức phát sóng ít nhất là 20 năm tính khi kết thúc năm dương lịch mà chương trình phát thanh, truyền hình được thực hiện (khoản 5 Điều 14). Hiệp định TRIPS cho phép các thành viên WTO quy định về các điều kiện, hạn chế, ngoại lệ và bảo lưu đối với những quyền được quy định cho người biểu diễn, nhà sản xuất bản ghi âm và tổ chức phát thanh, truyền hình trong phạm vi quy định của Công ước Roma (khoản 6 Điều 14).

2. Nhãn hiệu

Hiệp định TRIPS quy định rất rộng về phạm vi các dấu hiệu có khả năng được bảo hộ với danh nghĩa nhãn hiệu, đó là bất kì một dấu hiệu hoặc tổ hợp các dấu hiệu, bao gồm dấu hiệu nhìn thấy được (như các chữ cái, các chữ số, các yếu tố hình họa) và dấu hiệu không nhìn thấy được (như âm thanh, mùi, vị) có khả năng phân biệt hàng hoá hoặc dịch vụ của một doanh nghiệp với hàng hoá hoặc dịch vụ của các doanh nghiệp khác, đều có thể được đăng kí làm nhãn hiệu (khoản 1 Điều 15). Các thành viên WTO có thể quy định khả năng được đăng kí phụ thuộc vào 'tính phân biệt đạt được thông qua việc sử dụng' khi bản thân các dấu hiệu không có khả năng phân biệt hàng hoá hoặc dịch vụ tương ứng.

Chủ sở hữu nhãn hiệu đã đăng kí có độc quyền ngăn cấm những người khác, nếu không có sự đồng ý của mình, sử dụng trong hoạt động kinh doanh các dấu hiệu trùng hoặc tương tự cho hàng hoá hoặc dịch vụ trùng hoặc tương tự với những hàng hoá hoặc dịch vụ được đăng kí kèm theo nhãn hiệu đó, nếu việc sử dụng như vậy có nguy cơ gây nhầm lẫn. Khoản 1 Điều 16 Hiệp định TRIPS quy định: 'Việc sử dụng cùng một dấu hiệu cho cùng một loại hàng hoá hoặc dịch vụ phải bị coi là có nguy cơ gây nhầm lẫn'.

Vấn đề bảo hộ nhãn hiệu nổi tiếng được quy định tại khoản 2 Điều 16 và khoản 3 Điều 16 Hiệp định TRIPS. Những quy định này của Hiệp định TRIPS cung cấp sự bảo hộ bổ sung cho nhãn hiệu nổi tiếng đã được quy định tại Điều 6bis Công ước Paris. Trước hết, Hiệp định TRIPS khẳng định rằng 'Điều 6bis Công ước Paris (1967) phải được áp dụng, với những sửa đổi thích hợp, đối với các dịch vụ'. Để xác định nhãn hiệu có

[298] WTO, Báo cáo của Ban hội thẩm, vụ *US - Section 110(5) of the US Copyright Act*, WT/DS160/R, ngày 15/6/2000.

[299] WTO, Báo cáo của Ban hội thẩm, vụ *US - Section 110(5) of the US Copyright Act*, WT/DS160/R, ngày 15/6/2000, đoạn 6.80.

[300] WTO, Báo cáo của Ban hội thẩm, vụ *US - Section 110(5) of the US Copyright Act*, WT/DS160/R, ngày 15/6/2000, các đoạn 6.94, 6.87-6.89, 6.90.

[301] WTO, Báo cáo của Ban hội thẩm, vụ *US - Section 110(5) of the US Copyright Act*, WT/DS160/R, ngày 15/6/2000, các đoạn 6.112, 6.165, 6.166-6.167, 6.222, 6.223-6.225.

nổi tiếng hay không, không chỉ phải xem xét danh tiếng của nhãn hiệu đó trong bộ phận công chúng có liên quan thông qua sử dụng nhãn hiệu, mà còn thông qua hoạt động quảng cáo nhãn hiệu. Hơn nữa, bảo hộ nhãn hiệu nổi tiếng mở rộng đối với hàng hoá hoặc dịch vụ không tương tự với những hàng hoá hoặc dịch vụ được đăng kí kèm theo nhãn hiệu nổi tiếng, với điều kiện việc sử dụng nhãn hiệu đó thể hiện mối liên hệ giữa hàng hoá hoặc dịch vụ này với chủ sở hữu nhãn hiệu đã đăng kí và lợi ích của chủ sở hữu nhãn hiệu đã đăng kí có nguy cơ bị tổn hại do việc sử dụng nhãn hiệu.

Theo quy định tại Điều 17, các thành viên WTO có thể quy định một số ngoại lệ đối với các quyền đã quy định cho chủ sở hữu nhãn hiệu, *ví dụ*, sử dụng lành mạnh các thuật ngữ mang tính chất mô tả, với điều kiện những ngoại lệ đó không ảnh hưởng đến lợi ích hợp pháp của chủ sở hữu nhãn hiệu và của bên thứ ba. Thời hạn bảo hộ nhãn hiệu cho lần đầu đăng kí và mỗi lần gia hạn ít nhất là 7 năm. Số lần gia hạn hiệu lực đăng kí nhãn hiệu không bị giới hạn (Điều 18).

Về yêu cầu sử dụng nhãn hiệu, Hiệp định TRIPS quy định như sau: chỉ được hủy bỏ một nhãn hiệu trên cơ sở không sử dụng, nếu việc không sử dụng diễn ra ít nhất ba năm liên tục, trừ trường hợp chủ sở hữu nhãn hiệu đưa ra những lí do chính đáng cản trở việc sử dụng nhãn hiệu. Các trường hợp không sử dụng nhãn hiệu không phụ thuộc vào ý chí của chủ sở hữu nhãn hiệu, *ví dụ*, việc hạn chế nhập khẩu hoặc những hạn chế khác của chính phủ, được coi là lí do chính đáng cho việc không sử dụng nhãn hiệu. Việc người khác sử dụng nhãn hiệu dưới sự kiểm soát của chủ sở hữu nhãn hiệu phải được công nhận là sử dụng nhãn hiệu nhằm duy trì hiệu lực đăng kí nhãn hiệu (Điều 19).

3. Chỉ dẫn địa lí

Định nghĩa chỉ dẫn địa lí được đưa ra tại khoản 1 Điều 22 Hiệp định TRIPS. Theo đó, 'chỉ dẫn địa lí là những chỉ dẫn về hàng hoá bắt nguồn từ lãnh thổ của một thành viên hoặc từ khu vực hay địa phương thuộc lãnh thổ đó, có chất lượng, uy tín hoặc đặc tính nhất định chủ yếu do xuất xứ địa lí quyết định'.

Hiệp định yêu cầu các thành viên WTO cung cấp các phương tiện pháp lí để ngăn chặn việc sử dụng chỉ dẫn gây nhầm lẫn cho công chúng về nguồn gốc địa lí của hàng hoá và việc sử dụng đó cấu thành hành vi cạnh tranh không lành mạnh theo nghĩa của Điều 10bis Công ước Paris (khoản 2 Điều 22).

Mối quan hệ giữa nhãn hiệu và chỉ dẫn địa lí được đề cập tại khoản 3 Điều 22. Cụ thể, phải từ chối đăng kí nhãn hiệu hoặc hủy bỏ hiệu lực của nhãn hiệu đã đăng kí theo quy định của pháp luật hoặc theo yêu cầu của các bên liên quan, nếu nhãn hiệu sử dụng chỉ dẫn địa lí gây nhầm lẫn cho công chúng về xuất xứ thực của hàng hoá.

Cần lưu ý rằng Hiệp định TRIPS cung cấp sự bảo hộ đặc biệt đối với các chỉ dẫn địa lí dùng cho rượu vang và rượu mạnh (Điều 23). Theo đó, các thành viên WTO phải cung cấp những biện pháp pháp lí để ngăn ngừa việc sử dụng một chỉ dẫn địa lí của rượu vang cho những loại rượu vang không bắt nguồn từ lãnh thổ tương ứng với chỉ dẫn địa lí đó. Quy định này cũng được áp dụng trong trường hợp công chúng không nhầm lẫn, không cấu thành hành vi cạnh tranh không lành mạnh và nguồn gốc thực sự của hàng hoá được chỉ ra hoặc chỉ dẫn địa lí được sử dụng gắn với các từ như 'loại', 'kiểu', 'dạng', 'phỏng theo' hoặc tương tự như vậy. Việc bảo hộ tương tự được áp dụng cho rượu mạnh và cho nhãn hiệu. Các trường hợp ngoại lệ đối với bảo hộ chỉ dẫn địa lí được quy định tại Điều 24.

4. Kiểu dáng công nghiệp

Hiệp định TRIPS yêu cầu các thành viên WTO bảo hộ các kiểu dáng công nghiệp mới hoặc nguyên gốc được tạo ra một cách độc lập và sự bảo hộ đó không áp dụng cho những kiểu dáng công nghiệp chủ yếu do đặc tính kĩ thuật và chức năng quyết định (khoản 1 Điều 25).

Xuất phát từ mối liên hệ không thể phủ nhận giữa kiểu dáng công nghiệp và ngành công nghiệp dệt, thời gian tồn tại ngắn của những kiểu dáng mới trong lĩnh vực dệt, Hiệp định TRIPS bao gồm một quy định riêng về bảo hộ kiểu dáng công nghiệp cho hàng dệt may. Khoản 2 Điều 25 Hiệp định TRIPS quy định:

> Bảo hộ đối với các kiểu dáng hàng dệt may, đặc biệt là yêu cầu về lệ phí, xét nghiệm hoặc công bố, không làm giảm một cách bất hợp lí cơ hội tìm kiếm và đạt được sự bảo hộ đó. Các thành viên được tự do lựa chọn áp dụng pháp luật kiểu dáng công nghiệp hoặc pháp luật về quyền tác giả để thực hiện nghĩa vụ này.

Khoản 1 Điều 26 yêu cầu các thành viên WTO trao cho chủ sở hữu kiểu dáng công nghiệp quyền ngăn cấm những người không được sự đồng ý của mình sản xuất, bán hoặc nhập khẩu các sản phẩm mang hoặc thể hiện một kiểu dáng là bản sao, hoặc về cơ bản là bản sao, của kiểu dáng đã được bảo hộ, nếu các hành vi này nhằm mục đích thương

mại. Các thành viên được phép quy định các ngoại lệ đối với việc bảo hộ kiểu dáng công nghiệp, với điều kiện các ngoại lệ đó không mâu thuẫn bất hợp lí với việc khai thác bình thường kiểu dáng công nghiệp được bảo hộ, và không làm tổn hại một cách bất hợp lí lợi ích hợp pháp của chủ sở hữu kiểu dáng công nghiệp đã được bảo hộ, và trong trường hợp này cần xem xét cả lợi ích của các bên thứ ba (khoản 2 Điều 26). Thời hạn bảo hộ kiểu dáng công nghiệp tối thiểu là 10 năm (khoản 3 Điều 26).

5. Sáng chế

Hiệp định TRIPS đòi hỏi các thành viên bảo hộ sáng chế cho sản phẩm hoặc quy trình thuộc mọi lĩnh vực công nghệ với điều kiện sản phẩm hoặc quy trình có tính mới, có trình độ sáng tạo và khả năng áp dụng công nghiệp (khoản 1 Điều 27). Có thể loại trừ không cấp bằng độc quyền sáng chế trong ba trường hợp. *Thứ nhất*, đối với những sáng chế trái ngược với trật tự công cộng hoặc đạo đức xã hội; bao gồm những sáng chế gây nguy hiểm cho sức khoẻ của con người và động vật hoặc thực vật hoặc để tránh gây nguy hại nghiêm trọng cho môi trường (khoản 2 Điều 27). *Thứ hai*, các thành viên có thể không cấp bằng độc quyền sáng chế cho các phương pháp chẩn đoán bệnh, các phương pháp nội và ngoại khoa để chữa bệnh cho người và động vật (khoản 3(a) Điều 27). *Thứ ba*, các thành viên có thể không cấp bằng độc quyền sáng chế cho thực vật và động vật, chủ yếu mang tính chất sinh học và không phải là các quy trình phi sinh học hoặc vi sinh. Tuy nhiên, bất kì thành viên nào không bảo hộ giống cây trồng theo hệ thống sáng chế đều phải quy định hệ thống bảo hộ riêng hữu hiệu đối với giống cây trồng (khoản 3(b) Điều 27).

Chủ sở hữu sáng chế có quyền sản xuất, sử dụng, chào hàng, bán sản phẩm và nhập khẩu sản phẩm để thực hiện những mục đích nêu trên. Nếu sáng chế là một quy trình, chủ sở hữu sáng chế không chỉ có quyền đối với quy trình mà còn có quyền đối với sản phẩm tạo ra trực tiếp bằng quy trình đó. Chủ sở hữu sáng chế cũng có quyền chuyển nhượng, để lại thừa kế quyền đối với sáng chế và giao kết các hợp đồng chuyển giao quyền sử dụng sáng chế (Điều 28). Các thành viên WTO có thể quy định những ngoại lệ đối với các quyền nêu trên, với điều kiện những ngoại lệ đó không mâu thuẫn bất hợp lí với việc khai thác bình thường sáng chế và không gây tổn hại bất hợp lí đến lợi ích hợp pháp của chủ sở hữu sáng chế và lợi ích hợp pháp của bên thứ ba (Điều 30). Trong vụ *Canada - Pharmaceutical Patents*,[302] Ban hội thẩm đã làm rõ các quyền

[302] WTO, Báo cáo của Ban hội thẩm, vụ *Canada - Patent Protection of Pharmaceutical Products,* WT/DS114/R, ngày 17/3/2000.

của chủ sở hữu sáng chế được quy định tại Điều 28 và những ngoại lệ đối với các quyền này được quy định tại Điều 30.

Thời hạn bảo hộ sáng chế không được ngắn hơn 20 năm tính từ ngày nộp đơn (Điều 33). Trong vụ *Canada - Term of Patent Protection*,[303] Cơ quan phúc thẩm kết luận rằng: thời hạn bảo hộ sáng chế là 17 năm (tính từ ngày cấp văn bằng bảo hộ) cho những đơn đăng kí sáng chế được nộp trước ngày 01/10/1989 và thường kết thúc trước 20 năm tính từ ngày nộp đơn theo quy định tại Phần 45 Đạo luật sáng chế Canada là không phù hợp với quy định tại Điều 33 Hiệp định TRIPS.

Pháp luật quốc gia được phép quy định về việc bắt buộc chuyển giao quyền sử dụng sáng chế (li-xăng bắt buộc), hoặc sử dụng sáng chế do chính phủ thực hiện mà không được phép của chủ thể nắm giữ quyền được thừa nhận, nhưng với những điều kiện nhất định nhằm bảo vệ lợi ích hợp pháp của chủ thể nắm giữ quyền (Điều 31). Điều kiện áp dụng bắt buộc chuyển giao quyền sử dụng sáng chế được giảm nhẹ nhằm xử lí các hành vi hạn chế cạnh tranh. Các điều kiện áp dụng này phải được xem xét trong mối quan hệ với các quy định liên quan tại khoản 1 Điều 27 Hiệp định TRIPS.

6. Thiết kế bố trí mạch tích hợp

Theo Hiệp định TRIPS, việc bảo hộ thiết kế bố trí mạch tích hợp dựa trên các quy định của Hiệp ước về sở hữu trí tuệ đối với mạch tích hợp (Điều 35) và một số quy định bổ sung của Hiệp định TRIPS (từ Điều 36 đến Điều 38). Trong đó, Hiệp ước về sở hữu trí tuệ đối với mạch tích hợp bao gồm định nghĩa 'mạch tích hợp' và 'thiết kế bố trí', các điều kiện bảo hộ, các độc quyền, những giới hạn và khai thác, đăng kí, mở thiết kế bố trí mạch tích hợp.[304] Các quy định về thiết kế bố trí mạch tích hợp trong Hiệp định TRIPS bổ sung ba vấn đề quan trọng đáng kể cho Hiệp ước về sở hữu trí tuệ đối với mạch tích hợp. Đó là: (i) Khả năng bảo hộ sản phẩm chứa thiết kế bố trí bất hợp pháp (Điều 36); (ii) Xử lí người vi phạm không có lỗi - đó là việc người thực hiện hành vi nhập khẩu, bán hoặc phân phối mạch tích hợp chứa thiết kế bố trí bị sao chép bất hợp pháp, hoặc bất kì sản phẩm nào chứa mạch hợp như vậy, dưới hình thức khác, nhằm mục đích thương mại, nếu tại thời điểm tiếp nhận mạch tích hợp hoặc sản phẩm chứa mạch tích hợp đó mà không biết, hoặc không có căn cứ hợp lí để biết rằng trong đó chứa thiết kế bố trí bị sao chép bất hợp pháp (khoản

[303] WTO, Báo cáo của Ban hội thẩm, vụ *Canada - The term of Patent Protection,* WT/DS170/AB/R, ngày 18/9/2000.

[304] *Xem* các điều 2, 3, 6, và 7 Hiệp ước về sở hữu trí tuệ đối với mạch tích hợp.

1 Điều 37); và (iii) Áp dụng các quy định tại Điều 31 Hiệp định TRIPS đối với chuyển giao không tự nguyện quyền sử dụng thiết kế bố trí, hoặc sử dụng thiết kế bố trí do chính phủ thực hiện mà không được phép của chủ thể nắm giữ quyền, thay cho các quy định về bắt buộc chuyển giao quyền sử dụng thiết kế bố trí (li-xăng bắt buộc) trong Hiệp ước về sở hữu trí tuệ đối với thiết kế bố trí mạch tích hợp (khoản 2 Điều 37).

7. Thông tin bí mật

Khác với 6 đối tượng sở hữu trí tuệ đã đề cập ở trên, Hiệp định TRIPS chỉ rõ rằng việc bảo hộ thông tin bí mật nhằm bảo đảm 'chống cạnh tranh không lành mạnh một cách hiệu quả' (khoản 1 Điều 39). Bên cạnh đó, Hiệp định bao gồm định nghĩa 'thông tin bí mật' tại khoản 2 Điều 39. Theo quy định này, thông tin này phải có tính chất bí mật, có giá trị thương mại vì có tính chất bí mật, được giữ bí mật bằng các biện pháp hợp lí. Hiệp định TRIPS cũng quy định về dữ liệu thử nghiệm và các dữ liệu bí mật khác trong trường hợp phải nộp dữ liệu theo yêu cầu của chính phủ để được phép tiếp thị dược phẩm hoặc các sản phẩm hoá nông có chứa những thành phần hoá học mới (khoản 3 Điều 39). Trong trường hợp như vậy, các thành viên WTO phải bảo hộ để các dữ liệu đó không bị sử dụng trong thương mại một cách không lành mạnh và không bị tiết lộ, trừ trường hợp cần bảo vệ công chúng hoặc trừ khi áp dụng các biện pháp nhằm bảo đảm các dữ liệu đó không bị sử dụng trong thương mại một cách không lành mạnh.

B. *Kiểm soát hành vi hạn chế cạnh tranh liên quan đến IPRs*

Hiệp định TRIPS bao gồm một số quy định về hành vi hạn chế cạnh tranh liên quan đến IPRs, cụ thể là khoản 2 Điều 8, Điều 31(k) và Điều 40.[305] Vấn đề thoả thuận giới hạn trong hợp đồng liên quan đến IPRs chỉ được hiểu thông qua quy định tại khoản 2 Điều 8 và Điều 40.[306] Theo những quy định này, sự lạm dụng IPRs và những hành vi hạn chế cạnh tranh liên quan đến IPRs có thể hạn chế cạnh tranh, do đó một mặt Hiệp định TRIPS dành quyền cho các thành viên WTO điều chỉnh các hành vi này, mặt khác yêu cầu các thành viên WTO tuân thủ những nghĩa vụ nhất định.

1. Những quy định linh hoạt

[305] Trong một chừng mực nhất định, các Điều 6, Điều 31(c), khoản 2 Điều 37 Hiệp định TRIPS cũng có thể được coi là những quy định về cạnh tranh.

[306] Điều 31(k) chỉ liên quan tới hành vi lạm dụng IPRs đơn phương chứ không phải hợp đồng.

Các quy định linh hoạt, được quy định tại khoản 2 Điều 8 và khoản 2 Điều 40 Hiệp định TRIPS, cho phép các thành viên áp dụng 'các biện pháp thích hợp' để ngăn chặn, xử lí những hành vi hạn chế cạnh tranh liên quan đến IPRs. Với quy định tại khoản 2 Điều 8, các thành viên thừa nhận rằng: những hành vi hạn chế cạnh tranh liên quan đến IPRs 'có thể cần… phải được ngăn ngừa', và các thành viên được trao quyền xử lí những hành vi này. Cụm từ 'có thể cần' thừa nhận thẩm quyền của các thành viên đối với những hành vi hạn chế cạnh tranh liên quan đến IPRs. Những hành vi này bao gồm lạm dụng IPRs bởi những người nắm giữ quyền, cản trở hoạt động thương mại một cách bất hợp pháp, gây ảnh hưởng xấu đến chuyển giao công nghệ quốc tế.

Quyền kiểm soát các hành vi hạn chế cạnh tranh phát sinh từ hợp đồng chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ được quy định tại Điều 40. Điều 40 bao gồm bốn khoản, trong đó các khoản 1 và 2 quy định về nội dung, còn các khoản 3 và 4 quy định về các vấn đề thực thi. Điều 40 là quy định 'đặc biệt' trong mối quan hệ với khoản 2 Điều 8, theo đó Điều 40 nêu giới hạn phạm vi của khoản 2 Điều 8 và chỉ liên quan đến một số hành vi của chủ thể nắm giữ IPRs được liệt kê tại khoản 2 Điều 8.[307] Điều 40 thuộc Mục 8 của Hiệp định TRIPS và mục này có tiêu đề 'Kiểm soát hành vi hạn chế cạnh tranh trong hợp đồng chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ'. Tuy nhiên, khoản 1 Điều 40 đề cập thuật ngữ chung 'một số hoạt động hoặc điều kiện chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ' bao hàm tất cả các hành vi xoay quanh việc xác lập và thực hiện hợp đồng chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ. Do đó, hành vi đơn phương và các điều khoản hợp đồng mang tính giới hạn liên quan đến IPRs đều thuộc phạm vi điều chỉnh của khoản 1 Điều 40. Khoản 1 Điều 40 thừa nhận rằng: 'Một số hoạt động hoặc điều kiện chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ liên quan đến IPRs có tính chất hạn chế cạnh tranh có thể ảnh hưởng xấu đến hoạt động thương mại và có thể cản trở việc chuyển giao và phổ biến công nghệ'.

Do đó, khoản 1 Điều 40 cũng 'nước đôi' như khoản 2 Điều 8.[308]

Trong khi khoản 1 Điều 40 không liệt kê những hoạt động hoặc

[307] UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), tr. 554. Bên cạnh quan điểm cho rằng Điều 40 là quy định đặc biệt trong mối quan hệ với khoản 2 Điều 8, có quan điểm cho rằng khoản 2 Điều 8 là một tuyên bố chung và được thực thi bởi Điều 40. *Xem*: Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis,* Sweet and Maxwell, (1998), tr. 68, đoạn 2.49.

[308] Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis,* Sweet and Maxwell, (1998), đoạn 191; Heinemann, 'Antitrust Law of Intellectual Property in the TRIPS Agreement of the World Trade Organization', in Schricker Beier (ed.), *From GATT to TRIPS*, Weinheim, (1996), tr. 245.

điều kiện chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ bị coi là hạn chế cạnh tranh, khoản 2 Điều 40 liệt kê một số hoạt động này như 'điều kiện chuyển giao IPRs dưới hình thức độc quyền, điều kiện ngăn cấm việc không thừa nhận hiệu lực và việc chuyển giao quyền sử dụng trọn gói'. Tuy nhiên, từ 'chẳng hạn' cho thấy đây không phải là danh mục được liệt kê đầy đủ. Điều này cho phép các thành viên WTO định nghĩa 'điều kiện và hoạt động chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ'. Hơn nữa, khoản 2 Điều 40 nhấn mạnh việc cho phép các thành viên WTO thiết lập và xác định nội dung pháp luật cạnh tranh nhằm khống chế hoặc ngăn chặn điều kiện và hoạt động chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ bị coi là hạn chế cạnh tranh. Bên cạnh đó, khoản 2 Điều 40 ghi nhận thẩm quyền của các thành viên được 'áp dụng các biện pháp thích hợp để ngăn ngừa, khống chế' những hoạt động đó, đồng thời đòi hỏi các thành viên tuân thủ những nghĩa vụ tối thiểu nhất định.

Tóm lại, khoản 2 Điều 8, khoản 1 Điều 40 và khoản 2 Điều 40 cho phép các thành viên WTO được tự do trong việc xử lí những hành vi hạn chế cạnh tranh liên quan đến IPRs. Cụ thể, các thành viên có quyền xử lí những hành vi đó; định nghĩa hành vi hạn chế cạnh tranh liên quan đến IPRs, và điều kiện hoặc hoạt động chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ; thiết lập và xác định nội dung của pháp luật cạnh tranh nhằm khống chế hoặc ngăn chặn những hành vi nêu trên.

2. Những tiêu chuẩn tối thiểu

Bên cạnh những quy định linh hoạt về hành vi hạn chế cạnh tranh liên quan đến IPRs, khoản 2 Điều 8 và khoản 2 Điều 40 Hiệp định TRIPS quy định những tiêu chuẩn tối thiểu cho các biện pháp ngăn chặn hành vi hạn chế cạnh tranh liên quan đến IPRs. Cụ thể, các thành viên có quyền quyết định điều chỉnh hay không điều chỉnh hành vi hạn chế cạnh tranh liên quan đến IPRs bằng pháp luật cạnh tranh của nước mình. Nếu các thành viên điều chỉnh hành vi này, thì pháp luật cạnh tranh của nước này phải phù hợp với các quy định khác của Hiệp định TRIPS và thích hợp để ngăn chặn những hành vi hạn chế cạnh tranh liên quan đến IPRs. Nói cách khác, những biện pháp này phải đáp ứng hai điều kiện là sự 'phù hợp' và 'thích hợp'. Hơn nữa, các khoản 3 và 4 Điều 40 yêu cầu các thành viên WTO có nghĩa vụ thương lượng và hợp tác trong kiểm soát hành vi hạn chế cạnh tranh liên quan đến IPRs. *Thứ nhất*, khoản 2 Điều 8 và khoản 2 Điều 40 yêu cầu các biện pháp kiểm soát hoặc ngăn chặn hành vi hạn chế cạnh tranh liên quan đến IPRs phải 'phù hợp' với các quy định khác của Hiệp định TRIPS. *Thứ hai*, khoản 2 Điều 8 và khoản 2 Điều 40 yêu cầu các biện pháp này phải 'thích hợp' và 'cần thiết'. Yêu cầu về sự 'thích hợp' được giải thích trong một số văn bản của WTO[309] và được WTO giải thích chi tiết hơn trong một số án lệ liên quan đến GATT/GATS. *Ví dụ*: các vụ *Korea - Measures Affecting Import of Fresh*; *Chilled and Frozen Beef*; *European Communities - Measures Affecting Asbestos-containing Products*; *European Communities - Trade Description of Sardines*; *Japan - Measures Affecting the Importation of Apples*; *United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services*; *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*.[310] *Thứ ba*, các khoản 3 và 4 Điều 40 thiết lập nghĩa vụ thương lượng và hợp tác trong kiểm soát hành vi hạn chế cạnh tranh liên quan đến hợp đồng chuyển giao quyền sử dụng đối tượng sở hữu trí tuệ. Đây là thoả thuận quốc tế đa phương đầu tiên thiết lập nghĩa vụ hợp tác trong thực thi pháp luật chống độc quyền.[311]

C. *Thực thi IPRs*

1. Các nghĩa vụ chung

Theo yêu cầu của Hiệp định TRIPS, pháp luật quốc gia của các thành viên WTO phải quy định các thủ tục thực thi, cho phép hành động một cách có hiệu quả chống lại hành vi xâm phạm IPRs được đề cập trong Hiệp định, trong đó bao gồm các chế tài khẩn cấp nhằm ngăn chặn các hành vi xâm phạm và các chế tài nhằm ngăn chặn các hành vi xâm phạm tiếp theo. Các thủ tục thực thi phải được áp dụng theo cách thức nhằm tránh tạo ra những rào cản cho hoạt động thương mại hợp pháp và nhằm quy định những biện pháp chống lạm dụng các thủ tục thực thi (khoản 1 Điều 41). Hơn nữa, các thủ tục thực thi phải đúng đắn và công bằng, không phức tạp và tốn kém một cách không cần thiết,

309 WTO Working Party on Domestic Regulation, *'Necessity Test' in the WTO,* Note by the Secretariat, S/WPDR/W/27, ngày 02/12/2003, đoạn 4.

310 WTO, vụ *Korea - Measures Affecting Import of Fresh, Chilled and Frozen Beef,* WT/DS161/AB//R; và WT/DS169/AB/R, ngày 11/12/2000; WTO, vụ *European Communities - Measures Affecting Asbestos-containing Products,* WT/DS135/AB/R, ngày 12/3/2001, các đoạn 168-175; WTO, vụ *European Communities - Trade Description of Sardines,* WT/DS231/AB/R, ngày 26/12/2002, các đoạn 285-291; WTO, vụ *Japan - Measures Affecting the Importation of Apples,* WT/DS245/R, ngày 15/7/2003, các đoạn 8.180-8.198; và WT/DS245/AB/R, ngày 26/11/2003, các đoạn 163-165; WTO, vụ *United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services,* WT/DS285/AB/R, ngày 07/4/2005, các đoạn 309-311; WTO, vụ *European Communities - Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS291/R, WT/DS292/R; và WT/DS293/R, ngày 29/9/2006, đoạn 7.1423.

311 UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development*, Cambridge University Press, (2005), tr. 561-562.

không bao gồm những thời hạn bất hợp lí hoặc những trì hoãn không có lí do chính đáng (khoản 2 Điều 41). Trong vụ *Canada - The Term of Patent Protection*,[312] Ban hội thẩm chỉ ra rằng:

> Những chậm trễ mà người nộp đơn phải gánh chịu do sự không sát sao của người nộp đơn, do sắp đặt lại thủ tục, do không thanh toán phí và không phúc đáp thông báo của xét nghiệm viên sáng chế bị coi là không phù hợp với nguyên tắc chung rằng thủ tục thực thi không được phức tạp một cách không cần thiết như quy định nhấn mạnh tại khoản 2 Điều 41.[313]

Các quyết định xử lí vụ việc cần phải được: thể hiện bằng văn bản và nêu rõ lí do; ít nhất phải được trao cho các bên tham gia khiếu kiện mà không được chậm trễ quá mức; phải dựa vào chứng cứ mà các bên đã có cơ hội trình bày (khoản 3 Điều 41). Các bên tham gia khiếu kiện phải có cơ hội yêu cầu cơ quan tư pháp xem xét lại các quyết định hành chính cuối cùng và ít nhất là các khía cạnh pháp lí của các quyết định xét xử vụ việc ở cấp sơ thẩm. Quy định này không áp dụng cho những tuyên bố vô tội trong các vụ án hình sự (khoản 4 Điều 41).

2. Các chế tài, thủ tục dân sự và hành chính

Hiệp định TRIPS bao gồm những quy định chi tiết về thực thi IPRs bằng biện pháp dân sự và hành chính. Những quy định này tập trung vào các vấn đề sau đây: (i) Yêu cầu thủ tục thực thi phải đúng đắn và công bằng (Điều 42);[314] (ii) Chứng cứ (Điều 43);[315] (iii) Lệnh của toà án (Điều 44); (iv) Bồi thường thiệt hại (Điều 45); (v) Các biện pháp chế tài khác, *ví dụ*: cơ quan có thẩm quyền ra lệnh tiêu hủy hàng hoá vi phạm hoặc các vật liệu và phương tiện được sử dụng để tạo ra hàng hoá vi phạm (Điều 46); (vi) Quyền được thông tin (Điều 47); (vii) Bồi thường cho bị đơn (Điều 48); và (viii) Áp dụng những hướng dẫn nêu trên trong thực thi IPRs bằng biện pháp hành chính (Điều 49).

[312] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada - The Term of Patent Protection*, WT/DS170/AB/R, ngày 18/9/2000.

[313] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Canada - The Term of Patent Protection*, WT/DS170/AB/R, ngày 18/9/2000, các đoạn 6.117-6.118.

[314] Điều 42 bao gồm một số nguyên tắc nhằm bảo đảm các thủ tục thích hợp cho chủ thể quyền. Trong vụ *US - Section 211 Appropriations Act (US-Havane Club)*, Cơ quan phúc thẩm cho rằng chủ thể quyền bao gồm không chỉ chủ sở hữu quyền mà còn những người đã khiếu kiện nhằm có được địa vị pháp lí để xác nhận quyền. *Xem*: WTO, Báo cáo của Ban hội thẩm, vụ *United States - Section 211 Omnibus Appropriations Acts of 1988 (US-Havane Club)*, WT/DS176/R, ngày 06/8/2001, đoạn 217.

[315] Quy định này đã được giải thích trong khuôn khổ cơ chế giải quyết tranh chấp của WTO, *xem*: WTO, Báo cáo của Ban hội thẩm, vụ *India-Patents (EC)*, WT/DS79/R, ngày 24/8/1998.

3. Các biện pháp tạm thời

Các biện pháp tạm thời được áp dụng nhằm ngăn chặn hành vi xâm phạm IPRs, đặc biệt nhằm ngăn chặn hàng hoá vào các kênh thương mại, trong đó bao gồm hàng hoá nhập khẩu ngay sau khi hoàn thành thủ tục hải quan và nhằm lưu giữ các chứng cứ liên quan đến hành vi bị khiếu kiện là xâm phạm quyền (khoản 1 Điều 50). Các biện pháp tạm thời cũng được áp dụng, 'khi mà bất kì sự chậm trễ nào cũng có thể tạo nguy cơ gây hậu quả không khắc phục được cho chủ thể nắm giữ quyền, hoặc khi thấy rằng chứng cứ đang có nguy cơ bị tiêu hủy' (khoản 2 Điều 50). Cơ quan xét xử và cơ quan hành chính có thẩm quyền áp dụng các biện pháp tạm thời.

Nhằm chống lại sự lạm dụng các biện pháp tạm thời, Hiệp định TRIPS quy định cơ quan xét xử có thể yêu cầu nguyên đơn: (i) Cung cấp bất kì chứng cứ nào có thể có được một cách hợp lí, đủ sức thuyết phục rằng nguyên đơn là chủ thể quyền, và quyền của nguyên đơn đang bị xâm phạm hoặc rõ ràng có nguy cơ bị xâm phạm (khoản 3 Điều 50); và (ii) Buộc nguyên đơn nộp một khoản bảo đảm hoặc bảo hiểm tương đương đủ để bảo vệ bị đơn và ngăn chặn sự lạm dụng (khoản 3 Điều 50). Bên cạnh đó, trong một thời hạn hợp lí, bị đơn có quyền yêu cầu xem xét lại lệnh áp dụng các biện pháp tạm thời để quyết định những biện pháp này có phải sửa đổi, hủy bỏ hay nên giữ nguyên (khoản 4 Điều 50).

4. Những yêu cầu đặc biệt liên quan đến các biện pháp kiểm soát biên giới

Các biện pháp kiểm soát biên giới được quy định nhằm xử lí hàng hoá giả mạo nhãn hiệu hoặc hàng hoá sao chép lậu (Điều 51). Các biện pháp này cho phép cơ quan hải quan ngăn chặn hàng hoá nhập khẩu là hàng hoá giả mạo nhãn hiệu hoặc hàng hoá sao chép lậu được đưa vào lưu thông tự do. Theo quy định tại Điều 60, các thành viên có thể không áp dụng quy định này trong trường hợp nhập khẩu với số lượng nhỏ và không có mục đích thương mại, *ví dụ,* hàng hoá trong hành lí cá nhân của hành khách hoặc hàng hoá nhỏ được kí gửi. Hiệp định TRIPS dành quyền tự quyết cho các thành viên WTO trong áp dụng các thủ tục tương ứng đối với những hàng hoá xâm phạm được tập kết để xuất khẩu ra khỏi lãnh thổ của mình (Điều 51).

Tương tự như đối với các biện pháp tạm thời, Hiệp định TRIPS đưa ra một số quy định nhằm ngăn chặn lạm dụng các biện pháp kiểm soát biên giới. Cụ thể, cơ quan có thẩm quyền có thể yêu cầu nguyên đơn nộp khoản bảo đảm hoặc bảo hiểm tương đương đủ để bảo vệ bị

đơn và các cơ quan có thẩm quyền, đồng thời ngăn chặn sự lạm dụng. Người nhập khẩu và nguyên đơn phải được thông báo ngay về việc đình chỉ thông quan đối với hàng hoá (Điều 54). Nếu chủ thể nắm giữ quyền thất bại trong việc đề xướng các thủ tục ra quyết định giải quyết vụ việc trong thời hạn 10 ngày làm việc, thì thông thường hàng hoá sẽ phải được thông quan (Điều 55). Trong trường hợp hàng hoá được cho là vi phạm liên quan đến kiểu dáng công nghiệp, sáng chế, thiết kế bố trí hoặc thông tin bí mật, hàng hoá sẽ được thông quan nếu người nhập khẩu nộp khoản bảo đảm đủ bảo vệ chủ thể nắm giữ quyền đối với bất kì xâm phạm nào, thậm chí khi các thủ tục ra quyết định giải quyết vụ việc đã được tiến hành (khoản 2 Điều 53).

Về chế tài, cơ quan có thẩm quyền có quyền ra lệnh tiêu hủy hàng hoá vi phạm hoặc đưa những hàng hoá này ra khỏi các kênh thương mại theo cách thức không gây tổn hại tới các quyền khiếu kiện của chủ thể nắm giữ quyền (Điều 59).

5. Các biện pháp hình sự

Hiệp định TRIPS yêu cầu các thành viên quy định các biện pháp hình sự và hình phạt được áp dụng ít nhất đối với các trường hợp cố ý giả mạo nhãn hiệu hoặc sao chép lậu với quy mô thương mại. Các thành viên cũng phải quy định các chế tài như phạt tù, phạt tiền, tịch thu, trưng thu, tiêu hủy hàng hoá vi phạm và bất kì vật liệu, phương tiện nào được sử dụng chủ yếu để thực hiện hành vi phạm tội (Điều 61).

D. *Giải quyết tranh chấp*

Giải quyết các tranh chấp liên quan đến IPRs theo cơ chế giải quyết tranh chấp của WTO là một trong những nội dung quan trọng nhất của Hiệp định TRIPS.

Khoản 2 Điều 3 Hiệp định của WTO về các quy tắc và thủ tục giải quyết tranh chấp (viết tắt là 'DSU') ghi nhận:

> Hệ thống giải quyết tranh chấp của WTO là yếu tố chính trong việc cung cấp sự an toàn và tính có thể dự đoán cho hệ thống thương mại đa phương … bảo đảm các quyền và nghĩa vụ của các thành viên được quy định trong các hiệp định, và giải thích các quy định hiện hành trong những hiệp định này, phù hợp với các quy tắc tập quán về giải thích pháp luật của công pháp quốc tế.[316]

Hoạt động của hệ thống giải quyết tranh chấp liên quan đến Ban hội thẩm, Cơ quan phúc thẩm, Ban thư kí WTO, các trọng tài viên, các chuyên gia độc lập và một số bộ phận chuyên trách.

Hiệp định TRIPS viện dẫn các quy định của Điều XXII và Điều XXIII GATT 1994 - đã được chi tiết hoá trong DSU - để áp dụng đối với việc thương lượng và giải quyết tranh chấp theo Hiệp định TRIPS (Điều 64). Kết quả là, các tranh chấp IPRs trong khuôn khổ Hiệp định TRIPS được giải quyết theo cơ chế giải quyết tranh chấp của WTO.

Mục 6. CƠ CHẾ GIẢI QUYẾT TRANH CHẤP CỦA WTO

1. Tổng quan

A. *Hệ thống giải quyết tranh chấp - từ GATT đến WTO*

Hệ thống giải quyết tranh chấp của WTO, được vận hành từ ngày 01/01/1995 đến nay, vốn không phải là hệ thống mới. Thực chất, hệ thống này được xây dựng trên cơ sở hệ thống giải quyết tranh chấp của GATT 1947.[317] Trong suốt gần 50 năm trước khi WTO ra đời, hệ thống giải quyết tranh chấp của GATT 1947 được vận hành chỉ dựa trên hai điều khoản ngắn gọn - Điều XXII và Điều XXIII GATT 1947, cùng với một số nguyên tắc cũng như thông lệ được hệ thống hoá trong các quyết định và thoả thuận của các bên kí kết GATT 1947.[318] Vì vậy, cũng dễ hiểu khi hệ thống giải quyết tranh chấp của GATT đã không thể đưa ra những thủ tục cụ thể để giải quyết các tranh chấp một cách hiệu quả. Hơn thế

[316] Khoản 2 Điều 3 DSU (một số từ được tác giả lược bỏ và thêm vào).

[317] Khoản 1 Điều 3 DSU. Hệ thống hiện hành của WTO giữ nguyên các nguyên tắc giải quyết tranh chấp được quy định tại Điều XXII và Điều XXIII GATT 1947.

[318] Các nước thành viên của GATT 1947 đã từng bước hệ thống hoá và sửa đổi một số thông lệ mới về thủ tục giải quyết tranh chấp. Các quyết định và thoả thuận quan trọng nhất đạt được trước Vòng đàm phán Uruguay là:

- Quyết định ngày 05/4/1966 về các thủ tục theo Điều XXIII;
- Thoả thuận về khai báo, tham vấn, giải quyết tranh chấp và giám sát, được thông qua ngày 28/11/1979;
- Quyết định về giải quyết tranh chấp, ban hành kèm theo Tuyên bố cấp bộ trưởng ngày 29/11/1982;
- Quyết định về giải quyết tranh chấp ngày 30/11/1984.

Xem: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm, truy cập ngày 3/8/2017.

nữa, hệ thống giải quyết tranh chấp của GATT 1947 còn có nhiều điểm hạn chế đáng kể, dẫn đến việc nảy sinh những vấn đề phức tạp vào những năm 1980.[319] Do đó, rất nhiều bên kí kết của GATT 1947, kể cả các DCs và các nước phát triển, đều nhận thấy rằng cần phải thay thế hệ thống giải quyết tranh chấp của GATT 1947, vốn đã lạc hậu, đơn giản, được vận hành dựa trên sức mạnh, và giải quyết các tranh chấp chủ yếu thông qua các cuộc đàm phán mang tính ngoại giao, bằng một hệ thống cụ thể và được vận hành dựa trên các quy tắc để giải quyết các tranh chấp thông qua việc xét xử. Trên cơ sở đó, sau các cuộc tranh luận kéo dài, một hệ thống giải quyết tranh chấp của WTO, được đàm phán trong khuôn khổ Vòng đàm phán Uruguay, đã được thiết lập. Hệ thống này được hình thành chủ yếu nhằm đưa ra một cơ chế giải quyết tranh chấp nhanh chóng giữa các thành viên WTO liên quan đến các quyền và nghĩa vụ của họ theo quy định của WTO, cũng như nhằm bảo vệ an ninh và cung cấp khả năng có thể dự đoán của hệ thống thương mại đa phương.[320] Hệ thống giải quyết tranh chấp của WTO được vận hành dựa trên các nguyên tắc cơ bản như nguyên tắc 'đồng thuận nghịch', nguyên tắc bí mật trong tố tụng, nguyên tắc bình đẳng trong giải quyết tranh chấp và nguyên tắc dành sự đối xử đặc biệt cho các thành viên DCs.

Mặc dù hệ thống giải quyết tranh chấp của WTO được xây dựng trên cơ sở các quy định và thực tiễn giải quyết tranh chấp của GATT 1947, nhưng nó vẫn có một số thay đổi đáng kể, đó là:

- Sự xuất hiện của nguyên tắc 'đồng thuận nghịch';
- Việc đẩy nhanh các thủ tục với những khung thời hạn cụ thể cho các hoạt động tố tụng tại WTO;
- Bổ sung thủ tục phúc thẩm nhằm mang lại cho các bên tranh chấp cơ hội tiếp theo để bảo vệ các quyền và lợi ích chính đáng của mình theo quy định của WTO; và
- Bổ sung tính bắt buộc và xây dựng cơ chế thực thi nhằm đảm bảo tốt hơn việc bảo vệ quyền lợi cho các thành viên WTO.

Bên cạnh những thành công đáng kể, hệ thống giải quyết tranh chấp của WTO vẫn còn tồn tại nhiều vấn đề, đồng thời nảy sinh một số vấn đề thực tiễn mới cần phải được giải quyết thông qua đàm phán trong khuôn khổ WTO, như vấn đề về khả năng và tính hiệu quả của việc áp dụng các biện pháp trả đũa, về phạm vi xem xét phúc thẩm, cũng như việc áp dụng các biện pháp tạm thời, đệ trình các văn bản điện tử. Các thành viên WTO cũng đã nhất trí việc tiến hành đàm phán nhằm cải tiến và làm rõ các quy định của DSU. Trên thực tế, các cuộc đàm phán để rà soát và sửa đổi DSU đã diễn ra từ năm 1998 nhưng cho đến nay vẫn chưa đạt được bất kì thoả thuận nào.[321]

[319] Peter Van den Bossche, Sđd, tr. 170. *Xem Weaknesses of the GATT Dispute Settlement System*, nguồn: http://www.wto.org/english/tratop_e/dispu_e/disp_ settlement_cbt_e/c2s1p1_e.htm, truy cập ngày 03/8/2017.

[320] Peter Van den Bossche, Sđd, tr. 171-172.

B. *Hiệp định về giải quyết tranh chấp của WTO (DSU)*

Hiệp định về các quy tắc và thủ tục giải quyết tranh chấp, thường được gọi là Hiệp định về giải quyết tranh chấp hay DSU,[322] thường được xem như là một trong những thành công đáng kể nhất của Vòng đàm phán Uruguay. DSU đưa ra một cơ chế giải quyết tranh chấp duy nhất áp dụng cho tất cả các hiệp định của WTO được liệt kê trong Phụ lục 1 của DSU, bao gồm Hiệp định thành lập WTO; 12 hiệp định đa phương trong lĩnh vực thương mại hàng hoá; Hiệp định GATS; Hiệp định TRIPS; Hiệp định về mua sắm chính phủ; Hiệp định về mua bán máy bay dân dụng; và chính DSU.

Về cấu trúc, DSU gồm có 27 điều và 4 phụ lục. DSU quy định về phạm vi thẩm quyền và chức năng cơ bản của các thiết chế trong việc giải quyết tranh chấp tại WTO. Bốn phụ lục của DSU đã cụ thể hoá các hiệp định có liên quan; phân nhóm các quy tắc và thủ tục đặc biệt và bổ sung được quy định trong các hiệp định có liên quan; quy định những thủ tục làm việc cơ bản và kế hoạch làm việc dự kiến của Ban hội thẩm và đưa ra những quy tắc và thủ tục được áp dụng cho bất kì nhóm chuyên gia rà soát nào có thể được thành lập bởi Ban hội thẩm.[323]

C. *Các cơ quan của WTO tham gia vào quá trình giải quyết tranh chấp*

Các cơ quan chính của WTO tham gia vào quá trình giải quyết tranh chấp đó là: Cơ quan giải quyết tranh chấp (viết tắt là 'DSB'), Ban hội

[321] WTO, *News, Negotiations to Improve Dispute Settlement Procedures, and Consultations on Panel Process*, nguồn: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm, truy cập ngày 03/8/2017. *Xem*: Thomas A. Zimmermann, 'The DSU Review (1998-2004): Negotiations, Problems and Perspective', trong sách của Dencho Georgiev và Kim Van der Borght (chủ biên), *Reform and Development of the WTO Dispute Settlement System*, Cameron May Ltd, (2006).

[322] Phụ lục 2 của Hiệp định WTO về các thủ tục giải quyết tranh chấp thương mại.

[323] David Palmeter và Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, (2004), tr. 16.

thẩm, Cơ quan phúc thẩm, Tổng giám đốc và Ban thư kí của WTO, các trọng tài viên, các chuyên gia độc lập và các cơ quan chuyên môn khác. Nội dung của mục này chủ yếu trình bày về DSB, Ban hội thẩm và Cơ quan phúc thẩm.

Đại hội đồng sẽ thực hiện nhiệm vụ của mình theo quy định của DSU thông qua DSB.[324] Giống như Đại hội đồng, DSB là cơ quan chính trị bao gồm đại diện của tất cả các thành viên WTO. Theo khoản 1 Điều 2 DSU, DSB có thẩm quyền thành lập Ban hội thẩm để giải quyết tranh chấp, thông qua các báo cáo của Ban hội thẩm và Cơ quan phúc thẩm, duy trì sự giám sát việc áp dụng các phán quyết và khuyến nghị mà cơ quan này thông qua và cho phép đình chỉ các nhượng bộ và các nghĩa vụ khác theo các hiệp định có liên quan, nếu các phán quyết và khuyến nghị đó không được các thành viên thực hiện trong khoảng thời gian hợp lí. DSB có một Chủ tịch riêng, thường là người đứng đầu của phái đoàn thường trực tại Geneva của một trong các thành viên[325] và được hỗ trợ bởi Ban thư kí WTO.[326]

Ban hội thẩm là một cơ quan bán tư pháp và độc lập, do DSB thành lập để xem xét các tranh chấp không thể giải quyết được ở giai đoạn tham vấn. Khoản 1 Điều 6 của DSU quy định rằng Ban hội thẩm được thành lập chậm nhất là vào ngày cuộc họp tiếp theo của DSU, mà tại đó yêu cầu thành lập Ban hội thẩm lần đầu tiên được đưa ra như một nội dung trong chương trình nghị sự của DSB, trừ trường hợp tại cuộc họp đó, DSB quyết định trên cơ sở đồng thuận không thành lập Ban hội thẩm. Mỗi Ban hội thẩm thường bao gồm ba, trong trường hợp đặc biệt là năm chuyên gia có trình độ và độc lập được lựa chọn trên cơ sở '*ad hoc*' (theo từng vụ việc).[327] Theo khoản 10 Điều 8 DSU, trong trường hợp tranh chấp xảy ra giữa một thành viên DC và một thành viên phát triển, nếu thành viên DC có yêu cầu thì trong thành phần Ban hội thẩm sẽ phải có ít nhất một hội thẩm viên là công dân của một thành viên DC. Chức năng của Ban hội thẩm là đưa ra các đánh giá khách quan về cả nội dung sự kiện và nội dung pháp luật của vụ việc, và đệ trình một báo cáo lên DSB, trong đó Ban hội thẩm đưa ra các kết luận của mình bao gồm cả những khuyến nghị, trong trường hợp phát hiện có sự vi phạm nghĩa vụ của một thành viên WTO.[328]

[324] Khoản 3 Điều IV Hiệp định thành lập WTO.

[325] David Palmeter và Petros C. Mavroidis, Sđd, tr. 15.

[326] Khoản 1 Điều 27 DSU.

[327] Các khoản 1 và 2 Điều 8 DSU.

[328] Điều 11 và Điều 19 DSU.

Cơ quan phúc thẩm là cấp xét xử thứ hai và cũng là cấp xét xử cuối cùng của hệ thống giải quyết tranh chấp. Giống như Ban hội thẩm, Cơ quan phúc thẩm là cơ quan bán tư pháp và độc lập, nhưng khác với Ban hội thẩm, Cơ quan phúc thẩm là cơ quan thường trực bao gồm bảy thành viên, trong đó mỗi thành viên có nhiệm kì bốn năm và có thể được tái bổ nhiệm một lần.[329] Theo khoản 3 Điều 17 DSU, các thành viên Cơ quan phúc thẩm phải là những người có uy tín, có kinh nghiệm chuyên môn về pháp luật, về thương mại quốc tế và những lĩnh vực thuộc diện điều chỉnh của các hiệp định nói chung; đồng thời họ cũng không được liên kết với bất kì chính phủ nào. Trong trường hợp có kháng cáo đối với báo cáo của Ban hội thẩm, Cơ quan phúc thẩm sẽ tiến hành xem xét lại các nội dung pháp luật bị kháng cáo và đệ trình báo cáo lên DSB, trong đó Cơ quan phúc thẩm có thể giữ nguyên, hủy bỏ hoặc sửa đổi kết luận của Ban hội thẩm, nhưng chỉ trong phạm vi các nội dung pháp lí đã được nêu và việc giải thích pháp luật.[330] Một điều cần lưu ý là trong các kết luận và khuyến nghị của mình, Ban hội thẩm và Cơ quan phúc thẩm không thể bổ sung hay hạn chế các quyền và nghĩa vụ của bất cứ thành viên WTO nào được quy định trong các hiệp định có liên quan.[331]

Ngoài ba cơ quan nêu trên, trong khuôn khổ WTO, còn có một số cơ quan khác cũng đóng vai trò quan trọng trong quá trình giải quyết tranh chấp, như Tổng giám đốc và Ban thư kí của WTO,[332] các trọng tài viên,[333] các chuyên gia độc lập và các cơ quan chuyên môn.[334]

D. *Các bên tham gia vào hệ thống giải quyết tranh chấp*

Cơ chế giải quyết tranh chấp của WTO là cơ chế giải quyết giữa chính phủ với chính phủ, vì vậy chỉ các thành viên WTO mới có thể sử dụng hệ thống giải quyết tranh chấp của WTO với tư cách là các bên tranh chấp hoặc các bên thứ ba. Do đó, bất kì ngành kinh tế hoặc cá nhân của một thành viên WTO muốn sử dụng hệ thống giải quyết tranh chấp của WTO để chống lại chính phủ của thành viên WTO khác thì trước

[329] Khoản 2 Điều 17 DSU.

[330] Các khoản 6 và 13 Điều 17 DSU.

[331] Khoản 2 Điều 19 DSU.

[332] Liên quan đến trách nhiệm của Tổng giám đốc WTO, *xem* khoản 6 Điều 5, khoản 7 Điều 8, chú thích 12 của khoản 3(c) Điều 21, khoản 6 Điều 22 và khoản 2 Điều 24 DSU. Liên quan đến trách nhiệm của Ban thư kí WTO, *xem* khoản 6 Điều 8, các khoản 1, 2 và 3 Điều 27 DSU.

[333] Liên quan đến các trọng tài viên, *xem* Điều 22 và Điều 25 DSU.

[334] Liên quan đến các chuyên gia, *xem* Điều 13 và Phụ lục 4 DSU; Khoản 2 Điều 11 Hiệp định SPS; Các khoản 2 và 3 Điều 14 và Phụ lục 2 Hiệp định TBT; Các khoản 3 và 4 Điều 19 và Phụ lục 2 CVA; Khoản 5 Điều 4 và Khoản 3 Điều 24 Hiệp định SCM.

hết, họ phải thuyết phục được chính phủ nước mình đệ đơn khởi kiện chống lại thành viên WTO khác đó.[335] Điều đó cũng có nghĩa rằng, Ban thư kí WTO, các quan sát viên của WTO, các tổ chức quốc tế khác và các chính quyền địa phương, nếu không phải là thành viên của WTO, thì không có quyền đề xuất khởi xướng các thủ tục giải quyết tranh chấp trong khuôn khổ WTO.[336] Tương tự, các tổ chức phi chính phủ (viết tắt là 'NGOs') cũng không có quyền này. Các NGOs không có quyền tham gia trực tiếp vào hệ thống giải quyết tranh chấp của WTO, nhưng họ có thể có vai trò trong tiến trình giải quyết tranh chấp của WTO bằng cách đệ trình các ý kiến theo hình thức '*amicus curiae*' tới Ban hội thẩm hoặc Cơ quan phúc thẩm.[337]

E. *Các phương thức giải quyết tranh chấp trong khuôn khổ WTO*

Cần lưu ý rằng sự tham gia của Ban hội thẩm và Cơ quan phúc thẩm không phải là cách thức duy nhất để giải quyết tranh chấp giữa các thành viên WTO. Trong khuôn khổ WTO, các bên tranh chấp có thể lựa chọn nhiều phương thức khác nhau, ngoài việc sử dụng Ban hội thẩm và Cơ quan phúc thẩm. Những phương thức khác đó bao gồm tham vấn; môi giới, hoà giải và trung gian; trọng tài. Trong nhiều trường hợp, các bên lại thích sử dụng các phương thức nêu trên hơn là phải viện dẫn đến sự phân xử của Ban hội thẩm và Cơ quan phúc thẩm. Tuy nhiên, điều đó không có nghĩa là các bên có thể tiến hành việc giải quyết tranh chấp theo bất cứ cách thức nào mà các bên mong muốn, mặc dù việc tìm ra giải pháp được chấp nhận chung luôn là ưu tiên của hệ thống giải quyết tranh chấp của WTO. Khi sử dụng những phương thức khác, theo quy định của DSU, các bên phải bảo đảm sự tin cậy và không được xâm phạm đến quyền của bất kì thành viên WTO nào khác.

Tham vấn là phương thức trong đó các bên tự thương lượng với nhau để đưa ra giải pháp thống nhất nhằm giải quyết tranh chấp. Tham vấn có thể là 'một phương thức giải quyết tranh chấp thay thế', như phương thức thương lượng, hoặc có thể là 'một giai đoạn bắt buộc' trong quy trình giải quyết tranh chấp của WTO - giai đoạn luôn phải tiến hành trước khi bước sang giai đoạn xét xử. Trong trường hợp đó, nếu việc tham vấn không giải quyết được tranh chấp, thì bên nguyên đơn có thể yêu cầu thành lập Ban hội thẩm.

Môi giới, hoà giải và trung gian là các thủ tục tự nguyện và đòi hỏi phải có sự chấp thuận của các bên tham gia.[338] Theo khoản 3 Điều 5 của DSU, những phương thức nêu trên có thể được một thành viên yêu cầu vào thời điểm bất kì và về bất cứ vấn đề tranh chấp nào. Các phương thức này cũng có thể kết thúc vào bất kì thời điểm nào, và khi kết thúc, bên nguyên đơn có quyền yêu cầu thành lập Ban hội thẩm. Trong trường hợp các bên chấp thuận, các thủ tục môi giới, hoà giải hoặc trung gian có thể được tiếp tục ngay cả khi Ban hội thẩm đang tiến hành các thủ tục tố tụng.[339]

Trọng tài có thể được sử dụng như phương thức giải quyết tranh chấp thay thế nhằm tìm ra giải pháp cho các tranh chấp cụ thể giữa các thành viên WTO liên quan đến các vấn đề đã được các bên tranh chấp xác định rõ ràng. Theo Điều 25 của DSU, nếu các bên quyết định sử dụng trọng tài, thì các bên sẽ phải tuân thủ các thủ tục cụ thể mà họ đã thống nhất, đồng thời phải tuân thủ các phán quyết của trọng tài.[340] Tuy nhiên, điều cần thiết là phải phân biệt giữa thủ tục trọng tài theo Điều 25 DSU và thủ tục trọng tài khác, được quy định tại khoản 3 Điều 21 và khoản 6 Điều 22 của DSU, vốn không phải là 'phương thức giải quyết tranh chấp thay thế'.[341]

2. Thủ tục giải quyết tranh chấp của WTO

Thủ tục giải quyết tranh chấp của WTO bao gồm 4 giai đoạn sau:

- Giai đoạn tham vấn (A);
- Giai đoạn hội thẩm (B);
- Giai đoạn phúc thẩm (C);
- Thi hành phán quyết (D).

335 Buce Wilson, 'The WTO Dispute Settlement System and Its Operation: A Brief Overview of the First Ten Years', trong sách Rufus Yerxa và Bruce Wilson (chủ biên), *Key Issues in WTO Dispute Settlement*, (2005), tr. 16.

336 WTO, *Participants in the Dispute Settlement System*, nguồn: http://www.wto.org/en glish/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm, truy cập ngày 3/8/2017.

337 Trong những trường hợp này, theo các quy định của WTO, Ban hội thẩm và Cơ quan phúc thẩm có quyền chấp nhận hoặc từ chối những ý kiến này và không có nghĩa vụ phải xem xét chúng. *Xem*: David Palmeter và Petros C. Mavroidis, Sđd, tr. 39.

338 Khoản 1 Điều 5 DSU.

339 Khoản 5 Điều 5 DSU.

340 Cần nhấn mạnh rằng quyết định trọng tài phải phù hợp với các hiệp định của WTO. *Xem*: Khoản 5 Điều 3 DSU.

341 Theo khoản 3 Điều 21 và khoản 6 Điều 22 DSU, thủ tục trọng tài xem xét một số vấn đề cụ thể phát sinh từ tranh chấp như xác định khoảng thời gian hợp lí để thi hành và mức độ trả đũa phù hợp.

A. *Giai đoạn tham vấn*

Tham vấn là giai đoạn đầu tiên và là giai đoạn bắt buộc trong trình tự giải quyết tranh chấp tại WTO. Các quy định và thủ tục tham vấn trong khuôn khổ WTO được quy định tại Điều 4 của DSU.

Việc giải quyết tranh chấp sẽ được bắt đầu bằng một yêu cầu tham vấn chính thức. Yêu cầu tham vấn phải được lập thành văn bản và một bản sao phải được gửi cho DSB, các hội đồng và uỷ ban có liên quan của WTO. Yêu cầu tham vấn cũng phải đưa ra lí do yêu cầu, kể cả việc xác định mức độ của vấn đề và chỉ ra cơ sở pháp lí cho việc khiếu kiện. Trong một số trường hợp, một thành viên WTO không phải là nguyên đơn hay bị đơn cũng có thể yêu cầu tham gia tham vấn.[342] Yêu cầu được tham gia này phải được gửi cho các thành viên tham vấn và DSB trong vòng 10 ngày kể từ ngày yêu cầu tham vấn được gửi.

Theo khoản 3 Điều 4 của DSU, trừ trường hợp có thoả thuận khác, bên được yêu cầu tham vấn phải tuân theo hai mốc thời hạn sau: Trong vòng 10 ngày phải trả lời yêu cầu tham vấn, và trong vòng 30 ngày kể từ ngày nhận được yêu cầu tham vấn hoặc trong khoảng thời gian do các bên thoả thuận phải tiến hành tham vấn, nếu chấp nhận tham vấn. Nếu bên được yêu cầu tham vấn không tuân thủ bất cứ thời hạn nào nói trên, nguyên đơn có thể ngay lập tức yêu cầu DSB thành lập Ban hội thẩm. Ngoài ra, nguyên đơn cũng có thể yêu cầu thành lập Ban hội thẩm, nếu trong thời hạn 60 ngày kể từ ngày nhận được yêu cầu tham vấn, các bên không đưa ra được một giải pháp phù hợp cho việc tham vấn; hoặc nếu các bên tham vấn đều cho rằng việc tham vấn không thể giải quyết được tranh chấp, dù thời hạn 60 ngày chưa kết thúc.[343] Trong trường hợp khẩn cấp, các thời hạn trên có thể được rút ngắn.[344]

B. *Giai đoạn hội thẩm*

[342] Nếu thành viên WTO có lợi ích thương mại đáng kể trong vấn đề đang tranh chấp, và nếu việc tham vấn được yêu cầu trên cơ sở khoản 1 Điều XXII GATT, khoản 1 Điều XXII GATS hoặc các điều khoản tương tự trong các hiệp định liên quan khác. Ngoài ra, việc tham gia của thành viên có lợi ích liên quan phải được thành viên là bị đơn chấp nhận. Nếu bị đơn không nhất trí rằng tuyên bố về lợi ích thương mại đáng kể là có đủ căn cứ, thì thành viên có lợi ích liên quan không thể đòi hỏi được tham gia tham vấn. Trong trường hợp đó, theo khoản 11 Điều 4 DSU, thành viên có lợi ích liên quan có thể yêu cầu tham vấn trực tiếp với bị đơn và việc này sẽ là sự khởi đầu cho trình tự giải quyết tranh chấp mới, độc lập.

[343] Khoản 7 Điều 4 DSU.

[344] Theo khoản 8 Điều 4 của DSU, trong trường hợp khẩn cấp, kể cả các trường hợp liên quan đến hàng hoá dễ bị hư hỏng, thời hạn để tham gia tham vấn là 10 ngày kể từ ngày nhận được yêu cầu tham vấn, và thời hạn yêu cầu thành lập Ban hội thẩm là 20 ngày kể từ ngày nhận được yêu cầu tham vấn.

Trong trường hợp việc tham vấn không giải quyết được tranh chấp, nguyên đơn có thể yêu cầu DSB thành lập Ban hội thẩm. Trong trường hợp này, theo khoản 1 Điều 6 của DSU, Ban hội thẩm sẽ được thành lập chậm nhất là vào ngày họp tiếp theo của DSB mà tại đó yêu cầu thành lập Ban hội thẩm lần đầu tiên được đưa ra như một nội dung trong chương trình nghị sự của DSB, trừ trường hợp DSB quyết định,trên cơ sở đồng thuận, không thành lập Ban hội thẩm. Yêu cầu thành lập Ban hội thẩm phải được lập thành văn bản, trong đó phải chỉ rõ thủ tục tham vấn đã được tiến hành hay chưa, xác định cụ thể các biện pháp là đối tượng của tranh chấp và cung cấp bản tóm tắt ngắn gọn, rõ ràng về cơ sở pháp luật của đơn kiện.[345]

Ban hội thẩm sẽ được thành lập cho từng vụ tranh chấp. Về thành phần của Ban hội thẩm, nếu không có thoả thuận nào giữa các bên trong vòng 20 ngày kể từ ngày DSB quyết định thành lập Ban hội thẩm, mỗi bên đều có thể yêu cầu Tổng giám đốc của WTO quyết định. Tổng giám đốc, trong thời hạn 10 ngày sau khi gửi yêu cầu này tới Chủ tịch của DSB, sẽ chỉ định các thành viên Ban hội thẩm trên cơ sở tham vấn với Chủ tịch của DSB và Chủ tịch của các hội đồng hoặc Ủy ban có liên quan, sau khi đã tham vấn với các bên tranh chấp.[346]

Ban hội thẩm có thể bắt đầu công việc với việc đưa ra kế hoạch làm việc, thông thường sẽ tuân theo thời gian biểu được khuyến nghị tại Phụ lục 3 DSU và thông báo cho các bên. Kế hoạch làm việc có thể được điều chỉnh tùy thuộc vào hoàn cảnh cụ thể của mỗi vụ việc. Các bước chính trong giai đoạn phúc thẩm cũng được thể hiện trong kế hoạch làm việc (xem Bảng 2.6.1).

Bảng 2.6.1. Thủ tục làm việc và thời gian dự kiến đối với hoạt động của Ban hội thẩm theo Phụ lục 3 DSU

Tiếp nhận các văn bản đệ trình đầu tiên của các bên: (a) Bên nguyên đơn (b) Bên bị đơn	 3-6 tuần 2-3 tuần
Cuộc họp chính thức đầu tiên với các bên; Phiên làm việc với bên thứ ba	1-2 tuần
Nhận văn bản phản bác của các bên	2-3 tuần
Cuộc họp chính thức thứ hai với các bên	1-2 tuần

[345] Khoản 2 Điều 6 DSU.

[346] Khoản 7 Điều 8 DSU.

Đưa ra phần mô tả của báo cáo cho các bên	2-4 tuần
Nhận ý kiến của các bên về phần mô tả của báo cáo	2 tuần
Đưa ra báo cáo sơ bộ, bao gồm các kết quả điều tra và kết luận, cho các bên	2-4 tuần
Thời hạn cuối cùng cho các bên đưa ra yêu cầu xem xét lại (các) phần của báo cáo	1 tuần
Thời hạn để Ban hội thẩm xem xét lại báo cáo, kể cả các cuộc họp có thể bổ sung với các bên	2 tuần
Đưa ra báo cáo cuối cùng cho các bên tranh chấp	2 tuần
Gửi báo cáo cuối cùng cho các thành viên	3 tuần

Báo cáo cuối cùng của Ban hội thẩm sẽ được gửi cho các bên tranh chấp và được gửi cho tất cả các thành viên WTO và trở thành văn kiện WT/DS công khai. Nếu báo cáo của Ban hội thẩm bị kháng cáo, tranh chấp sẽ được đưa ra giải quyết tại Cơ quan phúc thẩm. Nếu không, báo cáo của Ban hội thẩm sẽ được DSB thông qua theo nguyên tắc 'đồng thuận nghịch'. Báo cáo của Ban hội thẩm sẽ không được thông qua trước ngày thứ 20 sau ngày báo cáo này được ban hành, và trong trường hợp không có đơn kháng cáo cũng như không có sự đồng thuận phủ quyết việc thông qua, thì Báo cáo của Ban hội thẩm sẽ phải được thông qua trong thời hạn 60 ngày kể từ ngày báo cáo được gửi.[347]

C. *Giai đoạn phúc thẩm*

Trong trường hợp báo cáo của Ban hội thẩm bị kháng cáo, tranh chấp sẽ được đưa ra giải quyết tại Cơ quan phúc thẩm. Một điều cần lưu ý là báo cáo của Ban hội thẩm phải bị kháng cáo trước khi được DSB thông qua.

Cần phải nhấn mạnh rằng chỉ có các bên tranh chấp, cụ thể là 'bên thắng kiện' và 'bên thua kiện', chứ không phải là bên thứ ba, mới có quyền kháng cáo đối với báo cáo của Ban hội thẩm. Tuy nhiên, các bên thứ ba đã tham gia trong giai đoạn hội thẩm vẫn có thể tiếp tục đóng vai trò là 'bên thứ ba' trong giai đoạn phúc thẩm. Họ có thể đệ trình văn bản kiến nghị và có cơ hội được trình bày tại giai đoạn phúc thẩm.[348]

Giai đoạn phúc thẩm được bắt đầu với một thông báo bằng văn bản gửi tới DSB và một đơn kháng cáo đã được điền đầy đủ gửi tới Ban thư kí. Trong trường hợp này, một Ban phúc thẩm gồm ba thành viên được lựa chọn trong số bảy thành viên của Cơ quan phúc thẩm sẽ được thành lập để xem xét kháng cáo.[349] Ban phúc thẩm này sẽ chuẩn bị kế hoạch làm việc. Theo khoản 5 Điều 17 DSU, nhìn chung thủ tục kháng cáo phải hoàn thành trong vòng 60 ngày[350] và không thể kéo dài quá 90 ngày kể từ ngày gửi đơn kháng cáo. Báo cáo của Cơ quan phúc thẩm sẽ được DSB thông qua theo nguyên tắc 'đồng thuận nghịch' trong vòng 30 ngày kể từ ngày báo cáo này được gửi tới các thành viên, và nếu nó được thông qua thì các bên tranh chấp phải chấp nhận vô điều kiện. Cần lưu ý rằng, khác với thủ tục xét xử tại Ban hội thẩm, trong giai đoạn phúc thẩm sẽ không có việc xem xét sơ bộ.

Các bước chính trong giai đoạn phúc thẩm được đưa ra trong bảng sau (xem Bảng 2.6.2):

Bảng 2.6.2. Thủ tục làm việc và thời gian biểu cho các kháng cáo chung được quy định tại Phụ lục 1 trong thủ tục làm việc của quá trình xét xử phúc thẩm

Đơn kháng cáo	0
Đệ trình của bên kháng cáo	0
Đơn kháng cáo khác	5
Đệ trình của bên kháng cáo khác	5
Đệ trình của bên bị kháng cáo	18
Đệ trình của bên thứ ba	21
Thông báo của bên thứ ba	21
Đối chất	30 - 45
Chuyển Báo cáo phúc thẩm	60 - 90
Phiên họp của DSB để thông qua báo cáo	90 - 120

D. *Thi hành phán quyết*

DSB là cơ quan của WTO chịu trách nhiệm giám sát việc thi hành các báo cáo của Ban hội thẩm và Cơ quan phúc thẩm. Khi một báo cáo được thông qua, các khuyến nghị và quyết định của báo cáo đó sẽ trở thành

347 Các khoản 1 và 4 Điều 16 DSU.

348 Khoản 4 Điều 17 DSU.

349 Quy tắc 6 trong Thủ tục làm việc của quá trình xét xử phúc thẩm được ban hành ngày 16/8/2010 và được áp dụng cho các kháng cáo được gửi từ hoặc sau ngày 15/9/2010 (sau đây gọi là Thủ tục làm việc của quá trình xét xử phúc thẩm).

350 Nếu thủ tục kháng cáo kéo dài hơn 60 ngày, Cơ quan phúc thẩm phải thông báo cho DSB về nguyên nhân chậm trễ và đưa ra khoảng thời gian dự kiến để chuyển báo cáo cho các thành viên.

phán quyết của DSB. Trong trường hợp đó, theo khoản 3 Điều 21 DSU, các khuyến nghị và quyết định đã được DSB thông qua phải được thi hành ngay lập tức, và nếu không thể thực hiện ngay được thì thành viên thua kiện sẽ có khoảng thời gian hợp lí để thi hành.[351] Nếu thành viên thua kiện không thực hiện các khuyến nghị và quyết định trong khoảng thời gian hợp lí, và thoả thuận về bồi thường không đạt được trong thời hạn 20 ngày kể từ ngày kết thúc khoảng thời gian hợp lí nói trên, thành viên thắng kiện có thể yêu cầu DSB cho phép tạm hoãn thi hành các nghĩa vụ thành viên WTO, thường được gọi là 'biện pháp trả đũa' hay 'các biện pháp trừng phạt'.[352] Tuy nhiên, việc tạm hoãn thi hành các nghĩa vụ phải được áp dụng trên cơ sở có sự phân biệt đối xử và chỉ dành cho thành viên không thi hành phán quyết. Ngoài ra, mức độ trả đũa còn phải 'tương xứng' với mức độ thiệt hại hoặc bị vi phạm.[353] Nếu thành viên thua kiện không đồng ý với hình thức trả đũa mà thành viên thắng kiện đề xuất, thì nước đó có thể yêu cầu trọng tài xem xét.[354] DSB sẽ tiếp tục giám sát việc thi hành cho đến khi các khuyến nghị và quyết định được thi hành.

3. Các thành viên đang phát triển và hệ thống giải quyết tranh chấp của WTO

Các thành viên DCs, chiếm đa số các thành viên của WTO, ngày càng sử dụng hệ thống giải quyết tranh chấp của WTO một cách thường xuyên hơn và đã có những chiến thắng trước nhiều thành viên phát triển. Vụ *US-Underwear* do Costa Rica khởi xướng, hay vụ *US-Gambling* với nguyên đơn là Antigua and Barbuda, chính là những ví dụ điển hình cho câu chuyện 'David chiến thắng Golia' khi sử dụng thành công hệ thống giải quyết tranh chấp này.[355] Tiếp đó, sự thành công của Thái Lan và Việt Nam trước Hoa Kỳ trong các vụ *US-Shrimp (Thailand)* và *US-Shrimp (Viet Nam)* cũng là những điểm nhấn rất đáng kể.

Tuy nhiên, trong hầu hết các trường hợp, các thành viên DCs gặp phải nhiều bất lợi hơn khi muốn sử dụng hệ thống giải quyết tranh chấp của WTO, như việc thiếu các chuyên gia hiểu biết về pháp luật WTO và các thủ tục giải quyết tranh chấp; thiếu năng lực tài chính và cả những khó khăn trong việc sử dụng các biện pháp trả đũa. Ở mức độ nhất định, WTO đã nhận thức được các khó khăn của các thành viên DCs khi tham gia vào hệ thống giải quyết tranh chấp của WTO, vì vậy WTO đã dành sự đối xử S&D cũng như sự trợ giúp pháp lí cho các thành viên này.[356] Tuy nhiên, cần phải lưu ý rằng, những ưu đãi và sự trợ giúp nói trên sẽ không làm hạn chế các nghĩa vụ cũng như tăng cường quyền hạn cho các thành viên này. Đơn giản, chúng chỉ hỗ trợ cho các thành viên DCs bằng cách quy định các thủ tục bổ sung hoặc thủ tục đặc biệt, hoặc kéo dài hay rút ngắn các thời hạn. Theo đó, các thành viên DCs có thể lựa chọn thủ tục rút gọn, yêu cầu tăng thời hạn hoặc yêu cầu được trợ giúp pháp lí.[357]

Việt Nam được công nhận là thành viên DC khi gia nhập WTO năm 2007. Cho tới năm 2017, Việt Nam đã tham gia tổng cộng 27 lần với tư cách là bên thứ ba và ba lần với tư cách là bên nguyên đơn vào hệ thống giải quyết tranh chấp của WTO.[358] Rõ ràng, sau hơn 10 năm gia nhập, Việt Nam đã tham gia tích cực hơn vào hệ thống giải quyết tranh chấp của. Qua đó, Việt Nam đã thu được nhiều bài học kinh nghiệm quý báu, đồng thời có được những cơ hội để có thể tác động đến hệ thống quy định của WTO theo hướng nhằm bảo vệ các lợi ích thương mại của mình. Tuy nhiên, cũng giống như các thành viên DCs khác, Việt Nam vẫn còn gặp rất nhiều thách thức trong khuôn khổ WTO; vì vậy, Việt Nam cần phải tăng cường năng lực và kinh nghiệm để có thể tự bảo vệ mình trước những tranh chấp có thể xảy ra trong tương lai, bằng việc sử dụng hiệu quả hệ thống giải quyết tranh chấp của WTO.

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[351] Về việc xác định khoảng thời gian hợp lí, khoảng thời gian đó có thể: (i) Được thành viên liên quan đề xuất và được DSB đồng thuận thông qua; (ii) Do các bên tranh chấp thoả thuận với nhau trong thời hạn 45 ngày kể từ khi báo cáo được thông qua; hoặc (iii) Do trọng tài viên quyết định. *Xem* khoản 3 Điều 21 DSU.

[352] Theo khoản 3 Điều 22 DSU, có 3 hình thức áp dụng biện pháp tạm hoãn thi hành nghĩa vụ: (i) Áp dụng các biện pháp trả đũa đối với cùng lĩnh vực mà Ban hội thẩm hoặc Cơ quan phúc thẩm đã kết luận là có vi phạm hoặc làm vô hiệu hoặc gây phương hại (thường được gọi một cách không chính thức là trả đũa 'song hành'); (ii) Áp dụng các biện pháp trả đũa đối với những lĩnh vực khác nhưng vẫn thuộc cùng một hiệp định, nếu bên nguyên đơn cho rằng việc trả đũa trong cùng một lĩnh vực là không thể thực hiện được, hoặc không mang lại hiệu quả (thường được gọi một cách không chính thức là trả đũa 'chéo lĩnh vực'); và (iii) Áp dụng các biện pháp trả đũa đối với hiệp định khác, nếu bên nguyên đơn cho rằng việc trả đũa trong cùng một hiệp định là không thể thực hiện được, hoặc không mang lại hiệu quả, đồng thời tình huống xảy ra phải đủ nghiêm trọng (thường được gọi một cách không chính thức là trả đũa 'chéo hiệp định')

[353] Khoản 4 Điều 22 DSU.

[354] Các khoản 6 và 7 Điều 22 DSU.

[355] Peter Van den Bossche, Sđd, tr. 232.

[356] Đối xử S&D dành cho các thành viên DCs và LDCs được quy định trong nhiều điều khoản về thủ tục giải quyết tranh chấp của WTO, như khoản 10 Điều 4, khoản 10 Điều 8, khoản 10 Điều 12, khoản 11 Điều 12, các khoản 2 và 8 Điều 21 DSU. Ngoài ra, Ban thư kí và Trung tâm tư vấn của WTO đặt tại Geneva sẽ cung cấp sự trợ giúp pháp lí.

[357] WTO, *Developing Country Members and the Dispute Settlement System*, nguồn: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s6p1_e.htm, truy cập ngày 03/8/2017.

[358] WTO, *Dispute Cases Involving Viet Nam*, nguồn: http://www.wto.org/english/thewto_e/ countries_e /vietnam_e.htm.

Mục 7. MỘT SỐ VẤN ĐỀ MỚI CỦA WTO

1. Thương mại và môi trường

Sự mở rộng hoạt động thương mại khiến cho mối tương quan giữa thương mại và môi trường trở thành vấn đề đáng lưu tâm. Không thể phủ nhận rằng dòng chảy thương mại và các quy tắc chi phối chúng đã gây ra những thay đổi về môi trường. Đa số các chỉ số về môi trường trên thế giới đang suy giảm và thương mại quốc tế là tác nhân ngày càng đóng vai trò to lớn trong sự suy giảm này. Tuy nhiên, đồng thời, thương mại cũng có thể hỗ trợ để đạt được những mục tiêu về môi trường.

Càng ngày những vấn đề về môi trường liên quan đến thương mại và vai trò của WTO trong lĩnh vực thương mại và môi trường càng được quan tâm. Lời nói đầu của Hiệp định Marrakesh (Hiệp định thành lập WTO) đã nhắc đến tầm quan trọng của việc hướng tới sự phát triển bền vững. Các thành viên của WTO thừa nhận rằng:

> … [M]ối quan hệ của họ trong các nỗ lực kinh tế và thương mại cần được thực hiện với mục tiêu nâng cao mức sống… [t]rong khi vẫn cho phép sử dụng tối ưu các nguồn tài nguyên trên thế giới theo đúng mục tiêu phát triển bền vững, bảo vệ và gìn giữ môi trường; nâng cao các biện pháp để thực hiện điều đó theo cách thức phù hợp với nhu cầu và mối quan tâm của họ ở các cấp độ phát triển kinh tế khác nhau.

Luật thương mại quốc tế ngày càng quy định rõ cách thức xây dựng luật trong nước liên quan đến các lĩnh vực như bảo vệ môi trường. Hiểu biết rộng hơn về mối quan hệ giữa hai đối tượng này là chìa khoá để nắm bắt mục tiêu cần đạt được. Mục tiêu của phần này là thúc đẩy sự hiểu biết về mối quan hệ giữa môi trường và thương mại từ góc độ pháp luật. Hay nói chính xác hơn, Mục này sẽ nghiên cứu sự tương tác giữa môi trường và luật thương mại quốc tế bằng cách đi vào chi tiết các điều khoản liên quan của GATT cũng như các hiệp định của WTO có liên quan trực tiếp tới vấn đề môi trường. Sau đó sẽ tập trung vào các hiệp định CBD (Công ước về đa dạng sinh học) và TRIPS, trước khi đề cập đến các tranh chấp liên quan đến môi trường.

A. *Các điều khoản liên quan của GATT/WTO*

1. GATT: Điều I và Điều III về không phân biệt đối xử

Các quy định thương mại quốc tế chủ yếu dựa trên cơ sở nguyên tắc không phân biệt đối xử. Điều I GATT quy định về nguyên tắc MFN, và Điều III quy định về NT, do đó cả hai điều này đều quy định về nguyên tắc không phân biệt đối xử.

Khoản 1 Điều I quy định:

> Với mọi khoản thuế quan và khoản thu thuộc bất cứ loại nào nhằm vào hay có liên quan tới nhập khẩu và xuất khẩu, hoặc đánh vào các khoản chuyển khoản để thanh toán hàng xuất nhập khẩu, hay cách thức áp thuế hoặc áp dụng phụ thu nêu trên, hay với mọi luật lệ hay thủ tục trong xuất nhập khẩu và liên quan tới mọi nội dung đã được nêu tại khoản 2 và khoản 4 Điều III, mọi lợi thế, biệt đãi, đặc quyền hay quyền miễn trừ được bất kì bên kí kết nào dành cho bất cứ một sản phẩm có xuất xứ từ hay được giao tới bất kì một nước nào khác, sẽ được áp dụng cho sản phẩm tương tự có xuất xứ từ hay giao tới mọi bên kí kết khác ngay lập tức và vô điều kiện.

Khoản 4 Điều III quy định:

> Các sản phẩm từ lãnh thổ của bất kì bên kí kết nào được nhập khẩu vào lãnh thổ của bên kí kết khác sẽ được hưởng đối xử không kém phần thuận lợi hơn sự đối xử dành cho các sản phẩm tương tự nội địa về mặt pháp luật, quy tắc và các quy định ảnh hưởng đến việc bán hàng, chào bán, mua, vận chuyển, phân phối hoặc sử dụng ở thị trường nội địa.

Yếu tố cấu thành đầu tiên của nguyên tắc không phân biệt đối xử đạt được khi tất cả các thành viên WTO đều bình đẳng theo nguyên tắc MFN. Điều I đảm bảo rằng các thành viên sẽ không được đưa ra bất kì lợi thế thương mại đặc biệt nào cho thành viên khác hay phân biệt đối xử chống lại thành viên đó. Yếu tố cấu thành thứ hai của nguyên tắc không phân biệt đối xử được quy định trong Điều III cũng đạt được khi hàng hoá nhập khẩu vào một nước được hưởng sự đối xử giống như hàng hoá nội địa.

Về vấn đề môi trường liên quan đến thương mại, nguyên tắc không phân biệt đối xử đảm bảo rằng các thành viên sẽ không ban hành các chính sách trong nước về bảo vệ môi trường theo kiểu phân biệt đối

xử tùy tiện giữa sản phẩm nội địa và sản phẩm nhập khẩu. Nguyên tắc này cũng hướng tới việc ngăn chặn bất kì sự phân biệt đối xử nào giữa sản phẩm nhập khẩu tương tự từ các đối tác thương mại khác nhau. Mục đích là tránh việc sử dụng và lạm dụng các chính sách môi trường như là các rào cản trá hình trong thương mại quốc tế.

2. GATT: Điều XI về loại bỏ các hạn chế số lượng

Điều XI GATT tập trung vào việc quy định loại bỏ các hạn chế số lượng đối với hàng hoá xuất nhập khẩu được các thành viên đặt ra hoặc duy trì. Mục đích của việc ngăn cấm các hạn chế như vậy là để khuyến khích các thành viên chuyển các công cụ hạn chế số lượng thành công cụ thuế quan - biện pháp có tính minh bạch hơn. Đoạn đầu tiên của Điều XI quy định:

> Không biện pháp cấm hay hạn chế nào khác, trừ thuế quan và các khoản thu khác, dù dưới hình thức hạn ngạch, giấy phép nhập khẩu hay xuất khẩu hoặc các biện pháp khác, sẽ được bất cứ một bên kí kết nào định ra hay duy trì nhằm vào việc nhập khẩu từ lãnh thổ của bất kì bên kí kết nào, hay nhằm vào việc xuất khẩu hay bán hàng để xuất khẩu đến lãnh thổ của bất kì bên kí kết nào.

Quy định này có liên quan đến các tranh luận về thương mại và môi trường bởi vì quy định này đã bị vi phạm trong một số tranh chấp về môi trường khi các nước áp đặt lệnh cấm nhập khẩu đối với các sản phẩm nhất định.

3. GATT: Điều XX về các ngoại lệ chung

Điều XX về các ngoại lệ chung đưa ra một số trường hợp cụ thể, theo đó các thành viên WTO có thể được miễn áp dụng các quy định của GATT. Hai trường hợp ngoại lệ quy định tại đoạn (b) và đoạn (g) đều liên quan đến vấn đề bảo vệ môi trường. Điều XX quy định:

> [V]ới yêu cầu rằng các biện pháp này không được áp dụng theo cách có thể tạo ra công cụ phân biệt đối xử tùy tiện và vô căn cứ giữa các nước nơi có các điều kiện tương tự, hoặc tạo thành một hạn chế trá hình trong thương mại quốc tế, không có quy định nào trong Hiệp định này được hiểu là ngăn cản bất kì bên kí kết nào ban hành hoặc thực thi các biện pháp:
>
> (…)
>
> (b) Cần thiết để bảo vệ cuộc sống và sức khoẻ của con người, động vật hoặc thực vật;
>
> (…)
>
> (g) Liên quan đến việc bảo tồn nguồn tài nguyên thiên nhiên có thể cạn kiệt, nếu các biện pháp này cũng được áp dụng hạn chế với sản xuất hoặc tiêu dùng trong nước.

Hai ngoại lệ trên cho phép các thành viên của WTO có thể biện minh cho các biện pháp chính sách không phù hợp với GATT, nếu như chúng hoặc là 'cần thiết' để bảo vệ cuộc sống và sức khoẻ của con người, động vật hoặc thực vật, hoặc là các biện pháp này liên quan đến việc bảo tồn các tài nguyên thiên nhiên có thể cạn kiệt. Điều XX quy định rằng những biện pháp này không được phép dẫn tới bất kì phân biệt đối xử tùy tiện và vô căn cứ nào. Và cũng cần đảm bảo rằng các ngoại lệ này sẽ không tạo ra những hạn chế trá hình trong thương mại quốc tế.

4. GATS: Điều XIV

GATS quy định các ngoại lệ chung tại Điều XIV, giống như Điều XX GATT. Trong việc giải quyết các vấn đề về môi trường, Điều XIV(b) GATS cho phép các thành viên của WTO duy trì các biện pháp chính sách không phù hợp với GATS, nếu điều này là 'cần thiết để bảo vệ cuộc sống và sức khoẻ con người, động vật hoặc thực vật', tương tự như Điều XX(b) GATT. Tương tự, các ngoại lệ này không được tạo ra bất kì sự phân biệt đối xử tùy tiện và vô căn cứ nào, cũng như bất kì hạn chế trá hình nào trong thương mại quốc tế.

5. Hiệp định TBT: Khoản 2 Điều 2

Hiệp định TBT đảm bảo rằng đặc điểm kĩ thuật của sản phẩm (quy chuẩn và tiêu chuẩn kĩ thuật), cũng như các thủ tục đánh giá sự phù hợp với các đặc điểm kĩ thuật đó, không tạo ra trở ngại không cần thiết đối với thương mại. Mặt khác, việc bảo vệ cuộc sống và sức khoẻ của con người, động vật và thực vật và việc bảo vệ môi trường được coi là mục tiêu chính đáng của các thành viên. Khoản 2 Điều 2 quy định:

> Các thành viên phải đảm bảo rằng các quy định về kĩ thuật không được soạn thảo, thông qua hoặc áp dụng với mục đích tạo ra các trở ngại không cần thiết đối với thương mại quốc tế. Với mục đích này, các quy định về kĩ thuật sẽ không được phép hạn chế thương mại nhiều hơn mức cần thiết để thực hiện một mục tiêu chính đáng, có tính đến những rủi ro từ việc không thực hiện các mục tiêu. Các mục tiêu chính đáng gồm có: các yêu cầu về an ninh quốc gia; ngăn ngừa các hành vi lừa đảo; bảo vệ sức khoẻ và

sự an toàn cho con người, cuộc sống và sức khoẻ cho động-thực vật, hoặc môi trường. Khi đánh giá các rủi ro, các yếu tố có liên quan được cân nhắc gồm có: thông tin khoa học kĩ thuật hiện có, công nghệ xử lí liên quan hoặc mục đích sử dụng cuối cùng theo dự tính của sản phẩm.

6. Hiệp định SPS

Hiệp định SPS và Hiệp định TBT bổ sung cho nhau. SPS điều chỉnh nhóm các biện pháp hẹp hơn so với TBT, bao gồm các biện pháp được các thành viên thực thi để đảm bảo an toàn vệ sinh thực phẩm, đồ uống và thức ăn gia súc khỏi các phụ gia, độc chất hoặc chất gây bệnh. Ngoài ra, SPS còn bao gồm cả các biện pháp ngăn chặn sự lây lan của dịch bệnh. Các biện pháp SPS chỉ nên được áp dụng ở mức độ cần thiết để bảo vệ sức khoẻ và cuộc sống của con người, động vật và thực vật. Những biện pháp này không được phép phân biệt đối xử tùy tiện và vô căn cứ giữa các thành viên có điều kiện tương tự.

7. Hiệp định TRIPS và Công ước về đa dạng sinh học (CBD)

Hiệp định TRIPS đặt ra những tiêu chuẩn tối thiểu về pháp luật được các chính phủ sử dụng nhằm nâng cao sự bảo hộ IPRs đầy đủ và hiệu quả. IPRs bao gồm rất nhiều chức năng, như khuyến khích sáng kiến và công khai thông tin về sáng chế, trong đó có các công nghệ về môi trường. Đối với thương mại và môi trường, Hiệp định TRIPS thực sự có tầm quan trọng đặc biệt. Một số điều khoản của Hiệp định TRIPS được xây dựng để giải quyết các vấn đề liên quan đến môi trường trong việc bảo hộ IPRs. Vấn đề môi trường được đề cập một cách trực tiếp ở Điều 27, Mục 5 (về Bằng sáng chế). Khoản 2 quy định rằng các thành viên có thể loại bỏ bằng sáng chế, nếu việc bảo hộ nó có thể gây tổn thất nghiêm trọng đến môi trường:

> Các thành viên có thể loại trừ việc cấp bằng sáng chế cho những sáng chế cần phải bị cấm khai thác nhằm mục đích thương mại trong lãnh thổ của mình để bảo vệ trật tự công cộng hoặc đạo đức xã hội, kể cả để bảo vệ cuộc sống và sức khoẻ của con người và động vật hoặc thực vật hoặc để tránh gây tổn thất nghiêm trọng cho môi trường, với điều kiện những ngoại lệ đó được quy định không chỉ vì lí do duy nhất là việc khai thác các sáng chế tương ứng bị pháp luật của nước đó ngăn cấm.

Ngoài việc ngăn chặn sự nguy hiểm cho môi trường, sự ngăn chặn này cũng có thể được áp dụng trên lãnh thổ các thành viên nếu thấy cần thiết để bảo vệ sức khoẻ và cuộc sống của con người, động vật và thực vật. Theo Hiệp định, các thành viên có thể ngăn chặn việc cấp bằng sáng chế cho các giống động-thực vật (không bao gồm vi sinh vật), và các quy trình sản xuất động thực vật (không bao gồm các quy trình phi sinh học hoặc vi sinh học). Khoản 3(b) quy định: 'Các thành viên có thể ngăn chặn việc cấp bằng sáng chế: … (b) [T]hực vật và động vật không phải là các chủng vi sinh, và các quy trình sản xuất thực vật và động vật, chủ yếu mang tính chất sinh học và không phải là các quy trình phi sinh học hoặc vi sinh'.

Khoản này còn bổ sung rằng các thành viên phải bảo hộ các giống cây trồng khác nhau nhằm mục tiêu đa dạng sinh học, bằng việc cấp bằng sáng chế hoặc các biện pháp khác được đề cập trong Hiệp định.

Hiệp định TRIPS mang tính cấm đoán tích cực. Điều này khiến cho Hiệp định TRIPS trở thành duy nhất trong hệ thống quy tắc của WTO, vốn thường mô tả những việc mà các thành viên không nên làm. Hiệp định còn đặc biệt bởi nó đề cập các quyền cá nhân (quyền của các nhà sáng tạo và các nhà cải tiến), trong khi các quy định khác của WTO đề cập đến các quyền và nghĩa vụ của chính phủ.

Mặt khác, Công ước đa dạng sinh học (CBD) yêu cầu các bên tham gia hợp tác để đảm bảo rằng các bằng sáng chế và IPRs khác 'hỗ trợ và không đi ngược lại' các mục tiêu của họ. Một số xung đột thực sự có thể xảy ra giữa CBD và các đặc điểm nhất định của IPRs. Vấn đề tiềm ẩn có thể xảy ra, bởi vì CBD cho phép các thành viên có toàn quyền kiểm soát về nguồn tài nguyên di truyền. Qua đó, họ có thể điều chỉnh và kiểm soát quyền tiếp cận nguồn tài nguyên di truyền trong lãnh thổ của họ. Nguồn tài nguyên di truyền có thể được thể hiện trong đa dạng giống cây trồng với các mã di truyền có giá trị, hoặc thậm chí cả kiến thức truyền thống.

Nguồn tài nguyên này là mục tiêu tìm kiếm của rất nhiều lợi ích thương mại, bao gồm dược phẩm và thảo dược, công nghệ sinh học, nông nghiệp v.v.. CBD đòi hỏi rằng bất kì tiếp cận nào đến các nguồn tài nguyên di truyền đều phải dựa trên các điều kiện có lợi cho cả hai bên, và nước chủ nhà cần phải được thông báo trước. Bên cạnh đó, nó đảm bảo nước cung cấp nguồn tài nguyên di truyền cũng được hưởng lợi từ doanh thu của việc thương mại hoá công bằng sản phẩm hoặc thuốc mới. Điều này tránh việc cấp bằng sáng chế dựa trên nguyên liệu di truyền 'ăn cắp', vi phạm các quy tắc trong cam kết.

B. *Các tranh chấp liên quan đến môi trường*

1. Vụ cá ngừ Hoa Kỳ/Canada (United State-Prohibition of Imports of Tuna and Tuna Products from Canada)[359]

Canada tịch thu tàu đánh cá và bắt giữ ngư dân của Hoa Kỳ, vì họ đánh bắt cá ngừ vây dài mà không được sự cho phép của chính quyền Canada. Vụ việc diễn ra tại vùng biển mà Canada cho là nằm trong phạm vi quyền tài phán của họ. Ngược lại, Hoa Kỳ không công nhận quyền tài phán này của Canada và bắt đầu thực hiện các lệnh cấm nhập khẩu để trả đũa Canada theo Đạo luật bảo tồn và quản lí nghề cá của Hoa Kỳ. Ban hội thẩm tuyên bố rằng việc cấm nhập khẩu là đi ngược lại với khoản 1 Điều XI GATT và không thể biện minh bởi khoản 2 Điều XI và Điều XX(g).

2. Vụ Hoa Kỳ/Canada về cá hồi và cá trích (Canada-Measures Affecting Exports of Unprocessed Herring and Salmon)[360]

Canada vẫn duy trì các quy định cấm xuất khẩu hoặc bán để xuất khẩu một số mặt hàng cá hồi và cá trích chưa qua chế biến, theo Đạo luật thủy sản Canada 1970. Điều XI GATT được Hoa Kỳ viện dẫn để chỉ trích các biện pháp này là không phù hợp. Ca-na-đa thì cho rằng việc áp dụng Điều XX(g) là đúng trong hoàn cảnh này, vì việc hạn chế xuất khẩu là một phần trong việc quản lí nguồn lợi thủy sản hướng tới bảo tồn nguồn cá. Mặc dù vậy, Ban hội thẩm tuyên bố rằng các biện pháp mà phía Canada áp dụng đã đi ngược lại với khoản 1 Điều XI GATT và không phù hợp với khoản 2(b) Điều XI hoặc Điều XX(g).

3. Vụ cá heo và cá ngừ [361]

Đạo luật bảo vệ động vật biển có vú của Hoa Kỳ (viết tắt là 'MMPA') quy định cấm đánh bắt các loại động vật biển có vú khi săn bắt cá ngừ vây vàng trên vùng biển nhiệt đới Đông Thái Bình Dương. Vùng biển này trên thực tế được biết đến với sự xuất hiện của đàn cá heo bơi phía trên đàn cá ngừ. Đồng thời, MMPA cấm nhập khẩu các động vật biển có vú (trừ khi được cho phép rõ ràng). Bên cạnh đó, nếu việc đánh cá sử dụng các công nghệ đánh cá thương mại gây giết hại ngẫu nhiên hoặc làm tổn thương nghiêm trọng cho động vật biển có vú, thì việc nhập khẩu cá sẽ bị cấm. Trong trường hợp cụ thể đối với cá ngừ, việc nhập khẩu bị cấm, trừ khi cơ quan có thẩm quyền của Hoa Kỳ cho rằng: (i) Chính quyền của nước khai thác có một 'chương trình quy định việc đánh bắt các loài động vật biển có vú tương tự như Hoa Kỳ', và (ii) 'Tỉ lệ trung bình của việc ngẫu nhiên đánh bắt các loại động vật biển có vú của các tàu của nước khai thác phải ngang bằng với tỉ lệ trung bình của các tàu Hoa Kỳ'. Thêm vào đó, Hoa Kỳ cũng cấm việc nhập khẩu cá ngừ từ các nước mua cá ngừ của một nước chịu lệnh cấm vận chính. Mexico cho rằng lệnh cấm nhập khẩu cá ngừ và các chế phẩm từ cá ngừ là không phù hợp với các Điều XI, XIII và III. Hoa Kỳ lập luận rằng việc cấm vận này phù hợp với Điều III, và trong mọi trường hợp đều thuộc phạm vi áp dụng Điều XX(b) và (g). Hoa Kỳ cũng bổ sung thêm rằng lệnh cấm 'qua trung gian' là phù hợp với Điều III và có thể biện minh theo Điều XX(b), (d) và (g).

Theo ý nghĩa của Điều III, Ban hội thẩm cho rằng việc cấm nhập khẩu theo các cách cấm trực tiếp và 'qua trung gian' là không phù hợp với khoản 1 Điều XI, và không thể biện minh bởi Điều XX(b) và (g). Lệnh cấm 'qua trung gian' cũng không thể biện minh theo Điều XX(d).

4. Vụ Hoa Kỳ-Xăng dầu (United States-Standards for Reformulated and Conventional Gasoline)[362]

Hoa Kỳ ban hành Luật xăng dầu quy định về thành phần và hiệu ứng khí thải của xăng dầu, nhằm mục tiêu giảm khí thải. Từ thời điểm Luật này được ban hành, chỉ được phép bán xăng dầu đạt mức độ sạch theo quy định (gọi là 'xăng đã xử lí') cho người tiêu dùng trong các vùng bị ô nhiễm nhiều nhất. Tại các vùng khác, chỉ được phép bán xăng dầu không 'bẩn' hơn xăng dầu được bán năm 1990 (gọi là 'xăng truyền thống'). Điều này được áp dụng cho tất cả các nhà máy lọc dầu, pha trộn dầu hoặc nhập khẩu dầu của Hoa Kỳ. Nó đòi hỏi các nhà máy lọc dầu nội địa tự thiết lập các tiêu chuẩn lọc dầu cho riêng mình. Và tiêu chuẩn này cần thể hiện chất lượng xăng dầu được sản xuất bởi cơ sở lọc dầu đó vào năm 1990.

Venezuela và Brazil chỉ ra sự không phù hợp của Luật xăng dầu Hoa Kỳ với Điều III của GATT và tiếp đó tuyên bố rằng nó không được biện minh theo Điều XX. Theo quan điểm của Hoa Kỳ, Luật xăng dầu Hoa Kỳ phù hợp với Điều III, và trong mọi trường hợp, được biện minh bằng các ngoại lệ quy định ở đoạn (b), (g) và (d) của Điều XX.

Mặc dù vậy, Ban hội thẩm tuyên bố rằng Luật xăng dầu Hoa Kỳ

[359] WTO, vụ *United State-Prohibition of Imports of Tuna and Tuna Products from Canada* (BISD 29S/91), http://www.wto.org.

[360] WTO, vụ *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon* (BISD 35S/98), http://www.wto.org.

[361] Vụ kiện này do Mexico và một số nước khác khởi kiện chống lại Hoa Kỳ trên cơ sở GATT 1947. Mặc dù Báo cáo của Ban hội thẩm đã được ban hành năm 1991, nhưng nó không được thông qua. Vì thế, vụ việc này không được xem như một giải thích pháp luật về luật GATT. Hai bên Hoa Kỳ và Mexico sau đó đã giải quyết vụ việc này 'bên ngoài toà án'.

[362] WTO, vụ *United States-Standards for Reformulated and Conventional Gasoline*, Vụ việc số 2 và 4 của WTO. Phán quyết được thông qua ngày 20/5/1996, http://www.wto.org.

không phù hợp với Điều III và không thể biện minh được theo Điều XX(b), (d) hoặc (g). Kết luận của Ban hội thẩm liên quan đến Điều XX bị kháng cáo, tại đây Cơ quan phúc thẩm kết luận rằng việc thiết lập tiêu chuẩn lọc dầu là nằm trong giới hạn của Điều XX(g), nhưng không đáp ứng đòi hỏi về điều kiện áp dụng của Điều XX.

5. Vụ EC-A-mi-ăng (European Communities-Measures Affecting Asbestos and Asbestos-Containing Products)[363]

Sau khi Pháp cấm sử dụng a-mi-ăng trắng, Canada lập luận rằng không nên cấm hoàn toàn mà thay vào đó chỉ cần hạn chế sử dụng a-mi-ăng trắng. Canada cũng bày tỏ không hài lòng về sự phân biệt đối xử của Pháp đối với các sản phẩm thay thế a-mi-ăng trắng. Ban hội thẩm tuyên bố rằng việc áp dụng lệnh cấm có thể biện minh để bảo vệ cho sức khoẻ của công nhân Pháp, trên cơ sở Điều XX(b) - cho phép áp dụng ngoại lệ của luật WTO bằng việc áp dụng các biện pháp cần thiết để bảo vệ sức khoẻ con người. Tuy nhiên, Ban hội thẩm cũng đồng ý với phía Canada rằng Pháp đã phân biệt đối xử đối với a-mi-ăng của Canada. Ban hội thẩm kết luận rằng a-mi-ăng trắng và các loại sợi thay thế nội địa ít độc hại là các sản phẩm tương tự theo khoản 4 Điều III. Vì thế, tại thị trường Pháp, các sản phẩm này, về nguyên tắc, cần phải được đối xử như nhau. Cơ quan phúc thẩm tán thành kết luận của Ban hội thẩm liên quan đến Điều XX(b), tuy nhiên lại hủy bỏ kết luận của Ban hội thẩm liên quan đến khoản 4 Điều III.

2. Thương mại và quyền xã hội

A. *Thương mại quốc tế và tiêu chuẩn lao động*

Sự tương tác của thương mại quốc tế và các tiêu chuẩn lao động là vấn đề nổi cộm giữa các nước phát triển và các DCs. GATT không nói đến các cân nhắc về lao động và xã hội. Tuy nhiên, phần mở đầu của Hiệp định thành lập WTO tuyên bố rằng 'thương mại cần được tiến hành với quan điểm nâng cao chất lượng cuộc sống, đảm bảo công ăn việc làm ... [h] ướng đến mục tiêu phát triển bền vững'. Dù vậy, trong các điều khoản thương mại hiện hành, chỉ có một số ít các tham chiếu gián tiếp tới các vấn đề liên quan đến lao động. Các tiêu chuẩn lao động và các hoạt động thương mại liên quan đến lao động cũng không được quy định. Trên thực tế, các tiêu chuẩn này được quy định bởi Tổ chức lao động quốc tế (viết tắt là 'ILO'). Mặc dù vậy, các thành viên của WTO khẳng định trong Tuyên bố cấp bộ trưởng tại Xinh-ga-po sự cam kết của họ đối với các quyền và nghĩa vụ được quy định bởi ILO. Họ tuyên bố rằng: 'Chúng tôi nhắc lại cam kết của chúng tôi đối với việc tuân thủ các tiêu chuẩn lao động cơ bản được công nhận trên toàn thế giới... [v]à chúng tôi khẳng định chúng tôi sẽ hỗ trợ cho hoạt động [của ILO] nhằm thúc đẩy các tiêu chuẩn đó.'[364]

Tuy nhiên, vì đây chỉ là Tuyên bố cấp bộ trưởng nên không tạo ra một nghĩa vụ nào. Mối quan hệ pháp lí giữa các tiêu chuẩn của WTO và tiêu chuẩn lao động vẫn sẽ là mối quan hệ đáng quan tâm và cần phát triển. Mục này sẽ xem xét sâu hơn về cách giải thích và áp dụng các quyền và nghĩa vụ WTO trong mối liên quan với các tiêu chuẩn lao động cơ bản.

B. *Các biện pháp nhân quyền liên quan đến thương mại và GATT*

1. Hạn chế pháp lí về các biện pháp nhân quyền liên quan đến thương mại

Ban đầu, hệ thống của WTO được thiết lập chỉ để điều chỉnh các mối quan hệ thương mại giữa các thành viên. Do đó, việc áp đặt các biện pháp nhân quyền liên quan đến thương mại đối với một thành viên, trước tiên, phải luôn tuân thủ các quy định của WTO. Nếu một biện pháp không tuân thủ các quy định của WTO, thì nó được coi là không hợp pháp theo luật WTO. *Ví dụ,* áp dụng biện pháp cấm vận thương mại đối với các sản phẩm của một thành viên cụ thể, do thành viên này vi phạm nhân quyền. Trường hợp này vi phạm Điều I GATT - quy định về MFN, bởi vì tình hình nhân quyền thường không ảnh hưởng đến chất lượng sản phẩm. Một *ví dụ* khác là lệnh cấm nhập khẩu những mặt hàng nhất định được sản xuất bằng sức lao động trẻ em và/hoặc trong điều kiện làm việc nặng nhọc và vi phạm những tiêu chuẩn lao động cơ bản. Lệnh cấm này sẽ vi phạm Điều XI GATT - quy định cấm mọi biện pháp hạn chế thương mại. Cuối cùng và đặc biệt là: giải quyết thế nào đối với trường hợp một mặt cho phép nhập khẩu, nhưng mặt khác lại áp loại thuế đặc biệt đối với các sản phẩm được sản xuất trong điều kiện lao động không đảm bảo? Việc này lại là một sự vi phạm nguyên tắc NT được quy định tại Điều III GATT, do không có loại thuế tương tự được áp đối với các sản phẩm nội địa tương tự.

[363] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products,* [WT/DS135/AB/R, ngày 12/3/2001], http://www.wto.org.

[364] WTO, Tuyên bố cấp bộ trưởng tại Singapore, WT/MIN(96)/DEC, ngày 13/12/1996.

2. Sự biện hộ theo các ngoại lệ của Điều XX GATT

Như đã giải thích trong phần trước liên quan đến môi trường, khả năng áp dụng các biện pháp hạn chế thương mại của một thành viên luôn bị giới hạn. Điều XX GATT mặc dù quy định các ngoại lệ chung, nhưng đòi hỏi những điều kiện áp dụng nghiêm ngặt. Điều khoản này liệt kê các trường hợp liên quan đến chính sách công rất cụ thể, có thể biện minh cho việc làm trái với các nguyên tắc của GATT. Các trường hợp này bao gồm: bảo vệ đạo đức xã hội - thể hiện trong đoạn (a); bảo vệ cuộc sống và sức khoẻ của người, động vật và thực vật - thể hiện trong đoạn (b); và các biện pháp liên quan đến lao động tù nhân - thể hiện trong đoạn (e). Việc sử dụng các biện pháp nêu trên phải tuân theo các điều kiện áp dụng được quy định ở phần đầu của Điều XX, đó là: tuân thủ nguyên tắc không phân biệt đối xử, và không tạo thành rào cản trá hình đối với thương mại quốc tế. Vì thế, ngay cả khi Điều XX không bao gồm khoản nào về xã hội, thì sự vi phạm các quyền xã hội cũng có thể được điều chỉnh bằng quy định hiện hành về các ngoại lệ cụ thể.

Trong khi đoạn (a) và (e) hiếm khi được áp dụng hoặc đề cập trong bất kì báo cáo nào của các cơ quan giải quyết tranh chấp, thì đoạn (b) lại thường được viện dẫn để biện minh cho các biện pháp về bảo vệ sức khoẻ. Tuy nhiên, đoạn (a) Điều XX vẫn có thể được viện dẫn làm cơ sở pháp lí. Ngoại lệ về đạo đức xã hội được thể hiện trong đoạn (a) có thể được diễn giải như việc cấm văn hoá phẩm đồi trụy, vì chúng được sản xuất dựa trên sự ngược đãi nghiêm trọng phụ nữ, và thậm chí cả trẻ em. Đoạn (e) bao gồm các biện pháp có liên quan tới các sản phẩm được sản xuất bằng sức lao động của tù nhân. Ngoại lệ này thậm chí có thể được mở rộng cho các trường hợp lao động nô dịch. Cả hai ngoại lệ (a) và (e) đều có khả năng được sử dụng để biện minh cho các biện pháp hạn chế thương mại liên quan đến việc vi phạm các tiêu chuẩn lao động và tiêu chuẩn xã hội. Tương tự, đoạn (b) có thể được sử dụng trong các trường hợp liên quan đến bảo vệ nhân quyền, để biện minh cho các biện pháp về y tế công cộng, cũng là khía cạnh của nhân quyền liên quan đến sức khoẻ. Tương tự, ngoại lệ này cũng bao gồm việc điều chỉnh các biện pháp phòng ngừa các điều kiện làm việc đặc biệt nguy hiểm cho con người.

Trong bất kì trường hợp nào, các điều kiện áp dụng của Điều XX luôn nhằm mục đích tránh việc lạm dụng các ngoại lệ này, bằng cách đòi hỏi đảm bảo hai điều kiện: (i) Không được phép áp dụng biện pháp theo cách tùy tiện và phân biệt đối xử giữa các thành viên có điều kiện tương tự; và (ii) Không được phép áp dụng các biện pháp này như các công cụ hạn chế trá hình đối với thương mại quốc tế.

C. *Các án lệ của GATT*

Các quyền về lao động và xã hội thường bị vi phạm thông qua điều kiện làm việc: lao động trẻ em, điều kiện làm việc như nô lệ, thiếu hoàn toàn các quyền cơ bản của công nhân... là một vài ví dụ của cái gọi là 'quy trình và phương pháp sản xuất' (viết tắt là 'PPM'), theo cách nói của WTO. Người ta sử dụng các biện pháp hạn chế nhập khẩu đối với các sản phẩm được sản xuất dưới điều kiện lao động như thế, nhằm đòi hỏi việc sản xuất hàng hoá phải đảm bảo thoả mãn các tiêu chuẩn về PPM.

Theo các quy định của GATT, nguyên tắc không phân biệt đối xử đã bị vi phạm thông qua hạn chế về PPM, vốn được áp dụng cho các sản phẩm tương tự. Các sản phẩm tương tự được xác định thông qua chất lượng, chức năng hoặc mục đích sử dụng cuối cùng trên thị trường. PPM thường không ảnh hưởng gì đến các tiêu chuẩn này, do đó không được phép đối xử khác nhau với các sản phẩm tương tự dựa theo PPM.

Ví dụ, việc một thành viên cấm nhập khẩu hoặc áp thuế nhập khẩu bổ sung đối với sản phẩm giày dép được sản xuất bởi lao động trẻ em là vi phạm Điều III hoặc Điều XI GATT. Trên thực tế, không có sự khác biệt về chất lượng, chức năng hoặc công dụng giữa các sản phẩm giày dép được sản xuất bởi lao động của người trưởng thành và lao động trẻ em.

Một số nhà bình luận cho rằng các ngoại lệ tại đoạn (e) của Điều XX có thể sẽ cho phép PPM và các biện pháp liên quan đến các sản phẩm của lao động tù nhân trở thành ngoại lệ hợp lệ. Nhưng thực tế là cho đến nay, điều khoản này chưa bao giờ được viện dẫn hoặc giải quyết bởi DSB. Tuy nhiên, trong vụ tôm của Hoa Kỳ (*US-Shrimp*), Cơ quan phúc thẩm đã nêu trong phần chú thích rằng điều khoản này không cho phép các nước nhập khẩu được nhập khẩu các sản phẩm được sản xuất theo chính sách về lao động tù nhân của nước xuất khẩu.[365] Vì thế, có thể hiểu là điều khoản này sẽ được giải thích một cách rất hạn chế.

Tuy nhiên, một thành viên sẽ được phép bảo vệ các mối quan tâm phi thương mại của mình theo Điều XX, trong trường hợp cụ thể của chính thành viên đó. *Ví dụ*, việc áp đặt các biện pháp để bảo vệ sức khoẻ công nhân trong một nước là được cho phép theo luật WTO. Đó là vụ A-mi-ăng (*Asbestos*), theo đó lệnh cấm nhập khẩu a-mi-ăng chứa các chất độc hại là để nhằm bảo vệ sức khoẻ của công nhân Pháp.

[365] WTO, vụ *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, DS58, http://www.wto.org.

Mặt khác, quan điểm của án lệ là hạn chế thừa nhận các biện pháp có tính trị ngoại lãnh thổ, được biết đến như việc buộc các thành viên khác của WTO phải áp dụng các tiêu chuẩn quốc gia của nước đưa ra sự áp đặt. Vụ cá ngừ của Hoa Kỳ đã thực sự nhấn mạnh việc cấm các biện pháp có tính trị ngoại lãnh thổ. Nếu không, các biện pháp này sẽ cho phép các thành viên đơn phương quyết định các chính sách mà các thành viên khác phải làm theo, để được hưởng các quyền theo GATT.

Nếu xem xét phạm vi áp dụng theo lãnh thổ của các nghĩa vụ nhân quyền, thì nhân quyền cần được đảm bảo cho tất cả mọi người trong một quốc gia, nhưng nhìn chung không có nghĩa vụ nào đòi hỏi việc khuyến khích hoặc bảo vệ nhân quyền ở ngoài lãnh thổ. Vì thế, việc cấm lao động trẻ em được áp dụng cho mọi trẻ em trong lãnh thổ một thành viên nào đó, và không thể được thực thi ở ngoài lãnh thổ. Vấn đề áp dụng luật quốc gia ở ngoài lãnh thổ thực sự là vấn đề khó giải quyết theo luật quốc tế, vì nó vi phạm chủ quyền của các quốc gia khác.

Tuy nhiên, một số công ước về nhân quyền đưa ra nghĩa vụ áp dụng nhân quyền phổ cập nhằm thúc đẩy nhân quyền thông qua hợp tác quốc tế, như Tuyên bố của Liên hợp quốc về quyền phát triển. Tuyên bố này nêu rõ nghĩa vụ thúc đẩy nhân quyền trên bình diện quốc tế. Việc này có thể được thực hiện tại các tổ chức quốc tế, như WTO. Mặc dù vậy, nó không cho phép thực thi luật quốc gia ở ngoài lãnh thổ, vì điều này vi phạm chủ quyền của các quốc gia khác.

3. Hiệp định thương mại song phương và khu vực

Các hiệp định thương mại khu vực và hiệp định thương mại song phương ngày càng phát triển mạnh mẽ. Hầu hết các thành viên của WTO đều theo đuổi các hiệp định song phương hoặc khu vực. Có thể nói tới Hiệp định hợp tác lao động Bắc Mỹ ('NAALC'), được đàm phán với tư cách là Hiệp định bổ sung của Hiệp định thương mại tự do Bắc Mỹ (NAFTA)[366] và có hiệu lực vào ngày 01/01/1994. Hiệp định bao gồm 11 nguyên tắc lao động cơ bản và yêu cầu các nước Mexico, Hoa Kỳ và Canada cải thiện tình hình thực thi các tiêu chuẩn và quyền lao động nêu trên.

Chính xác hơn, trong phần mở đầu của NAALC đã khẳng định tầm quan trọng của việc cải thiện tiêu chuẩn lao động và sinh hoạt. Bản thân Hiệp định đòi hỏi 'Các bên tham gia thúc đẩy việc tuân thủ và thực thi hiệu quả luật lao động thông qua các hành động phù hợp của chính phủ' và vạch ra các lĩnh vực khác nhau theo đó các bên nên hợp tác để đạt được sự phát triển. Mặc dù vậy, NAALC không thiết lập một bộ các quyền và tiêu chuẩn lao động quốc tế mà chỉ đề cập các luật lao động quốc gia và đòi hỏi các bên tham gia đảm bảo rằng luật lao động của từng nước đưa ra các tiêu chuẩn lao động cao. Hơn nữa, Hiệp định này đòi hỏi các bên tham gia phải quy định các thủ tục khiếu nại đối với các vi phạm luật quốc gia. Tuy nhiên, cơ chế thực thi còn yếu, Toà án trong khuôn khổ NAALC chưa xét xử vụ nào mà dẫn đến việc bên vi phạm phải thi hành nghĩa vụ sửa đổi các quy định về lao động của nước mình.

Sau Hiệp định NAFTA, Hoa Kỳ đã đàm phán nhiều hiệp định khác có các điều khoản cụ thể về quyền lao động. Hầu hết các điều khoản của Hoa Kỳ giới hạn trong cam kết của các bên về việc thực thi luật lao động trong nước. *Ví dụ*, Hiệp định thương mại tự do Trung Mỹ - Cộng hoà Dominica ('CAFTA'), bao gồm Hoa Kỳ, Honduras, Nicaragua, Costa Rica, Guatemala, El Salvador và Cộng hoà Dominica, quy định về quyền của người lao động. Nội dung mấu chốt của Hiệp định này là các nghĩa vụ lao động. Các điều khoản bao gồm cam kết của các nước CAFTA về việc tăng khả năng cho người lao động tiếp cận các thủ tục bảo vệ quyền lợi của họ. Nhìn chung, Hiệp định đòi hỏi các bên thực thi luật lao động trong nước của mình, phù hợp với các tiêu chuẩn quốc tế. Các bên cũng được yêu cầu phải làm việc với ILO nhằm cải thiện luật lao động hiện hành và vấn đề thực thi. Mặc dù vậy, Công ước cơ bản của ILO về phân biệt đối xử lại không được nhắc đến trong Hiệp định. Bên cạnh đó, các nước không có nghĩa vụ phải đưa ra các thủ tục đảm bảo hoặc biện pháp trừng phạt để điều chỉnh các hành vi vi phạm.

Thị trường chung Nam Mỹ ('MERCOSUR') là liên minh hải quan với sự tham gia của các nước Argentina, Brazil, Paraguay và Uruguay, có hiệu lực năm 1991. Bốn chính phủ thành viên kí bản Tuyên bố về xã hội và lao động 1998 - một bản Tuyên bố có phạm vi rất rộng. Trên thực tế, bản Tuyên bố vượt quá các công ước cơ bản của ILO và bao gồm cả đối thoại xã hội, việc làm, đề bạt, bảo trợ thất nghiệp, an toàn và y tế, và bảo trợ xã hội. Tuyên bố cũng bắt buộc thành lập Ủy ban để theo dõi việc tuân thủ Tuyên bố và đưa ra các khuyến nghị về các biện pháp đảm bảo việc tuân thủ.

Liên minh châu Âu ('EU') đã đặc biệt tích cực trong lĩnh vực này, với tuyên bố của Ủy ban châu Âu về việc thúc đẩy mối liên kết giữa thương mại và phát triển xã hội theo nhiều cách. Xuất phát điểm từ Hiệp định than thép châu Âu 1951, EU đã trở thành một trong những ví dụ sớm nhất và phát triển nhất về hiệp định thương mại. Kể từ đó,

[366] NAFTA là FTA có phạm vi rộng, bao hàm hoạt động thương mại hàng hoá và dịch vụ, sở hữu trí tuệ, đầu tư, mua sắm chính phủ, tự do dịch chuyển của thương nhân, cạnh tranh, và một cơ chế giải quyết tranh chấp. *Xem* Mục 3 - Chương 3 của Giáo trình.

EU đã phát triển cả về số lượng thành viên lẫn phạm vi áp dụng và trở thành thị trường chung về hàng hoá và dịch vụ với sự tự do dịch chuyển lao động trong nội bộ EU. Trong các hiệp định thương mại, 'Chương về chính sách xã hội' đã quy định cụ thể các quyền cơ bản của người lao động cần được tôn trọng trên toàn lãnh thổ các nước thành viên EU. Tương tự, sự quan tâm hàng đầu của EU tới các vấn đề xã hội cũng được nhấn mạnh trong các hiệp định giữa EU và các nước khác. Mặc dù vậy, các hiệp định song phương của EU lại tập trung nhiều hơn vào vấn đề nhân quyền, phát triển, hợp tác kĩ thuật và đối thoại chính trị. Đa số các hiệp định đều có đoạn nói rằng các bên tham gia sẽ phải tôn trọng nhân quyền, nhưng không có các điều khoản cụ thể và rõ ràng về thực thi quyền lao động.

Mục 8. VIỆT NAM VÀ CAM KẾT GIA NHẬP WTO

1. Tiến trình đàm phán gia nhập WTO của Việt Nam[367]

Bắt đầu từ năm 1986, theo đường lối đổi mới của Đảng và Nhà nước, Việt Nam đã tiến hành thực hiện quá trình cải cách và mở cửa, trong đó việc chuyển đổi từ nền kinh tế kế hoạch hoá tập trung sang nền kinh tế thị trường định hướng xã hội chủ nghĩa và hội nhập vào nền kinh tế thế giới là những mục tiêu chính mà Việt Nam hướng tới.[368] Ở trong nước, đường lối đổi mới tập trung vào việc tái cơ cấu nền kinh tế, thúc đẩy sản xuất hướng về xuất khẩu. Về đối ngoại, Việt Nam thực hiện chủ trương đa phương hoá, đa dạng hoá các mối quan hệ quốc tế, trong đó có việc thiết lập các mối quan hệ kinh tế với thế giới. Nhằm tăng cường các quan hệ kinh tế quốc tế, ở cấp độ song phương, Việt Nam đã thiết lập và mở rộng quan hệ với nhiều nước trên thế giới. Năm 1994, việc Hoa Kỳ bỏ lệnh cấm vận kinh tế đối với Việt Nam đã đánh dấu sự chuyển mình quan trọng trong quan hệ kinh tế song phương đó. Ở cấp độ khu vực, Việt Nam đã gia nhập Hiệp hội các quốc gia Đông Nam Á (ASEAN) vào năm 1995, Hội nghị cấp cao Á-Âu ('ASEM') năm 1996 và Diễn đàn hợp tác kinh tế châu Á-Thái Bình Dương ('APEC') năm 1998. Có thể nói, việc tham gia vào các thể chế khu vực nói trên đã tạo ra bước chuẩn bị cần thiết cho Việt Nam tham gia vào các quan hệ kinh tế-thương mại toàn cầu, trong đó gia nhập WTO là mục tiêu mà Việt Nam hướng tới, bởi điều đó đánh dấu sự hội nhập đầy đủ của Việt Nam vào nền kinh tế thế giới.

Ngày 04/01/1995, Việt Nam đã chính thức đệ trình đơn xin gia nhập lên WTO. Đại hội đồng WTO, sau đó, đã chấp thuận đơn xin gia nhập của Việt Nam và chính thức thành lập Nhóm công tác về việc Việt Nam gia nhập WTO. Các thành viên của Nhóm công tác này bao gồm Argentina, Australia, Brazil, Brunei, Bulgaria, Cam-pu-chia, Canada, Chile, Trung Quốc, Colombia, Croatia, Cuba, Cộng hoà Dominica, Ai Cập, El Salvador, EU và các nước thành viên, Honduras, Hong Kong, Iceland, Ấn Độ, Indonesia, Nhật Bản, Hàn Quốc, Cộng hoà Kyrghisia, Malaysia, Mexico, Morroco, Myanmar, New Zealand, Na Uy, Pakistan, Panama, Paraguay, Philippines, Romania, Singapore, Sri Lanka, Thụy Sỹ, Đài Loan, Thái Lan, Thổ Nhĩ Kỳ, Hoa Kỳ và Uruguay. Chủ tịch Nhóm công tác trong giai đoạn 1998-2004 là Đại sứ Seung Ho (người Hàn Quốc), và trong giai đoạn 2004-2006 là Đại sứ Eirik Glene (người Na Uy).[369]

Tháng 8/1996, Việt Nam hoàn thành Bị vong lục (Memorandum) về chế độ ngoại thương của Việt Nam và đệ trình văn kiện này tới Ban thư kí WTO để chuyển tới các thành viên của Nhóm công tác. Bị vong lục không chỉ giới thiệu tổng quan về nền kinh tế, các chính sách kinh tế vĩ mô, cơ sở hoạch định và thực thi chính sách, mà còn cung cấp các thông tin chi tiết về các chính sách liên quan đến thương mại hàng hoá, thương mại dịch vụ và IPRs. Sau khi gửi Bị vong lục, Việt Nam đã nhận được khoảng 3.516 câu hỏi của các thành viên Nhóm công tác đưa ra.[370] Với danh mục 3.516 câu hỏi này, Việt Nam nhận thấy không thể gia nhập WTO 'một sớm, một chiều', bởi vì để có thể trả lời được hết những câu hỏi đó, cần phải có những sự thay đổi đáng kể và quan trọng, mang tính hệ thống, của nền kinh tế và hệ thống pháp luật Việt Nam. Ngoài ra, những lo ngại về chính trị cũng như những yêu cầu Việt Nam phải đưa ra những nhượng bộ lớn hơn[371] cũng đã kéo dài thời gian đàm phán gia nhập WTO của Việt Nam.

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[367] Về tiến trình đàm phán gia nhập WTO, *xem*: WTO, *Membership, Alliances and Bureaucracy*, tại: http://wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (ngày 16/12/2011); WTO, *Understanding the World Trade Organization*, tại: http://wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm (ngày 16/12/2011). *Xem* thêm: Peter Van den Bossche, *Sđd*, tr. 108-112; GS. TS. Nguyễn Thị Mơ (chủ biên), *Giáo trình Pháp luật thương mại quốc tế*, Hà Nội, (2011).

[368] Đảng Cộng sản Việt Nam, *Phương hướng, mục tiêu chủ yếu phát triển kinh tế, xã hội trong năm năm 1986-1990, Báo cáo của Ban chấp hành Trung ương Đảng Cộng sản Việt Nam tại Đại hội đại biểu toàn quốc lần thứ VI của Đảng*, xem tại: http://123.30.190.43:8080/tiengviet/ tulieuvankien/vankiendang/details.asp?topic=191&subtopic=8&leader_topic=223&id=BT2540630903 (ngày 17/12/2011).

[369] Dự án hỗ trợ thương mại đa biên giai đoạn II (MUTRAP II), *Vị trí, vai trò và cơ chế hoạt động của Tổ chức thương mại thế giới trong hệ thống thương mại đa phương*, Nxb. Lao động-Xã hội, (2007), tr. 72.

[370] Dự án hỗ trợ thương mại đa biên giai đoạn II (MUTRAP II), *Sđd*, tr. 73.

[371] MUTRAP II, *Việt Nam gia nhập WTO: Giải thích các điều kiện gia nhập*, Nxb. Lao động-Xã hội, Hà Nội, (2008), tr. 23.

Thực tế cho thấy, ngay từ giai đoạn chuẩn bị đầu tiên, Việt Nam đã gặp phải những khó khăn nêu trên. Dù Bị vong lục được hoàn thành và đệ trình cho Nhóm công tác vào năm 1996, nhưng phải đến năm 1998, Nhóm công tác mới hoàn thành việc xây dựng kế hoạch cho các cuộc đàm phán đa phương, và Việt Nam phải trải qua 14 phiên đàm phán đa phương với Nhóm công tác. Phiên đàm phán đầu tiên diễn ra trong hai ngày 30-31/7/1998 và phiên cuối cùng kết thúc vào ngày 26/10/2006.[372]

Tại phiên đàm phán lần thứ 5 của Nhóm công tác, diễn ra vào ngày 7/01/2002, Việt Nam đưa ra Bản chào đầu tiên về mở cửa thị trường hàng hoá và dịch vụ, sau đó Bản chào này được sửa đổi và bổ sung ba lần vào các năm 2004, 2005 và 2006. Trong các lần sửa đổi này, Bản chào được đưa ra vào phiên họp thứ 8 của Nhóm công tác vào tháng 6/2004 đã tạo ra bước thay đổi quan trọng cho quá trình đàm phán gia nhập WTO của Việt Nam, với sự hoan nghênh của các thành viên Nhóm công tác. Sau một số phiên đàm phán, các đối tác thương mại của Việt Nam đồng ý bắt đầu dự thảo Báo cáo của Nhóm công tác về việc Việt Nam gia nhập WTO.

Về đàm phán song phương, lúc đầu có khoảng hơn 40 thành viên WTO đề nghị đàm phán song phương với Việt Nam. Tuy nhiên, nhờ những nỗ lực ngoại giao, cuối cùng số thành viên WTO đề nghị đàm phán song phương rút lại còn 28, trong đó có Hoa Kỳ, EU (được tính là một thành viên đại diện cho 25 quốc gia thành viên) và Trung Quốc. Ngay trong năm 2004 - năm bắt đầu các cuộc đàm phán song phương, Việt Nam đã đạt được thoả thuận với đối tác quan trọng là EU. Thoả thuận với Trung Quốc hoàn thành vào năm 2005. Đối với đối tác quan trọng nhất - Hoa Kỳ, Việt Nam đã phải trải qua quá trình đàm phán song phương rất khó khăn, vì Hoa Kỳ đã đưa ra những yêu cầu khá cao mà một số yêu cầu có thể được coi là 'không thể chấp nhận được' đối với Việt Nam. Những yêu cầu đó đã làm cho kế hoạch mà Việt Nam đặt ra là gia nhập WTO vào cuối năm 2005 đã không thành hiện thực, bởi quan điểm của đoàn đàm phán Việt Nam là 'không gia nhập WTO bằng mọi giá'.[373]

Thoả thuận kết thúc đàm phán song phương với Hoa Kỳ chỉ đạt được vào tháng 5/2006. Đây cũng là thoả thuận đàm phán song phương thứ 28 mà Việt Nam đạt được. Việc kí thoả thuận này cho phép Tổng thống Hoa Kỳ có thẩm quyền cần thiết để dành cho Việt Nam quy chế 'Quan hệ thương mại bình thường vĩnh viễn' ('Permanent Normal Trade Relations', viết tắt là 'PNTR').[374] Đạo luật về trao PNTR cho Việt Nam đã được Hạ viện và Thượng viện Hoa Kỳ, sau nhiều lần trì hoãn, bỏ phiếu thông qua vào ngày 9/12/2006 và được Tổng thống Bush kí phê chuẩn vào ngày 20/12/2006. Việc trao cho Việt Nam PNTR một mặt đánh dấu 'sự bình thường hoá hoàn toàn quan hệ song phương Việt Nam-Hoa Kỳ', mặt khác mở đường cho Việt Nam thực hiện các cam kết gia nhập WTO.[375]

Đàm phán song phương kết thúc là điều kiện tiên quyết để kết thúc quá trình đàm phán đa phương về việc gia nhập WTO của Việt Nam. Vào ngày 19/10/2006, Nhóm công tác họp phiên thứ 13 để xem xét và hoàn chỉnh Báo cáo gia nhập WTO của Việt Nam. Tuy nhiên, Bộ văn kiện về việc Việt Nam gia nhập WTO, bao gồm Báo cáo của Nhóm công tác, Dự thảo Nghị định thư gia nhập và các cam kết gia nhập WTO của Việt Nam, chỉ được hoàn tất ở phiên họp thứ 14 diễn ra vào ngày 26/10/2006.

Quá trình đàm phán gia nhập WTO của Việt Nam kết thúc vào ngày 7/11/2006, khi Đại hội đồng họp phiên đặc biệt để xem xét và biểu quyết kết nạp Việt Nam trở thành thành viên của WTO. Nghị định thư gia nhập được Quốc hội Việt Nam phê chuẩn vào ngày 28/11/2006. Ngày 12/12/2006, WTO nhận được văn bản phê chuẩn Nghị định thư gia nhập WTO của Việt Nam. Một tháng sau đó, ngày 11/01/2007, Việt Nam chính thức trở thành thành viên thứ 150 của tổ chức này và một ngày sau, những quyền và nghĩa vụ của Việt Nam, với tư cách là thành viên mới của WTO sẽ bắt đầu được thực thi.

2. Tóm tắt cam kết gia nhập WTO của Việt Nam

Bộ văn kiện gia nhập WTO của Việt Nam đã được thông qua bao gồm Báo cáo của Nhóm công tác về việc Việt Nam gia nhập WTO, Nghị định thư gia nhập đã được Quốc hội Việt Nam phê chuẩn và các Biểu cam kết về hàng hoá và dịch vụ.[376] Bộ văn kiện này, dày khoảng 1.200 trang, nêu lên toàn bộ các cam kết của Việt Nam về mở cửa thị trường hàng hoá, dịch vụ và các cam kết khác có liên quan và được tóm tắt dưới đây.

372 WTO, *Accessions: Viet Nam*, http://wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm, truy cập ngày 18/12/2011.

373 *Không gia nhập WTO bằng mọi giá*, http://www.tienphong.vn/Kinh-Te/27613/%E2%80%9CKhong-gia-nhap-WTO-bang-moi-gia%E2%80%9D.html, truy cập ngày 19/12/2011.

374 *Quy chế thương mại bình thường vĩnh viễn-Permanent Nornal Trade Relations Status-PNTR*, http://world.hbu.edu.vn/index.php?option=com_content&view=article&id=140:quy-ch-thng-mi-binh-thng-vnh-vin-permanent-normal-trade-relations-status-pntr-&catid=55:goc-hc-tp&Itemid=100 (ngày 19/12/2011).

375 Về những khó khăn mà Việt Nam đã gặp phải trong quá trình đàm phán gia nhập WTO, *xem*: Tư Giang, *Điếu thuốc ông Tuyển*, tại: http://vtc.vn/1-8907/kinh-doanh/dieu-thuoc-ong-tuyen.htm, truy cập ngày 19/12/2011.

376 Dự án hỗ trợ thương mại đa biên giai đoạn II (MUTRAP II), *Cam kết gia nhập WTO của Việt Nam*, Hà Nội, (2007), http://www.mutrap.org.vn/en/library/MUTRAPII/Forms/AllItems.aspx, truy cập ngày 19/12/2011.

A. *Cam kết đa phương*

Việt Nam đồng ý tuân thủ toàn bộ các hiệp định và các quy định mang tính ràng buộc của WTO từ thời điểm gia nhập. Tuy nhiên, do là DC ở trình độ thấp, lại đang trong quá trình chuyển đổi nên theo yêu cầu của Việt Nam, WTO đã chấp nhận cho Việt Nam hưởng một thời gian chuyển đổi để thực hiện một số cam kết có liên quan đến thuế tiêu thụ đặc biệt, trợ cấp cho lĩnh vực phi nông nghiệp, quyền kinh doanh v.v.. Cụ thể các cam kết đa phương như sau:

1. Nền kinh tế phi thị trường (NME)

Việt Nam chấp nhận bị coi là NME trong 12 năm (không muộn hơn ngày 31/12/2018). Tuy nhiên, trước thời điểm trên, nếu chứng minh được với đối tác nào đó là nền kinh tế Việt Nam đã hoàn toàn hoạt động theo cơ chế thị trường, thì đối tác đó sẽ ngừng áp dụng cơ chế 'phi thị trường'. Cơ chế 'phi thị trường' nói trên có ý nghĩa trong các vụ kiện AD.

2. Dệt may

- Các thành viên WTO sẽ không được áp dụng hạn ngạch đối với hàng dệt may của Việt Nam. Trong trường hợp Việt Nam vi phạm quy định của WTO về trợ cấp bị cấm đối với hàng dệt may, thì một số thành viên có thể áp dụng biện pháp trả đũa nhất định.
- Thành viên WTO cũng sẽ không được áp dụng biện pháp tự vệ đặc biệt đối với hàng dệt may của Việt Nam.

3. Trợ cấp phi nông nghiệp

- Loại bỏ hoàn toàn các loại trợ cấp bị cấm theo quy định của WTO ('trợ cấp xuất khẩu' và 'trợ cấp thay thế nhập khẩu');
- Đối với các ưu đãi đầu tư dành cho hàng xuất khẩu đã cấp trước ngày gia nhập WTO, Việt Nam được bảo lưu với thời gian quá độ là 5 năm (trừ ngành dệt may).

4. Trợ cấp nông nghiệp

- Không áp dụng trợ cấp xuất khẩu đối với nông sản từ thời điểm gia nhập. Đối với những loại hỗ trợ mà WTO quy định phải giảm, Việt Nam thoả thuận được duy trì ở mức không quá 10% 'tổng lượng hỗ trợ tính gộp' ('AMS'). Ngoài mức này, Việt Nam còn bảo lưu thêm một số khoản hỗ trợ nữa vào khoảng 4.000 tỉ đồng mỗi năm.
- Bảo lưu quyền được hưởng một số quy định về đối xử S&D của WTO dành cho DCs trong lĩnh vực này.
- Đối với các loại hỗ trợ mang tính chất khuyến nông hay phục vụ phát triển nông nghiệp được WTO cho phép, Việt Nam có quyền áp dụng không hạn chế.

5. Quyền kinh doanh (quyền xuất khẩu, nhập khẩu hàng hoá)

- Cho phép doanh nghiệp và cá nhân nước ngoài được quyền xuất, nhập khẩu hàng hoá như người Việt Nam kể từ khi gia nhập, trừ đối với các mặt hàng thuộc danh mục thương mại nhà nước như: xăng dầu, thuốc lá điếu, xì gà, băng đĩa hình, báo chí và một số mặt hàng nhạy cảm khác mà Việt Nam chỉ cho phép xuất khẩu hoặc nhập khẩu sau một thời gian chuyển đổi, như gạo và dược phẩm.
- Cho phép doanh nghiệp và cá nhân nước ngoài không có hiện diện tại Việt Nam được đăng kí quyền xuất nhập khẩu tại Việt Nam. Đây chỉ là quyền đứng tên trên tờ khai hải quan để làm thủ tục xuất nhập khẩu.
- Trong mọi trường hợp, doanh nghiệp và cá nhân nước ngoài sẽ không được tự động tham gia vào hệ thống phân phối trong nước. Các cam kết về quyền kinh doanh sẽ không ảnh hưởng đến quyền của Việt Nam trong việc đưa ra các quy định để quản lí dịch vụ phân phối, đặc biệt đối với sản phẩm nhạy cảm như dược phẩm, xăng dầu, báo-tạp chí...

6. Thuế tiêu thụ đặc biệt đối với rượu và bia

- Việt Nam có thời gian chuyển đổi không quá ba năm để điều chỉnh lại thuế tiêu thụ đặc biệt đối với rượu và bia cho phù hợp với quy định của WTO.
- Đối với rượu trên 20 độ cồn, Việt Nam hoặc sẽ áp dụng một mức thuế tuyệt đối hoặc một mức thuế phần trăm. Đối với bia, Việt Nam sẽ chỉ áp dụng một mức thuế phần trăm.

7. Doanh nghiệp nhà nước/doanh nghiệp thương mại nhà nước

- Nhà nước sẽ không can thiệp trực tiếp hay gián tiếp vào hoạt động của doanh nghiệp nhà nước.
- Với tư cách là một cổ đông, nhà nước có quyền can thiệp bình đẳng vào hoạt động của doanh nghiệp như các cổ đông khác.

- Việt Nam cũng đồng ý cách hiểu mua sắm của doanh nghiệp nhà nước không phải là mua sắm chính phủ.

8. Tỉ lệ cổ phần để thông qua quyết định tại doanh nghiệp

Việt Nam cho phép các bên tham gia liên doanh được thoả thuận về tỉ lệ vốn góp hoặc tỉ lệ cổ phần để thông qua quyết định trong điều lệ công ty.

9. Một số biện pháp hạn chế nhập khẩu

- Việt Nam đồng ý cho nhập khẩu xe máy phân khối lớn không muộn hơn ngày 31/5/2007.
- Với thuốc lá điếu và xì gà, Việt Nam đồng ý bỏ biện pháp cấm nhập khẩu từ thời điểm gia nhập. Tuy nhiên, sẽ chỉ có một doanh nghiệp nhà nước được quyền nhập khẩu toàn bộ thuốc lá điếu và xì gà (VINATABA).
- Với ô-tô cũ, Việt Nam cho phép nhập khẩu các loại xe đã qua sử dụng không quá 5 năm.

10. Minh bạch hoá

Việt Nam cam kết ngay từ khi gia nhập sẽ công bố dự thảo các văn bản quy phạm pháp luật do Quốc hội, Ủy ban thường vụ Quốc hội và Chính phủ ban hành để lấy ý kiến nhân dân. Thời hạn dành cho việc góp ý và sửa đổi tối thiểu là 60 ngày. Việt Nam cũng cam kết sẽ công bố công khai các văn bản pháp luật trên.

11. Một số nội dung khác

Về thuế xuất khẩu, Việt Nam chỉ cam kết sẽ giảm thuế xuất khẩu đối với phế liệu kim loại đen và phế liệu kim loại màu theo lộ trình, không cam kết về thuế xuất khẩu của các sản phẩm khác.

Việt Nam còn đàm phán một số vấn đề khác như bảo hộ IPRs, đặc biệt là sử dụng phần mềm hợp pháp trong cơ quan nhà nước; xác định trị giá tính thuế hải quan; các biện pháp đầu tư liên quan đến thương mại; các rào cản kỹ thuật trong thương mại; ... Với các nội dung này, Việt Nam cam kết tuân thủ các quy định của WTO kể từ khi gia nhập.

B. *Cam kết về thuế nhập khẩu*

1. Mức cam kết chung

- Việt Nam đồng ý ràng buộc mức trần cho toàn bộ biểu thuế (10.600 dòng thuế).
- Mức thuế bình quân toàn biểu được giảm từ mức hiện hành 17,4% xuống còn 13,4%, thực hiện giảm dần với lộ trình 5-7 năm. Mức thuế bình quân đối với hàng nông sản giảm từ mức hiện hành 23,5% xuống còn 20,9%, với hàng công nghiệp giảm từ 16,8% xuống còn 12,6% (xem Bảng 2.8.1).

Bảng 2.8.1:
Diễn giải mức thuế bình quân mà Việt Nam cam kết khi gia nhập WTO

Bình quân chung và theo ngành	Thuế suất MFN hiện hành (%)	Thuế suất cam kết khi gia nhập WTO (%)	Thuế suất cam kết vào cuối lộ trình (%)	Mức giảm so với thuế MFN hiện hành (%)	Cam kết WTO của Trung Quốc	Mức giảm thuế chung tại Vòng Uruguay	
						Nước phát triển	Nước đang phát triển
Nông sản	23,5	25,2	21,0	10,6	16,7	Giảm 40%	Giảm 30%
Hàng công nghiệp	16,6	16,1	12,6	23,9	9,6	Giảm 37%	Giảm 24%
Chung toàn biểu	17,4	17,2	13,4	23,0	10,1		

Nguồn: http://vnexpress.net/Vietnam/Kinh-doanh/Duong-vao-WTO/2006/11/3B9 F0224/ (truy cập ngày 17/12/2011).

2. Mức cam kết cụ thể

- Có khoảng hơn 1/3 số dòng thuế sẽ phải giảm, chủ yếu là các dòng có thuế suất trên 20%. Các mặt hàng trọng yếu, nhạy cảm đối với nền kinh tế như nông sản, xi măng, sắt thép, vật

liệu xây dựng, ô-tô-xe máy, ... vẫn duy trì được mức bảo hộ nhất định.

- Những ngành có mức giảm thuế nhiều nhất bao gồm: dệt may, cá và sản phẩm cá, gỗ và giấy, hàng chế tạo khác, máy móc và thiết bị điện-điện tử.
- Việt Nam cam kết giảm thuế theo một số hiệp định nhiều bên của WTO giảm thuế xuống 0% hoặc mức thấp. Hiệp định nhiều bên mà Việt Nam tham gia là Hiệp định về các sản phẩm công nghệ thông tin (Hiệp định ITA). Việt Nam cũng tham gia một phần với thời gian thực hiện từ 3-5 năm đối với các hiệp định về thiết bị máy bay, hoá chất và thiết bị xây dựng.
- Về hạn ngạch thuế quan, Việt Nam bảo lưu quyền áp dụng đối với đường, trứng gia cầm, lá thuốc lá và muối (xem Bảng 2.8.2).

Bảng 2.8.2:
Tổng hợp cam kết giảm thuế nhập khẩu trong WTO đối với một số nhóm hàng quan trọng của Việt Nam

TT	Ngành hàng/Mức thuế suất	Cam kết với WTO			
		Thuế suất MFN	Thuế suất khi gia nhập	Thuế suất cuối cùng	Thời gian thực hiện
1.	**Một số sản phẩm nông nghiệp**				
	- Thịt bò	20	20	14	5 năm
	- Thịt lợn	30	30	15	5 năm
	- Sữa nguyên liệu	20	20	18	2 năm
	- Sữa thành phẩm	30	30	25	5 năm
	- Thịt chế biến	50	40	22	5 năm
	- Bánh kẹo (thuế suất bình quân)	39,3	34,4	25,3	3-5 năm
	- Bia	80	65	35	5 năm
	- Rượu	65	65	45-50	5-6 năm
	- Thuốc lá điếu	100	150	135	5 năm
	- Xì gà	100	150	100	5 năm
	- Thức ăn gia súc	10	10	7	2 năm
2.	**Một số sản phẩm công nghiệp**				
	- Xăng dầu	0-10	38,7	38,7	
	- Sắt thép (thuế suất bình quân)	7,5	17,7	13	5-7 năm
	- Xi măng	40	40	32	2 năm
	- Phân hoá học (thuế suất bình quân)	0,7	6,5	6,4	2 năm
	- Giấy (thuế suất bình quân)	22,3	20,7	15,1	5 năm
	- Ti-vi	50	40	25	5 năm
	- Điều hoà	50	40	25	3 năm
	- Máy giặt	40	38	25	4 năm
	- Dệt may (thuế suất bình quân)	37,3	13,7	13,7	Ngay khi gia nhập (thực tế đã thực hiện theo các Hiệp định dệt may với Hoa Kỳ và EU)
	- Giày dép	50	40	30	5 năm
	- Xe ô-tô con				
	+ Xe từ 2.500 cc trở lên, chạy xăng	90	90	52	12 năm
	+ Xe từ 2.500 cc trở lên, loại 2 cầu	90	90	47	10 năm
	+ Dưới 2.500 cc và các loại khác	90	100	70	7 năm
	- Xe tải				
	+ Loại không quá 5 tấn	100	80	50	10 năm
	+ Loại thuế suất khác hiện hành 80%	80	100	70	7 năm
	+ Loại thuế suất khác hiện hành 60%	60	60	50	5 năm
	- Phụ tùng ô-tô	20,9	24,3	20,5	3-5 năm
	- Xe máy				
	+ Loại từ 800 cc trở lên	100	100	40	8 năm

Nguồn: http://vnexpress.net/Vietnam/Kinh-doanh/Duong-vao-WTO/2006/11/3B9 F0224/ (truy cập ngày 17/12/2011).

C. *Cam kết về mở cửa thị trường dịch vụ*

Theo thỏa thuận với WTO, Việt Nam cam kết mở cửa đủ 11 ngành dịch vụ, với 110 tiểu ngành so với cam kết mở cửa 8 ngành và 65 tiểu ngành trong Hiệp định thương mại Việt Nam-Hoa Kỳ (viết tắt là 'BTA').

Với hầu hết các ngành dịch vụ, trong đó có những ngành nhạy cảm như bảo hiểm, phân phối, du lịch... Việt Nam giữ được mức độ cam kết gần như trong BTA. Riêng với dịch vụ viễn thông, dịch vụ ngân hàng và chứng khoán, để sớm kết thúc đàm phán, Việt Nam đã có một số bước tiến, nhưng nhìn chung không vượt quá so với tình hình hiện tại và đều phù hợp với định hướng phát triển đã được phê duyệt cho các ngành này.

Nội dung cam kết của một số dịch vụ chính như sau:

1. Cam kết chung cho các ngành dịch vụ

- Công ty nước ngoài không được hiện diện tại Việt Nam dưới hình thức chi nhánh, trừ trường hợp được Việt Nam cho phép đối với từng ngành dịch vụ cụ thể và thực tế những cam kết đó là không nhiều.
- Cho phép tổ chức và cá nhân nước ngoài được mua cổ phần trong các doanh nghiệp Việt Nam, nhưng tỉ lệ phải phù hợp với mức độ mở cửa thị trường của ngành đó. Riêng với dịch vụ ngân hàng, Việt Nam chỉ cho phép ngân hàng nước ngoài được mua tối đa 30% vốn điều lệ của các ngân hàng Việt Nam.
- Công ty nước ngoài được phép đưa cán bộ quản lí vào làm việc tại Việt Nam, nhưng ít nhất 20% cán bộ quản lí của công ty phải là người Việt Nam.

2. Cam kết cụ thể đối với một số dịch vụ cụ thể

(a) Dịch vụ khai thác, hỗ trợ dầu khí

- Cho phép các doanh nghiệp nước ngoài được thành lập công ty 100% vốn nước ngoài sau 5 năm kể từ khi gia nhập để cung ứng dịch vụ hỗ trợ khai thác dầu khí. Tất cả các công ty vào Việt Nam cung ứng dịch vụ hỗ trợ dầu khí đều phải đăng kí với cơ quan có thẩm quyền.
- Việt Nam vẫn giữ nguyên quyền quản lí các hoạt động trên biển, thềm lục địa và quyền chỉ định các công ty thăm dò, khai thác tài nguyên. Việt Nam cũng bảo lưu được một danh mục các dịch vụ dành riêng cho các doanh nghiệp Việt Nam như dịch vụ bay, dịch vụ cung cấp trang thiết bị và vật phẩm cho dàn khoan xa bờ.

(b) Dịch vụ viễn thông

- Cho phép thành lập liên doanh đa số vốn nước ngoài để cung ứng dịch vụ viễn thông không gắn với hạ tầng mạng (phải thuê mạng do doanh nghiệp Việt Nam nắm quyền kiểm soát).
- Đối với dịch vụ viễn thông có gắn với hạ tầng mạng: Chỉ các doanh nghiệp mà nhà nước nắm đa số vốn mới đầu tư hạ tầng mạng, nước ngoài chỉ được góp vốn đến 49% và cũng chỉ được liên doanh với đối tác Việt Nam đã được cấp phép.

(c) Dịch vụ phân phối

- Kể từ ngày 01/01/2009, cho phép thành lập doanh nghiệp 100% vốn nước ngoài.
- Không mở cửa thị trường phân phối xăng dầu, dược phẩm, sách báo, tạp chí, băng hình, thuốc lá, gạo, đường và kim loại quý cho nước ngoài.
- Sau ba năm kể từ ngày gia nhập WTO, mở cửa thị trường đối với một số sản phẩm nhạy cảm như sắt thép, xi măng, phân bón.
- Việc mở điểm bán lẻ thứ hai trở đi của doanh nghiệp có vốn đầu tư nước ngoài phải được Việt Nam cho phép theo từng trường hợp cụ thể.

(d) Dịch vụ bảo hiểm

Về tổng thể, mức độ cam kết tương đương BTA, tuy nhiên, Việt Nam đồng ý cho Hoa Kỳ thành lập chi nhánh bảo hiểm phi nhân thọ sau 5 năm kể từ ngày gia nhập.

(e) Dịch vụ ngân hàng

- Cho phép thành lập ngân hàng con 100% vốn nước ngoài không muộn hơn ngày 01/4/2007.
- Ngân hàng nước ngoài được thành lập chi nhánh tại Việt Nam nhưng chi nhánh đó không được phép mở chi nhánh phụ và vẫn phải chịu hạn chế về huy động tiền gửi bằng đồng Việt Nam (VND) từ thể nhân Việt Nam trong vòng 5 năm kể từ khi Việt Nam gia nhập WTO.
- Phía nước ngoài chỉ được mua tối đa 30% vốn điều lệ của các ngân hàng Việt Nam.

(f) Dịch vụ chứng khoán: Sau 5 năm kể từ khi gia nhập WTO, cho phép thành lập công ty chứng khoán 100% vốn nước ngoài.

(g) Các cam kết khác: Với các ngành dịch vụ còn lại như du lịch, giáo dục, pháp lí, kế toán, xây dựng, vận tải..., mức độ cam kết cơ bản không khác so với BTA. Ngoài ra, Việt Nam không mở cửa dịch vụ in ấn-xuất bản.

3. Các cam kết của Việt Nam sau 10 năm gia nhập WTO

A. *Thực thi cam kết*

Tính đến hết tháng 8/2017, Việt Nam chưa bị bất kỳ Thành viên WTO nào khởi kiện ra DSB. Điều này không có nghĩa là Việt Nam đã thực hiện tốt tất cả các cam kết của mình. Thực tế, năm 2013, Cơ quan Rà soát Chính sách Thương mại của WTO đã tiến hành rà soát lần thứ nhất đối với chính sách thương mại củaViệt Nam. Kết quả rà soát cho thấy, về cơ bản, Việt Nam đã tuân thủ các cam kết của mình. Tuy nhiên, WTO cũng như một số Thành viên WTO đã nêu lên những quan ngại về việc thực thi cam kết mà Việt Nam cần quan tâm để đảm bảo tuân thủ đầy đủ các nghĩa vụ của mình.

1. Sự tuân thủ các cam kết gia nhập WTO của Việt Nam

Theo Báo cáo của Ban thư ký,[377] thực trạng thực thi các cam kết của Việt Nam được mô tả và phân tích ở nhiều khía cạnh. Có thể tóm tắt một số ý chính như sau:

- Cắt giảm thuế: Sau khi gia nhập WTO, Việt Nam đã tiến hành cắt giảm thuế quan theo lộ trình, theo đó, mức thuế suất MNF bình quân được giảm từ mức 18.5% năm 2007 xuống còn 10.4% vào năm 2013.[378]

- Hạn ngạch: Theo đúng cam kết, Việt Nam áp dụng hạn ngạch cho việc nhập khẩu các mặt hàng như trứng, đường, thuốc lá (bao gồm thuốc lá chưa chế biến và phế liệu lá thuốc lá) và muối.[379]

[377] Organe d'examen des politiques commerciales, *Examen des politiques commerciales - Rapport du Secrétariat - Viet Nam,* revision, le 4 novembre 2013, WT/TPR/S/287/Rev.1.

[378] *Tlđd,* WT/TPR/S/287/Rev.1, đoạn 11.

[379] Xem Thông tư số 188/2009/TT-BTC của Bộ Tài chính ngày 29/9/2009 về ban hành Danh mục hàng hóa và thuế xuất thuế nhập khẩu để áp dụng hạn ngạch thuế quan; Thông tư số 111/2012/TT-BTC của Bộ Tài chính ngày 18/8/2012 về ban hành Danh mục hàng hóa và thuế suất thuế nhập khẩu để áp dụng hạn ngạch thuế quan.

- Một số loại thuế nội địa: Thuế tiêu thụ đặc biệt được áp dụng chung, không phân biệt hàng nhập khẩu hay hàng sản xuất trong nước, cho một số mặt hàng như xì gà, đồ uống có cồn, xe có động cơ, xe máy và dịch vụ liên quan đến golf và trò chơi trúng thưởng. Đồng thời, Việt Nam đã ban hành Luật Thuế bảo vệ môi trường, dẫn đến, thuế bảo vệ môi trường được thu đối với năm nhóm hàng hóa.[380]

- Về các biện pháp phi thuế quan: Việt Nam cấm nhập khẩu các hàng hóa bị coi là gây tác động xấu lên sức khỏe và an toàn của con người hoặc vì an ninh quốc gia. Đồng thời, từ năm 2008, Việt Nam đã áp dụng hệ thống cấp phép nhập khẩu tự động cho nhiều loại hàng hóa khác nhau. Việt Nam cũng quy định việc nhập khẩu một số mặt hàng như rượu vang, mỹ phẩm và điện thoại di động chỉ có thể được thực hiện thông qua ba cảng biển. Tính đến hết năm 2012, Việt Nam có khoảng 6.800 các tiêu chuẩn quốc gia, trong đó có khoảng 40% đã được hài hòa hóa với các tiêu chuẩn quốc tế, khu vực hoặc của nước ngoài. Con số này được bổ sung thêm khoảng 813 tiêu chuẩn mới được ban hành vào năm 2013. Đối với các biện pháp SPS, các biện pháp SPS của Việt Nam được đánh giá là tương thích với các tiêu chuẩn do Tổ chức Thú y Thế giới, Codex Alimentarius ban hành hay được chứa đựng trong Công ước quốc tế về Bảo vệ thực vật, …[381]

- Về bảo hộ quyền sở hữu trí tuệ: Công việc này đã rất được Việt Nam quan tâm với việc ban hành nhiều văn bản quy phạm pháp luật về sở hữu trí tuệ và bảo hộ các quyền sở hữu trí tuệ. Hội đồng Sở hữu trí tuệ của WTO cũng đã xem xét và tiến hành đánh giá hệ thống pháp luật Việt Nam về sở hữu trí tuệ vào năm 2008. Nhân dịp này, nhiều Thành viên WTO đã đưa ra những câu hỏi và Việt Nam đã có dịp trả lời và khẳng định sự tương thích của pháp luật của Việt Nam với các quy định của WTO về sở hữu trí tuệ.382

[380] Theo Điều 3 Luật Thuế bảo vệ môi trường năm 2010, năm nhóm hàng này bao gồm: i) Xăng, dầu, mỡ nhờn; ii) Than đá; iii) Dung dịch hydro-chloro-fluoro-carbon (HCFC); iv) túi ni lông; v) một số loại thuốc có tác động đến môi trường (bao gồm thuốc diệt cỏ thuộc loại hạn chế sử dụng; thuốc trừ mối thuộc loại hạn chế sử dụng; thuốc bảo quản lâm sản thuộc loại hạn chế sử dụng và thuốc khử trùng kho thuộc loại hạn chế sử dụng).

[381] *Tlđd,* WT/TPR/S/287/Rev.1, đoạn 13-23.

[382] Conseil des aspects des droits de propriété intellectuelle qui touchent au commerce, *Examen des législations - Viet Nam,* IP/Q/VNM/1, IP/Q2/VNM/1, IP/Q3/VNM/1, IP/Q4/VNM/1, 07/09/2010.

Bên cạnh những vấn đề nêu trên, Báo cáo của Ban thư ký cũng chỉ ra và phân tích chính sác thương mại của Việt Nam ở nhiều lĩnh vực cụ thể khác. Các phân tích này cho thấy Việt Nam đã có nhiều nỗ lực trong cải cách mở cửa nền kinh tế cũng như tuân thủ các cam kết của mình tại WTO.

2. Một số quan ngại về việc thực thi các cam kết tại WTO của Việt Nam

Báo cáo của Ban thư ký và biên bản kỳ họp[383] của Cơ quan Rà soát Chính sách Thương mại cho thấy WTO và nhiều Thành viên WTO quan ngại về việc ban hành và thực thi một số chính sách và quy định liên quan đến thương mại của Việt Nam.

Về phía WTO, Báo cáo của Ban thư ký chỉ ra rằng từ khi Việt Nam gia nhập WTO, Việt Nam chưa thực hiện tốt nghĩa vụ thông báo của mình trong một số lĩnh vực, như: về trợ cấp trong lĩnh vực nông nghiệp; trợ cấp cho lĩnh vực công nghiệp; thương mại Nhà nước; giấy phép nhập khẩu.[384] Về thuế tiêu thụ đặc biệt, sự khác biệt trong việc xác định giá tính thuế giữa hàng nhập khẩu với hàng sản xuất nội địa có thể tạo nên lợi thế cho các nhà sản xuất trong nước.[385] Các vấn đề về hàng giả, vi phạm quyền tác giả hoặc ăn cắp tín hiệu được truyền thông qua hệ thống cáp hoặc vệ tinh, … vẫn còn tồn tại,[386] …

Về phía các Thành viên WTO, Thụy Sỹ cho biết các doanh nghiệp dược phẩm của nước này gặp nhiều rào cản khi cung ứng thuốc và các thiết bị y tế tại Việt Nam, như các nghĩa vụ bổ sung áp dụng cho nhập khẩu thành phẩm của các công ty dược có vốn đầu tư nước ngoài, sự chậm chễ trong việc gia hạn cấp phép lưu hành; không thừa nhận kết quả thử nghiệm ở nước ngoài đối với việc đăng ký các thành phần dược phẩm mới.[387] Hoa Kỳ chỉ ra, sau gần 7 năm là Thành viên WTO, Việt Nam chưa thông báo tới WTO các thủ tục liên quan đến giấy phép nhập khẩu theo quy định của Hiệp định về cấp phép nhập khẩu. Đồng thời, theo Hoa Kỳ, việc áp mã số HS khi nhập khẩu hàng hóa nhiều khi còn chưa thống nhất: hàng hóa giống nhau những lại được áp mã HS khác nhau, tạo nên sự phân biệt đối xử đối với hàng hóa nhập khẩu.[388] Hàn Quốc chỉ ra ba quan ngại chính: i) Chính phủ Việt Nam tiến hành trợ cấp nội địa cho các hoạt động chế tạo dưới hình thức thuế hoặc phi thuế, hoặc thông qua các hoạt động đấu thầu; ii) tình trạng hoạt động của các doanh nghiệp nhà nước; và iii) tình trạng bảo hộ và thực thi các quyền sở hữu trí tuệ ở Việt Nam.[389] Indonesia tiếp tục chỉ ra rằng Việt Nam đã từ chối nhập khẩu nhiều nông sản của Indonesia sau khi áp dụng một số quy định mới về các biện pháp an toàn thực phẩm có nguồn gốc thực vật vào năm 2011, trong khi lại không đưa ra một khoảng thời gian chuyển đổi đủ để các doanh nghiệp Indonesia thích ứng với các quy định mới.[390] Đồng thời, Indonesia cũng quan ngại về việc thủ tục và quy trình đăng ký lưu hành các dược phẩm của Indonesia tại Việt Nam bị kéo dài, dẫn đến việc tăng chi phí và thời gian cho nhập khẩu[391]…

Điều này cho thấy, bên cạnh ghi nhận những kết quả đạt được trong việc ban hành và thực thi các chính sách, quy định về thương mại, WTO và các Thành viên WTO đã chỉ rõ những vấn đề còn tồn tại trong quá trình thực thi các cam kết của Việt Nam. Nói cách khác, WTO và các Thành viên WTO đã theo dõi rất sát sao việc thực thi các nghĩa vụ của Việt Nam. Họ hoàn toàn có thể có những hành động pháp lý theo DSM khi thấy cần thiết để bảo vệ các lợi ích thương mại của mình.

B. *Mở rộng các cam kết*

Sau 10 năm gia nhập WTO, Việt Nam đã chủ động tham gia sâu rộng hơn vào WTO bằng việc phê chuẩn Hiệp định Tạo thuận lợi thương mại và xem xét gia nhập Hiệp định về mua sắm chính phủ.

1. Các cam kết của Việt Nam trong khuôn khổ Hiệp định tạo thuận lợi thương mại

Trải qua hơn 50 phiên đàm phán chính thức cùng với hàng trăm phiên trao đổi, thảo luận và làm việc nhóm,[392] Hiệp định Tạo thuận lợi thương mại (Trade Falicitation Agreement, TFA) đã được các Thành viên thống

383 Organe d'examen des politiques commerciales, *Examen des politiques commerciales - Viet Nam - Compte rendu de la réunion*, les 17 et 19 septembre 2013, WT/TPR/M/287.

384 *Tlđd*, WT/TPR/S/287/Rev.1, đoạn 9.

385 *Tlđd*, WT/TPR/S/287/Rev.1, đoạn 12.

386 *Tlđd*, WT/TPR/S/287/Rev.1, đoạn 23.

387 *Tlđd*, WT/TPR/M/287, đoạn 4.13.

388 *Tlđd*, WT/TPR/M/287, đoạn 4.35-4.38.

389 *Tlđd*, WT/TPR/M/287, đoạn 4.66.

390 *Tlđd*, WT/TPR/M/287, đoạn 4.75.

391 *Tlđd*, WT/TPR/M/287, đoạn 4.76.

392 Centre du commerce international, *Accord de facilitation des échanges de l'OMC: Guide du commerce pour les pays en développement*, 2013, tr. 1-6, xem tại: http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/C-UsersadeagboDesktopFACILITATIONFRENCHWTO%20T%20(1).pdf (truy cập ngày 15/9/2016); Stephen Creskoff, 'The WTO Trade Facilitation Negociations - It's Time to Agree on Basic Principles', *Global Trade and Customs Journal*, 2008, vol. 3, Nº. 5, tr. 149-162.

nhất thông qua tại Hội nghị Bộ trưởng Bali (Indonesia) tháng 12/2013.[393] Đến tháng 12/2014, các Thành viên tiếp tục thông qua Nghị định thư sửa đổi Hiệp định thành lập WTO năm 1994 về việc đưa TFA vào Phụ lục 1A về các hiệp định thương mại đa phương điều chỉnh lĩnh vực thương mại hàng hóa (Protocole Amending the Marrakesh Agreement Establishing the World Trade Organization).[394] Điều này có nghĩa là, sau khi TFA có hiệu lực, TFA sẽ trở thành hiệp định thương mại có giá trị ràng buộc đối với tất cả các Thành viên của WTO đã hoàn thành các thủ tục phê chuẩn nội địa.[395] TFA có nội dung chủ yếu bao trùm các vấn đề về hải quan nhằm thúc đẩy và tạo thuận lợi cho hoạt động vận chuyển, thông quan, giải phóng hàng hóa xuất nhập khẩu, quá cảnh tại các cửa khẩu cũng như các biện pháp hợp tác giữa hải quan các nước và hỗ trợ kỹ thuật. Việc thực thi hiệp định hứa hẹn tạo ra một động lực mới thúc đẩy hoạt động thương mại hàng hóa quốc tế, từ đó, mang lại lợi ích chung cho tất cả các Thành viên WTO[396].

Việt Nam bắt đầu tham gia đàm phán tạo thuận lợi thương mại trong khuôn khổ của WTO từ năm 2008. Ngày 26/11/2015, Quốc hội Việt Nam đã thông qua Nghị quyết số 108/2015/QH13 phê chuẩn Nghị định thư năm 2014. Nhờ đó, Việt Nam trở thành Thành viên thứ 54 phê chuẩn TFA. Có thể thấy, về khía cạnh chính trị và đối ngoại, việc phê chuẩn TFA phù hợp với đường lối và chính sách của Đảng và Nhà nước Việt Nam trong việc tích cực, chủ động hội nhập kinh tế quốc tế; khẳng định mong muốn và nỗ lực của Việt Nam trong việc tăng cường hợp tác quốc tế; góp phần nâng cao vị thế của Việt Nam trong khu vực và quốc tế. Đồng thời, điều này cũng thể hiện nỗ lực của Việt Nam hướng đến cải thiện môi trường đầu tư và kinh doanh, từ đó nâng cao năng lực cạnh tranh của nền kinh tế Việt Nam nói chung và của các doanh nghiệp nói riêng.[397]

[393] Xem nội dung của TFA tại: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (truy cập ngày 01/9/2016). Habib Gherari, 'L'accord de l'OMC sur la facilitation des échanges', *Journal du droit international (Clunet),* 2015, N°. 3, tr. 845-857.

[394] WTO - General Council, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization,* 28 November 2014, WT/L/940.

[395] WTO, 'World Trade Report 2015', 2015, tr. 33, xem tại: https://www.wto.org/english/res_e/booksp_e/world_trade_report15_e.pdf (truy cập ngày 06/9/2016).

[396] Gary Hufbauer & Jeffrey Schott, *Payoff from the World Trade Agenda 2013,* Peterson Institute for International Economics, Report to the ICC Research Foundation, April 2013, tr. 11-16, xem tại: https://piie.com/publications/papers/hufbauerschott20130422.pdf (truy cập ngày 10/09/2016).

[397] Xem các Nghị quyết số 19/NQ-CP của Chính phủ ngày 18/3/2014 về những nhiệm vụ, giải pháp chủ yếu cải thiện môi trường kinh doanh, nâng cao năng lực cạnh tranh quốc gia; Nghị quyết số 19/NQ-CP chủa Chính phủ ngày 12/3/2015 về những nhiệm vụ, giải pháp chủ yếu tiếp tục cải thiện môi trường kinh doanh, nâng cao năng lực cạnh tranh quốc gia hai năm 2015-2016.

Vì là một Thành viên đang phát triển, Việt Nam không có nghĩa vụ phải thực thi tất cả các quy định từ Điều 1 đến Điều 12 của TFA. Trên cơ sở Điều 14 của Hiệp định, Việt Nam đã lựa chọn và phân loại các quy định đó thành ba nhóm cụ thể như sau:

a. Các quy định thuộc nhóm A

Theo Điều 14 TFA, nhóm A hàm chứa các quy định mà một Thành viên đang và kém phát triển lựa chọn để thực thi ngay khi TFA có hiệu lực. Đối với Việt Nam, các quy định của nhóm A bao gồm (*xem bảng 2.8.3*):

Bảng 2.8.3: Các cam kết nhóm A của Việt Nam

STT	Điều, khoản	Tên cam kết
1	1.3	Điểm giải đáp
2	1.4	Thông báo
3	2.1	Cơ hội góp ý và thông tin trước thời điểm có hiệu lực
4	2.2	Tham vấn
5	4.1	Quyền khiếu nại hoặc khiếu kiện
6	6.1	Quy định chung về phí và lệ phí phải thu hoặc có liên quan đến xuất khẩu và nhập khẩu và xử phạt
7	6.2	Quy định cụ thể đánh vào phí và lệ phí hoặc liên quan đến nhập khẩu và xuất khẩu
8	7.8	Các lô hàng được xử lý nhanh
9	9	Vận chuyển hàng hóa dưới sự giám sát hải quan đối với nhập khẩu
10	10.1	Các yêu cầu về thủ tục và chứng từ
11	10.2	Chấp nhận bản sao
12	10.6	Sử dụng Đại lý hải quan
13	10.7	Các thủ tục quản lý biên giới và yêu cầu chứng từ chung
14	11.1-3	Phí quá cảnh, Quy định, và Thủ tục
15	11.4	Quá cảnh tăng cường không phân biệt đối xử

Nguồn: WTO - Preparatory Committee on Trade Facilitation, Notification of Category A Commitments under the Agreement on Trade Facilitation, Communication from Viet Nam, 31 July 2014, WT/PCTF/N/VNM/1, tr. 1-2.

Từ bảng trên, có thể thấy, các cam kết nhóm A của Việt Nam chỉ

liên quan đến khoảng 15 biện pháp được quy định trong TFA. Số lượng các cam kết nhóm A của Việt Nam là khá ít so với nhiều Thành viên WTO khác, trong đó có một số Thành viên ở ASEAN. Tuy nhiên, vì đây là một hiệp định mới, bước đi như vậy thể hiện sự thận trọng của Chính phủ nhằm đảm bảo Việt Nam có thể thực hiện tốt nhất những cam kết của mình về tạo thuận lợi thương mại.[398]

b. Các cam kết nhóm B và C

Ngoài những cam kết thuộc nhóm A nêu trên, các cam kết còn lại sẽ được xếp vào nhóm B hoặc nhóm C. Hiện tại, Việt Nam chưa thông báo cho WTO về việc phân loại các cam kết thuộc nhóm B và C này.

2. Việt Nam - Quan sát viên của Hiệp định Mua sắm chính phủ (GPA)

Hiệp định Mua sắm chính phủ (Government Procurement Agreement, GPA) là một trong những hiệp định nhiều bên của WTO. Bắt nguồn từ Vòng Tokyo, GPA đã được đàm phán song song với các hiệp định khác và được thông qua vào cuối Vòng Uruguay. Trở thành một trong những hiệp định thuộc phụ lục 4 của Hiệp định Marrakesh, GPA có hiệu lực từ ngày 01/01/1996, sau đó, được sửa đổi và văn bản sửa đổi có hiệu lực từ ngày 04/6/2014.[399] Tính đến nay, GPA đã có 42 Thành viên và 31 Thành viên WTO khác là quan sát viên.

Nhận thức được tầm quan trọng của GPA đối với Việt Nam trong tiến trình mở cửa và hội nhập kinh tế quốc tế, ngày 30/11/2012, Việt Nam đã gửi đơn yêu cầu quy chế quan sát viên lên Ủy ban về Mua sắm chính phủ của WTO.[400] Ủy ban đã xem xét đơn và yêu cầu của Việt Nam đã được chấp nhận vào ngày 05/12/2012.[401]

Việc trở thành quan sát viên sẽ giúp Việt Nam có cơ hội tham gia vào các cuộc họp của Ủy ban về Mua sắm chính phủ, từ đó, nắm bắt các vấn đề có liên quan và rút ra các bài học kinh nghiệm cần thiết cho việc xây dựng, hoàn thiện và thực thi khung pháp lý về mua sắm công ở trong nước. Đây cũng là bước đệm cần thiết để Việt Nam quyết định gia nhập GPA trong thời gian tới.

[398] Nguyễn Ngọc Hà, 'Thực thi Hiệp định Tạo thuận lợi thương mại của Tổ chức Thương mại thế giới tại Việt Nam', *Tạp chí Nhà nước và Pháp luật*, 2017, số 4(348), tr. 50-58.

[399] WTO, *Government Procurement Agreement - Opening Markets and Promoting Good Governance*, 2015, xem tại: *https://www.wto.org/english/thewto_e/20y_e/gpa_brochure2015_e.pdf (truy cập ngày 05/8/2017)*.

[400] WTO - Comité des marchés publics, *Demande de statut d'observateur - Communication présentée par le Viet Nam*, GPA/W/321, le 3 décembre 2012, p. 1.

[401] WTO - Comité des marchés publics, *Compte rendu de la réunion formelle du 5 décembre 2012*, GPA/M/49, le 14 janvier 2013, p. 1.

TÓM TẮT CHƯƠNG 2

Trong luật thương mại quốc tế, các quy tắc của WTO đóng vai trò trọng yếu do phạm vi áp dụng và tính toàn diện của chúng. Mặc dù các thành viên WTO liên tục đàm phán để đưa ra các quy tắc tốt hơn trong nhiều vấn đề của thương mại quốc tế, như có thể thấy trong vòng đàm phán gần đây nhất của WTO, Vòng đàm phán Doha, các quy định hiện hành đã đặt ra được những nguyên tắc cơ bản tạo nên các trụ cột cho hệ thống thương mại đa phương hoạt động. Các quy định này cũng điều chỉnh những lĩnh vực chính của thương mại quốc tế, như đã được trình bày trong Chương này, như thương mại hàng hoá, thương mại dịch vụ, IPRs và giải quyết tranh chấp. Vấn đề môi trường, nhân quyền và các hiệp định thương mại khu vực đang đặt ra nhưng thách thức cho WTO trong việc giải quyết mối quan hệ giữa các quy định thương mại của WTO và các quy tắc khác. Cùng với hơn 160 thành viên khác của WTO, Việt Nam hiện đang tích cực tham gia vào thương mại quốc tế theo các quy tắc đặt ra trong các hiệp định của WTO. Phần viết về quá trình gia nhập WTO của Việt Nam năm 2007 và các cam kết của Việt Nam đã làm sáng tỏ quá trình không dễ dàng này cũng như những nghĩa vụ cụ thể của Việt Nam trong các hoạt động kinh tế của mình. Chương này đã trình bày ngắn gọn và rõ ràng các nội dung nêu trên, trong đó có cả những vấn đề mang tính chuyên môn cao như chống bán phá giá ('AD'), trợ cấp và các biện pháp vệ sinh dịch tễ. Đây có thể được xem như xuất phát điểm trong việc tìm hiểu các quy định của WTO của các sinh viên Việt Nam. Các tài liệu đọc thêm được gợi ý ở cuối Chương sẽ là nguồn tham khảo tốt cho sinh viên trên con đường khám phá hơn nữa việc áp dụng các quy định cụ thể của WTO trong thương mại quốc tế. Rất nhiều trong số các quy tắc này đã góp phần phát triển các án lệ của WTO, mà chúng ta có thể dễ dàng tìm đọc trên trang web của WTO về các vụ kiện và phần phân tích. Hệ thống này vẫn đang phát triển với việc các nước tiếp tục nộp đơn xin gia nhập và nhu cầu thiết yếu phải áp dụng thường nhật các quy tắc của nó trong thương mại quốc tế. Là 'người chơi' trong hệ thống đó, Việt Nam cần được trang bị nguồn nhân lực đầy đủ với khả năng nắm vững các quy tắc của hệ thống thương mại đa phương. Chương này là một trong các nỗ lực để đáp ứng nhu cầu đó.

CÂU HỎI/BÀI TẬP

1. Những đối tượng nào có thể tham gia WTO?
2. Những nguyên tắc cơ bản của luật WTO là gì?
3. Việc trợ cấp có hoàn toàn bị cấm theo luật WTO không? Tại sao?
4. Điều XX và Điều XXI GATT có cần thiết không? Tại sao?
5. Trong thương mại hàng hoá trong khuôn khổ WTO, tại sao biện pháp thuế quan được đánh giá là tốt hơn biện pháp phi thuế quan (NTBs)?
6. Bằng cách nào để phân biệt giữa các biện pháp vệ sinh và kiểm dịch động-thực vật (SPS) với các biện pháp rào cản kĩ thuật đối với thương mại (TBT)?
7. Tại sao cần phải có các biện pháp chống bán phá giá (AD), biện pháp đối kháng (CVD) và biện pháp tự vệ? Các biện pháp đó có trái với các nguyên tắc chung của WTO về tự do hoá thương mại hay không? Tại sao?
8. Tại sao WTO không có hiệp định đầu tư toàn diện?
9. Hãy giải thích về tác động của nguyên tắc MFN đối với việc thực hiện các cam kết liên quan đến mở cửa thị trường dịch vụ của một thành viên WTO.
10. Tại sao Hiệp định TRIPS được coi là một trong những trụ cột quan trọng nhất của luật WTO?
11. Tại sao khẳng định rằng: 'Cho đến nay Hiệp định TRIPS là thỏa thuận đa phương toàn diện nhất về IPRs'?
12. Hãy trình bày những khía cạnh thương mại của IPRs được đề cập trong Hiệp định TRIPS?
13. Các DCs được hưởng lợi hay phải gánh chịu những bất lợi từ cơ chế bảo hộ IPRs của Hiệp định TRIPS? Tại sao?
14. Hãy nêu những điểm khác nhau giữa hệ thống giải quyết tranh chấp của WTO và hệ thống giải quyết tranh chấp của GATT 1947?
15. Hãy nêu những cơ hội và thách thức đối với các thành viên DCs trong hệ thống giải quyết tranh chấp của WTO?
16. Mục tiêu của các hiệp định của WTO là gì?

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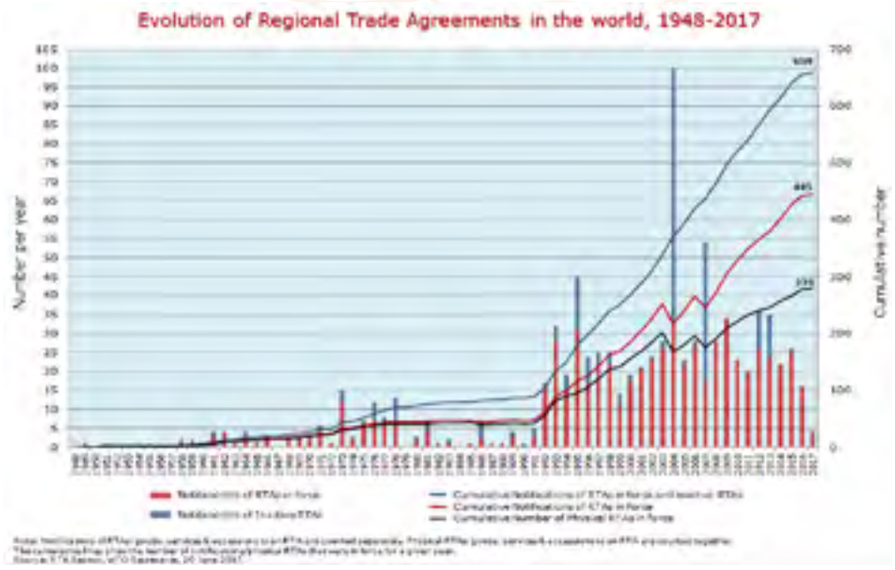
CHƯƠNG 3. PHÁP LUẬT HỘI NHẬP KINH TẾ KHU VỰC

PHÁP LUẬT HỘI NHẬP KINH TẾ KHU VỰC

Mục 1. GIỚI THIỆU

Chủ nghĩa khu vực được mô tả là các hoạt động của chính phủ nhằm tự do hoá hoặc tạo thuận lợi cho thương mại trên nền tảng khu vực, thường dưới hình thức các liên minh hải quan (viết tắt là 'CUs') hoặc các khu vực thương mại tự do (viết tắt là 'FTAs').

Từ những năm 1990, số lượng các hiệp định thương mại khu vực (RTA) đã tăng lên và tốc độ kí kết các RTA cũng trở nên nhanh hơn. Tính đến ngày 18/12/2017, 455 RTA đã được thông báo cho GATT/WTO. Trong số này, 255 hiệp định được kí kết theo Điều XXIV GATT; 49 hiệp định theo 'Điều khoản cho phép' ('Enabling Clause') và 151 hiệp định theo Điều V GATS.[1] Tính đến ngày 30/12/2016, 32 PTAs được thông báo cho GATT/WTO và đã có hiệu lực.[2]



Source: WTO Secretariat, https://www.wto.org/english/tratop_e/region_e/regfac_e.htm (truy cập ngày 21/12/2017).

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[1] WTO, http://rtais.wto.org/UI/publicsummarytable.aspx (truy cập ngày 21/12/2017).

[2] WTO, http://ptadb.wto.org/ptaList.aspx (truy cập ngày 21/12/2017).

1. Quy định của WTO về hội nhập kinh tế khu vực và những ngoại lệ[4]

Đặc điểm chủ yếu của các hiệp định thương mại khu vực (viết tắt là 'RTAs') là các bên tham gia hiệp định dành cho nhau sự đối xử ưu đãi hơn về thương mại so với các đối tác thương mại khác. Sự phân biệt đối xử đó là trái ngược với nghĩa vụ đối xử MFN - một trong những nguyên tắc cơ bản của luật WTO. Tuy nhiên, sự phân biệt đối xử đó được chấp nhận theo quy định tại các điều khoản sau đây: Điều XXIV GATT, Điều V GATS và 'Điều khoản cho phép' và các quy định khác, theo đó các CUs hoặc FTAs được phép thành lập với những điều kiện nhất định. Các án lệ của WTO cũng là nguồn luật rất quan trọng về vấn đề này, đặc biệt là án lệ *Turkey-Restriction on Imports of Textiles and Other Clothing Products* [1999],[5] và án lệ *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, [2002].[6] Các quy định nói trên đã tạo ra các 'ngoại lệ hội nhập kinh tế khu vực' của nguyên tắc cơ bản MFN.

A. Cơ sở pháp lí của RTAs

Các thành viên WTO được phép gia nhập RTA theo quy định của những điều khoản dưới đây:

- Điều XXIV GATT (từ khoản 4 đến khoản 10) và các điều khoản có liên quan quy định về việc thành lập và hoạt động của CU và FTA trong lĩnh vực thương mại hàng hoá;
- Quyết định năm 1979 về đối xử khác biệt và ưu đãi hơn, có đi có lại và tham gia đầy đủ hơn của các DCs, được gọi là 'Điều khoản cho phép', đề cập đến các thoả thuận thương mại ưu tiên (viết tắt là 'PTAs') trong thương mại hàng hoá giữa các DCs;
- Điều V GATS điều chỉnh việc kí kết RTA trong lĩnh vực thương mại dịch vụ, dành cho cả các nước phát triển và các DCs; và

[3] WTO, http://www.wto.org

[4] WTO, http://www.wto.org

[5] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Turkey-Restriction on Imports of Textiles and Other Clothing Products* [1999], WT/DS34/AB/R, thông qua ngày 19/11/1999, http://www.wto.org.

[6] WTO, Báo cáo của Ban hội thẩm, vụ *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* [2002], WT/DS202/R, thông qua ngày 08/3/2002, http://www.wto.org.

Điều Vbis GATS quy định về các thoả thuận hội nhập kinh tế trong lĩnh vực dịch vụ;

- Các án lệ có liên quan của WTO, đặc biệt là án lệ *Turkey-Restriction on Imports of Textiles and Other Clothing Products* [1999] và án lệ *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, [2002].

1. Điều XXIV GATT và các điều khoản có liên quan

Điều XXIV GATT ban đầu được bổ sung bằng 'Điều khoản bổ sung Điều XXIV', đã được cập nhật vào năm 1994 bằng Hiệp định của Vòng đàm phán Uruguay về Điều XXIV GATT.

Theo Điều XXIV GATT, trong trường hợp CU hoặc FTA được thành lập, thuế quan và các rào cản thương mại khác sẽ được giảm hoặc loại bỏ về cơ bản đối với tất cả các lĩnh vực thương mại trong CU hoặc FTA đó.

Điều XXIV:5 GATT quy định về ngoại lệ có điều kiện và có giới hạn như sau:

> Các quy định của Hiệp định này không ngăn cản... [s]ự thành lập liên minh hải quan hoặc khu vực thương mại tự do, hoặc việc thông qua hiệp định tạm thời cần thiết cho sự hình thành liên minh hải quan hoặc khu vực thương mại tự do.

Với điều kiện thuế quan đối ngoại và các quy chế thương mại khác 'về tổng thể… [k]hông cao hơn hoặc hạn chế hơn những tác động chung so với trước khi thành lập liên minh hải quan hoặc khu vực thương mại tự do đó'. Đây là điều kiện 'đối ngoại'.

Ngoài ra, hiệu lực của ngoại lệ (Điều XXIV GATT) phụ thuộc vào sự tồn tại của CU hoặc FTA hoặc hiệp định tạm thời. Theo Điều XXIV GATT, nếu CU hoặc FTA được định nghĩa theo cách hạn chế, thì nó sẽ phải tiếp tục tuân thủ điều kiện 'đối nội'. Điều kiện này nằm trong khoản 8(a) Điều XXIV GATT, quy định rằng thuế quan và các quy chế thương mại hạn chế khác phải bị loại bỏ đối với hầu hết các lĩnh vực thương mại. Các điều kiện 'đối nội' và 'đối ngoại' nói trên bao gồm nhiều vấn đề rất khó giải thích.

Bên cạnh đó, Hiệp định của Vòng đàm phán U-ru-goay về Điều XXIV GATT cũng quy định một số giải thích và các yêu cầu bổ sung đối với các RTAs.

2. Điều V GATS

Điều V GATS đóng vai trò tương đương như Điều XXIV của GATT nhưng khác với Điều XXIV GATT. Điều V GATS quy định về các thoả thuận hội nhập kinh tế trong lĩnh vực dịch vụ. Khoản 1 của điều này quy định: 'Hiệp định này không ngăn cản bất kì thành viên nào trở thành một bên hoặc gia nhập hiệp định tự do hoá thương mại dịch vụ giữa các bên tham gia hiệp định đó'. Bên cạnh đó, Điều Vbis GATS còn quy định về các thoả thuận hội nhập thị trường lao động.

3. 'Điều khoản cho phép'

'Quyết định năm 1979 về đối xử khác biệt và ưu đãi hơn, có đi có lại và tham gia đầy đủ hơn của các nước đang phát triển' hoặc 'Quyết định ngày 28/11/1979 (L/4903)', hay còn gọi là 'Điều khoản cho phép' cho phép các DCs gia nhập các hiệp định toàn cầu hoặc khu vực, trong đó quy định giảm hoặc loại bỏ thuế quan và các rào cản phi thuế quan trong thương mại giữa các nước này với nhau. Nó cho phép vi phạm nguyên tắc MFN theo hướng có lợi cho các DCs.

'Điều khoản cho phép' năm 1979 đã trở thành bộ phận của luật WTO theo Phụ lục 1A Hiệp định Marrakesh, quy định các ngoại lệ của nghĩa vụ đối xử MFN theo hai cách. *Thứ nhất*, cho phép các bên kí kết dành sự đối xử ưu đãi một chiều cho hàng hoá nhập khẩu từ các DCs. *Thứ hai*, cho phép thiết lập các RTAs giữa các LDCs.

4. Các án lệ của WTO

Trong án lệ *Turkey-Restriction on Imports of Textiles and Other Clothing Products* [1999], Ấn Độ khiếu nại rằng việc Thổ Nhĩ Kỳ áp đặt các biện pháp hạn chế số lượng đối với 19 sản phẩm dệt may của nước này là 'không cần thiết' theo Quyết định số 1/952 (1995) của Hội đồng Hiệp hội Thổ Nhĩ Kỳ-EC, theo đó vạch ra quy tắc thực thi giai đoạn cuối của việc thành lập CU giữa Thổ Nhĩ Kỳ và Cộng đồng châu Âu, đồng thời ghi nhận điều khoản theo đó Thổ Nhĩ Kỳ phải áp dụng 'chính sách thương mại, về cơ bản, giống như Cộng đồng châu Âu, đối với lĩnh vực hàng dệt may, bao gồm các hiệp định hoặc thoả thuận về thương mại hàng dệt may'. Thổ Nhĩ Kỳ phản bác rằng: do việc áp đặt hạn ngạch đối với hàng dệt may được thực hiện theo quy định về thành lập CU, nên nó phù hợp với Điều XXIV GATT.[7] Trong vụ này, Cơ quan phúc thẩm xem xét mối quan hệ giữa Điều XXIV GATT và các điều khoản khác của GATT. Đặc

[7] WTO, Báo cáo của Cơ quan phúc thẩm, vụ *Turkey-Restriction on Imports of Textiles and Other Clothing Products* [1999], http://www.wto.org.

biệt, câu hỏi đặt ra là liệu có phải Điều XXIV của GATT được áp dụng chỉ nhằm tạo ra ngoại lệ của riêng nguyên tắc MFN, hay nó còn tạo ra ngoại lệ của các nguyên tắc khác của GATT?[8]

Trong vụ *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* [2002], Hàn Quốc khiếu kiện rằng với việc không áp dụng biện pháp tự vệ (dưới hình thức hạn ngạch thuế quan) đối với mặt hàng đường ống của Mexico và Canada, Hoa Kỳ đã vi phạm nguyên tắc MFN quy định tại Điều I, khoản 1 Điều XIII, và Điều XIX của GATT, và khoản 2 Điều 2 Hiệp định Tự vệ (viết tắt là 'SA'). Hoa Kỳ phản biện bằng cách lập luận rằng sự đối xử khác biệt dành cho hàng nhập khẩu từ Mexico và Canada (cả hai nước này đều là thành viên của NAFTA) được biện minh trên cơ sở 'ngoại lệ hạn chế' theo Điều XXIV GATT.[9]

B. Tại sao các quy định điều chỉnh RTAs được quy định trong luật WTO?[10]

Có nhiều lí do giải thích tại sao các quy định điều chỉnh RTAs lại được quy định trong luật WTO. Có thể nêu một số lí do sau đây:

Thứ nhất, RTAs có thể hỗ trợ cho hệ thống thương mại đa phương của WTO. RTAs cho phép một nhóm nước đàm phán các quy định và cam kết vượt ra ngoài giới hạn các cam kết của WTO.

Thứ hai, một số quy định có vai trò mở đường cho thoả thuận trong WTO. Dịch vụ, sở hữu trí tuệ và tiêu chuẩn môi trường, đầu tư và chính sách cạnh tranh là tất cả các vấn đề được đưa ra trong các cuộc đàm phán RTAs, và sau đó phát triển thành các thoả thuận được bàn bạc nhiều trong khuôn khổ WTO.

Thứ ba, các hiệp định của WTO thừa nhận rằng RTAs và hội nhập kinh tế sâu sắc hơn có thể đem lại lợi ích cho các nước. Thông thường, việc thiết lập CU hoặc FTA thường trái với các nguyên tắc của WTO về đối xử bình đẳng áp dụng cho tất cả các đối tác thương mại (nguyên tắc MFN). Tuy nhiên, Điều XXIV GATT cho phép RTAs được thành lập như một trường hợp ngoại lệ, với điều kiện đáp ứng được các tiêu chuẩn chặt chẽ nhất định.

[8] Joel P. Trachtman, *Handbook of International Economic Law*, 'Chapter on International Trade: Regionalism', (2006). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885660

[9] WTO, Báo cáo của Ban hội thẩm, vụ *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* [2002], WT/DS202/R, thông qua ngày 08/3/2002, http://www.wto.org.

[10] WTO, http://www.wto.org.

Thứ tư, RTA có thể giúp dòng chảy thương mại được tự do hơn giữa các nước trong nhóm mà không có các rào cản, nghĩa là có thể bổ sung cho hệ thống thương mại toàn cầu mà không hề đe dọa sự tồn tại của hệ thống thương mại toàn cầu.

C. Lí do kinh tế của việc thành lập RTAs

Người ta cho rằng tự do hoá thương mại sẽ diễn ra nhanh hơn nếu nó được tiến hành trong khối thương mại khu vực. Mặc dù động cơ kinh tế đóng vai trò quyết định trong việc cho ra đời một RTA, nhưng các lợi ích kinh tế lại không luôn luôn được đánh giá cao như vậy. Đối với các DCs, nhu cầu mở rộng thị trường xuất khẩu luôn luôn là động cơ chủ yếu của việc quyết định đàm phán RTA, đặc biệt trong trường hợp thành viên của RTA là thị trường xuất khẩu quan trọng. Đối với các nước phát triển như Nhật Bản, EU và Hoa Kỳ, lợi ích kinh tế do RTAs tạo ra luôn luôn được đánh giá trong bối cảnh rộng hơn. Thông qua RTAs, các nước phát triển sẽ có thể đẩy 'biên giới kinh tế' vượt xa hơn biên giới hải quan truyền thống. Sự khác nhau về lợi ích giữa chính các bên là lí do tại sao các cuộc đàm phán RTAs giữa các DCs và các nước phát triển đôi khi trở nên khó khăn.

D. Lí do chính trị của việc thành lập RTAs

Dưới đây là một số lí do:

- Trong trường hợp hội nhập châu Âu, thông qua hội nhập kinh tế, các nước thành viên EU đã cố gắng thành lập và đã thành công trong việc thành lập một liên minh gắn bó chặt chẽ hơn bao giờ hết giữa các dân tộc châu Âu, nhằm ngăn ngừa chiến tranh tái diễn.
- RTAs có thể tăng cường sự tham gia của các nước thành viên trong WTO, đặc biệt là trường hợp của các DCs, như trường hợp Việt Nam gia nhập WTO.
- Thông qua RTAs, một nước thành viên có thể duy trì khả năng cạnh tranh và ảnh hưởng của nó đối với các bên tham gia thương mại. Việc thiết lập RTAs giữa Trung Quốc, Nhật Bản, Hàn Quốc, Úc, Ấn Độ với ASEAN, hoặc RTA giữa ASEAN và EU, Hiệp định đối tác xuyên Thái Bình Dương (viết tắt là 'TPP') là các ví dụ điển hình cho các động cơ chính trị này.

- Các RTAs thường thúc ép các nước thành viên phải thay đổi trong nhiều lĩnh vực - những lĩnh vực không được điều chỉnh toàn diện trong các hiệp định của WTO - như môi trường, lao động và đầu tư.

2. Hội nhập kinh tế khu vực - Khái niệm truyền thống và sự phát triển

A. *Các cấp độ hội nhập kinh tế khu vực truyền thống*

Bằng chứng đầu tiên của hội nhập kinh tế khu vực đã tồn tại từ đầu thế kỉ XVI. Lúc đó, một nhóm các thành phố ở Bắc Âu đã thành lập Liên minh Hansetic nhằm mục đích bảo vệ lợi ích thương mại của họ trên cơ sở nguyên tắc có đi có lại.

Kể từ khi thành lập vào năm 1957, Cộng đồng kinh tế châu Âu ('EEC') đã là ví dụ điển hình của chủ nghĩa khu vực. Từ năm 1957, theo quan điểm của châu Âu về hội nhập kinh tế khu vực, *bước đầu tiên* của quá trình hội nhập đó bắt đầu bằng FTA, trong đó thuế quan và các rào cản phi thuế quan ('NTBs') được loại bỏ đối với hàng nhập khẩu trong nội bộ khu vực, nhưng mỗi thành viên vẫn duy trì rào cản thương mại đối ngoại của mình. FTA truyền thống được hiểu là: 'Một nhóm hai hoặc nhiều nước cùng nhau loại bỏ thuế quan và hầu hết các rào cản phi thuế quan gây tác động đến thương mại giữa các nước, trong khi đó mỗi nước vẫn áp dụng lộ trình thuế quan độc lập của riêng mình đối với hàng hoá nhập khẩu từ nước không phải là thành viên'.[11]

Điều XXIV GATT nói trên nêu lên ý nghĩa của FTA trong GATT và chỉ rõ hiệu lực của các quy định khác của GATT liên quan đến FTAs.

Bước thứ hai của hội nhập kinh tế khu vực là xây dựng CU - vốn được coi là 'FTA+' với thuế quan đối ngoại chung. *Bước thứ ba* là xây dựng thị trường chung (viết tắt là 'CM') bao gồm sự tự do dịch chuyển vốn và lao động. Trong CM, các thành viên có thể phối hợp mạnh mẽ hơn nữa các chính sách thương mại đối ngoại. *Bước thứ tư* là xây dựng liên minh tiền tệ và kinh tế (viết tắt là 'EMU') bao gồm sự tự do dịch chuyển tất cả các yếu tố kinh tế như hàng hoá, dịch vụ, lao động và vốn. Bên cạnh đó, EMU còn nhằm mục đích thống nhất các chính sách tiền tệ, tài chính và xã hội (*xem* Mục 2 - Chương 3 của Giáo trình).

[11] Ralph H. Folsom và các tác giả, *2003 Documents Supplement to International Business Transactions - A Problem-Oriented Coursebook*, American Casebook Series, Thomson West, 6th edn., (2003), tr. 9.

B. *Sự phát triển của các mô hình hội nhập kinh tế khu vực*

Phạm vi điều chỉnh và chiều sâu của sự đối xử ưu đãi được ghi nhận trong các RTAs không giống nhau. Các RTAs hiện đại, và không chỉ các RTAs liên quan đến các nền kinh tế phát triển nhất, có khuynh hướng không dừng lại ở cam kết giảm thuế quan. Các hiệp định đó đề ra các quy định ngày càng phức tạp nhằm điều chỉnh thương mại nội ngành (*ví dụ* liên quan đến tiêu chuẩn sản phẩm, các điều khoản về tự vệ, quản lí hải quan v.v.) và cũng đề ra khuôn khổ quy định ưu đãi đối với thương mại dịch vụ có đi có lại. Các RTAs tinh vi nhất đã vượt ra khỏi các cơ chế chính sách thương mại truyền thống, nó bao gồm các quy định khu vực điều chỉnh đầu tư, cạnh tranh, môi trường và lao động. Các RTAs hiện nay được mở rộng về mặt địa lí, với các thoả thuận xuyên lục địa, không chỉ bó hẹp trong nội bộ khu vực. Các RTAs có thể là các thoả thuận giữa các nước không nhất thiết nằm trong cùng khu vực địa lí, *ví dụ* FTA Hoa Kỳ - Singapore. Vì thế, Joel P. Trachtman cho rằng 'Thuật ngữ chính xác hơn [về RTA]… [c]ó thể là "hội nhập tiểu đa phương" hay "hiệp định thương mại ưu tiên" ('PTA')'.[12]

Xu hướng của các FTAs không phải là hiện tượng mới. Tuy nhiên, nó thực sự là hiện tượng đang tăng nhanh kể từ những năm 1990 đến nay.

Trước kia, các FTAs 'truyền thống' được thiết lập thường xuyên giữa các nước có những điểm tương đồng nhất định về chế độ chính trị, trình độ phát triển, khu vực địa lí hoặc cơ cấu thị trường. Những hiệp định này được gọi là các FTAs 'Bắc-Bắc' (như Cộng đồng kinh tế châu Âu - EEC trước đây), hoặc các FTAs 'Nam-Nam' (như AFTA, MERCOSUR). Gần đây, các FTAs đã hình thành một cách linh hoạt hơn và chấp nhận sự khác biệt về địa lí và quan điểm chính trị giữa các nước thành viên, đặc biệt là khi có sự tham gia của 'các nền kinh tế mới nổi' (*ví dụ*, Trung Quốc, Ấn Độ, Liên bang Nga và Brazil).

Bên cạnh EU, NAFTA là ví dụ điển hình khác của hội nhập kinh tế khu vực. NAFTA là FTA trong đó có sự tự do dịch chuyển hàng hoá, dịch vụ, lao động, vốn và sự hợp tác chặt chẽ về lĩnh vực IPR (*xem* Mục 3 - Chương 3 của Giáo trình).

[12] Joel P. Trachtman, *Handbook of International Economic Law*, 'Chapter on International Trade: Regionalism', (2006). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885660.

Mục 2. PHÁP LUẬT VỀ THỊ TRƯỜNG NỘI KHỐI CỦA LIÊN MINH CHÂU ÂU (EU)[13]

Tính đến thời điểm tháng 12/2017, với 28 quốc gia thành viên, 500 triệu dân và sử dụng 24 ngôn ngữ chính thức, Liên minh châu Âu (EU) là tổ chức có quyền lực pháp lí rất lớn. EU tạo ra một trật tự pháp luật không phải là luật quốc gia cũng không giống với luật quốc tế truyền thống, mà đó là 'luật siêu quốc gia'. Tôn chỉ của EU là 'Thống nhất trong đa dạng'. Ngày 09/5 hàng năm là 'Ngày châu Âu'.

Các đối tác thương mại của các nước thành viên EU và các doanh nghiệp có quan hệ kinh doanh với các doanh nghiệp của các nước thành viên EU đều cần hiểu biết về luật EU nói chung và các quy định của luật EU điều chỉnh quan hệ thương mại nội khối và quan hệ thương mại quốc tế của các nước thành viên EU.

1. Tổng quan về luật EU và các quan hệ thương mại đối ngoại của EU

A. *Luật EU*

1. Quá trình phát triển của EU

(a) Ý tưởng về EU và những người sáng lập EU

EU được thành lập sau Chiến tranh thế giới lần thứ II. Những bước đầu tiên được thực hiện nhằm thúc đẩy tiến trình hợp tác kinh tế, với triết lí khi các nước tiến hành thương mại với nhau thì sẽ phụ thuộc lẫn nhau về mặt kinh tế, từ đó tránh được các xung đột. Cha đẻ của ý tưởng này là Winston Churchill, Konrad Adenauer, Alcide De Gasperi, Robert Schuman, và Jean Monnet.

(b) Quá trình mở rộng của EU

Từ 6 quốc gia thành viên ban đầu, hiện nay EU đã mở rộng thành liên minh gồm 28 thành viên.

- Năm 1951, Cộng đồng than thép châu Âu (viết tắt là 'ECSC') được thành lập bởi 6 nước thành viên sáng lập: Pháp, Đức, Bỉ, Hà Lan, Luxemburg và Italia.
- Năm 1973, mở rộng lần đầu tiên - thêm các thành viên: Đan Mạch, Irland và Vương quốc Anh.
- Năm 1981, mở rộng lần thứ hai - thêm Hy Lạp.
- Năm 1986, mở rộng lần thứ ba - thêm Tây Ban Nha và Bồ Đào Nha.
- Năm 1995, mở rộng lần thứ tư - thêm Áo, Phần Lan, Thụy Điển.
- Năm 2004, mở rộng lần thứ năm - thêm Síp, Séc, Estonia, Hungary, Latvia, Litva, Malta, Phần Lan, Slovakia và Slovenia.
- Năm 2007, mở rộng lần thứ sáu - thêm Bulgaria và Romania.
- Năm 2013, mở rộng lần thứ bảy- thêm Croatia.

Ngoài ra, hiện nay các nước ứng cử gia nhập EU bao gồm Cộng hoà Macedonia (thuộc Nam Tư cũ), Thổ Nhĩ Kỳ, Iceland, và Montenegro.

(c) Các tiêu chí gia nhập EU

- Có nền dân chủ và pháp quyền;
- Có nền kinh tế thị trường đang vận hành;
- Đủ năng lực thực thi pháp luật EU.

Con đường đi đến một Thị trường châu Âu thống nhất thực sự không hề bằng phẳng. Bên cạnh những khác biệt tương đối về chính trị và văn hoá, sự không đồng đều về trình độ kinh tế giữa các nước thành viên cũng tạo ra những rào cản nhất định trong tiến trình hội nhập khu vực.

2. Các thiết chế của EU

(a) Hội đồng châu Âu (European Council)

Đây là Hội nghị thượng đỉnh của những người đứng đầu nhà nước và chính phủ các nước EU. Đây là cơ quan quan trọng của EU - đại diện cho các chính phủ của 28 nước thành viên, nhưng không phải là một thiết chế trong bộ máy của EU. Hội đồng châu Âu họp ít nhất bốn lần một năm. Cơ quan này đề ra những định hướng tổng thể cho các chính sách của EU, và xử lí những vấn đề phức tạp và nhạy cảm đã không thể giải quyết được ở cấp độ hợp tác liên chính phủ thấp hơn. Tuy nhiên, cơ quan này không có thẩm quyền lập pháp.

Hội đồng châu Âu quyết định trên cơ sở đồng thuận, trừ khi các hiệp ước thành lập EU quy định khác. Trong một số trường hợp, quyết định được thông qua trên cơ sở nhất trí hoặc đa số tuyệt đối, tùy theo quy định của các hiệp ước nêu trên.

[13] EU, http://europa.eu

(b) Nghị viện châu Âu (European Parliament)

Nghị viện châu Âu được thành lập thông qua bầu cử trực tiếp và đại diện cho tiếng nói của người dân EU, nhiệm kì 5 năm. Nghị viện châu Âu là một trong những thiết chế lập pháp chủ yếu của EU, quyết định những vấn đề về pháp luật và ngân sách của EU cùng với Hội đồng bộ trưởng, giám sát toàn diện các công việc của EU, có quyền miễn nhiệm Ủy ban châu Âu và áp dụng quyền phủ quyết đối việc gia nhập EU của nước ứng cử viên.

(c) Hội đồng bộ trưởng hay Hội đồng Liên minh châu Âu (Council of Ministers) - Tiếng nói của các nước thành viên EU.

Đây là cơ quan có quyền quyết định cao nhất của EU. Mỗi thành viên EU có một đại diện tại Hội đồng bộ trưởng, thường là bộ trưởng ngoại giao hoặc bộ trưởng chịu trách nhiệm về vấn đề được thảo luận. Vị trí chủ tịch Hội đồng được quay vòng sáu tháng một lần. Hội đồng bộ trưởng quyết định những vấn đề về pháp luật và ngân sách của EU cùng với Nghị viện châu Âu, đồng thời điều hành chính sách chung về ngoại giao và an ninh.

Số phiếu biểu quyết của mỗi nước thành viên EU tại Hội đồng Bộ trưởng (2016) [14]

Đức, Pháp, Italia, và Vương quốc Anh	29
Tây Ban Nha và Ba Lan	27
Romania	14
Hà Lan	13
Bỉ, Séc, Hy Lạp, Hungary và Bồ Đào Nha	12
Áo, Bulgaria và Thụy Điển	10
Croatia, Đan Mạch, Irland, Litva, Slovakia và Phần Lan	7
Estonia, Síp, Latvia, Luxembour và Slovenia	4
Malta	3
Tổng:	**352**

Kể từ năm 2014, tỉ lệ đa số các nước tham gia bỏ phiếu tối thiểu là 15 nước, và tối thiểu 65% dân số EU ủng hộ, hay còn gọi là 'đa số kép'.

[14] European Union, *The Council of the EU*, http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/.

Hội đồng bộ trưởng có các nhiệm vụ sau đây:

i) Thông qua luật EU;

ii) Điều phối chính sách kinh tế của các nước thành viên EU;

iii) Kí kết điều ước giữa EU với các nước khác;

iv) Phê duyệt ngân sách hàng năm của EU;

v) Phát triển chính sách đối ngoại và phòng vệ của EU;

vi) Điều phối hoạt động hợp tác giữa toà án và các lực lượng cảnh sát của các nước thành viên.

(d) Ủy ban châu Âu (European Commission) - Thiết chế thúc đẩy các lợi ích chung.

Ủy ban châu Âu bao gồm 28 ủy viên độc lập, mỗi ủy viên là đại diện của một nước EU. Ủy ban châu Âu là cơ quan chấp hành của EU, có thẩm quyền đề xuất pháp luật. Đồng thời, đây là cơ quan giám sát thực thi các điều ước quốc tế, đảm bảo việc thực thi pháp luật và không vi phạm các điều ước quốc tế của các nước thành viên EU. Ủy ban châu Âu đại diện cho EU trên trường quốc tế.

(e) Toà án công lí EU (Court of Justice of the European Union)

Toà án công lí EU là cơ quan xét xử của EU và Cộng đồng năng lượng nguyên tử châu Âu (viết tắt là 'EURATOM'), bao gồm 3 toà án: i) Toà án công lí ('Court of Justice'); ii) Toà án chung ('General Court') (thành lập năm 1988); và iii) 'Toà công chức' ('Civil Service Tribunal') (thành lập năm 2004). Nhiệm vụ cơ bản của các cơ quan này là xem xét tính hợp pháp của các biện pháp của EU và bảo đảm tính thống nhất trong việc giải thích và áp dụng luật EU.

i) 'Toà án công lí' ('Court of Justice'): Trước khi Hiệp ước Lisbon có hiệu lực ngày 01/12/2009, toà án này được gọi là 'Toà án công lí châu Âu' ('European Court of Jutice', viết tắt là 'ECJ'). Toà án công lí bao gồm 27 thẩm phán (mỗi nước EU được cử một thẩm phán), được trợ giúp bởi 8 tổng chưởng lí ('Advocates-general') - thực hiện nhiệm vụ trình bày ý kiến về vụ việc được khởi kiện trước Toà án công lí. Họ được bổ nhiệm với nhiệm kì 6 năm và có thể được tái bổ nhiệm. Toà án công lí có nhiệm vụ sau đây: (i) Giải thích luật EU, nhằm bảo đảm rằng luật EU phải được áp dụng thống nhất ở tất

cả các nước thành viên EU; (ii) Giải quyết tranh chấp về pháp luật giữa các chính phủ các nước thành viên EU và các thiết chế của EU; ngoài ra, các cá nhân, công ty, tổ chức cũng có thể khởi kiện trước Toà án công lí, nếu quyền của họ bị xâm phạm bởi một thiết chế của EU.

ii) 'Toà án chung' ('General Court'): Trước khi Hiệp ước Lisbon có hiệu lực ngày 01/12/2009, toà án này được gọi là 'Toà sơ thẩm châu Âu' ('Court of First Instance', viết tắt là 'CFI'). Để giúp Toà án công lí xử lí một số lượng lớn các vụ kiện và giúp cho các công dân được bảo vệ tốt hơn về mặt pháp luật, một Toà án chung (General Court) đã được thành lập năm 1988 (khi đó là CFI) để giải quyết các vụ kiện của cá nhân, công ty và một số tổ chức, và các vụ kiện liên quan đến luật cạnh tranh. Toà án chung bao gồm ít nhất 27 thẩm phán (trong đó mỗi nước thành viên cử đến một thẩm phán), với nhiệm kì 6 năm và có thể được tái bổ nhiệm. Không giống Toà án công lí, Toà án chung không có tổng chưởng lí thường trực ('Advocates-general'). Trong trường hợp đặc biệt, nhiệm vụ của tổng chưởng lí sẽ do một thẩm phán thực hiện.

iii) 'Toà công chức' ('Civil Service Tribunal'): được thành lập năm 2004, thực hiện nhiệm vụ giải quyết tranh chấp giữa EU và các công chức EU. Toà công chức bao gồm 7 thẩm phán do Hội đồng châu Âu bổ nhiệm với thời hạn 6 năm và có thể được tái bổ nhiệm.

(f) Toà kiểm toán châu Âu (European Court of Auditors) - Thiết chế giám sát các hoạt động tài chính của EU. Toà kiểm toán bao gồm 28 thành viên độc lập, mỗi thành viên đến từ một nước EU. Nhiệm vụ của cơ quan này là kiểm tra việc các khoản tài chính của EU có được sử dụng hợp lí hay không thông qua tiến hành kiểm toán đối với các cá nhân và tổ chức sử dụng nguồn tiền của EU.

(g) Ủy ban kinh tế và xã hội châu Âu (European Economic and Social Committee) là ủy ban tư vấn, đại diện cho tiếng nói của các cộng đồng dân sự như các nghiệp đoàn, người sử dụng lao động, nông dân, người tiêu dùng v.v. tham gia tư vấn về pháp luật và chính sách mới của EU. Ủy ban này thúc đẩy sự tham gia của các cộng đồng dân sự trong các vấn đề của EU.

(h) Ủy ban các vùng (Committee of the Regions) cũng là ủy ban tư vấn của EU, đại diện cho tiếng nói của chính quyền địa phương. Ủy ban này đại diện cho các thành phố và các vùng, tham gia tư vấn pháp luật và chính sách của EU, nhằm thúc đẩy sự tham gia của chính quyền địa phương trong các vấn đề của EU.

(i) Ngân hàng trung ương châu Âu (European Central Bank - viết tắt là 'ECB') là thiết chế điều hành chính sách tiền tệ của Khu vực đồng tiền chung châu Âu ('Eurozone'), bao gồm 17 nước thành viên. ECB đảm bảo sự ổn định của giá cả, quản lí nguồn cung tiền và ấn định lãi suất. Cơ quan này hoạt động độc lập với chính phủ các nước thành viên.

(j) Các thiết chế khác của EU, *ví dụ*, Ngân hàng đầu tư châu Âu (European Investment Bank) và các cơ quan khác.

Cần tránh sự nhầm lẫn giữa Hội đồng châu Âu (European Council), Hội đồng bộ trưởng hay Hội đồng liên minh châu Âu (Council of Ministers hay Council of the EU), và Hội đồng châu Âu (Council of Europe). Hội đồng châu Âu (Council of Europe) không phải là một thiết chế của EU. Đây là tổ chức quốc tế được thành lập năm 1949 với mục đích bảo vệ nhân quyền và củng cố nền dân chủ trên khắp châu Âu, đồng thời thúc đẩy những đặc trưng văn hoá của châu Âu, và là cầu nối giữa Đông Âu và Tây Âu.

3. Thủ tục thông thường để ban hành các quyết định của EU

Thủ tục thông thường để ban hành quyết định của EU được gọi là 'Thủ

tục lập pháp thông thường' ('Ordinary Legislative Procedure'), theo đó luật EU do Nghị viện châu Âu cùng với Hội đồng châu Âu phê chuẩn. Còn Ủy ban châu Âu là cơ quan lập dự thảo và thực thi pháp luật.

4. Cấu trúc của luật EU: Ba trụ cột

Pháp luật EU được cấu trúc dựa trên ba trụ cột.

- Trụ cột thứ nhất là pháp luật liên quan đến các quyền kinh tế và xã hội, bao gồm Hiệp ước thành lập Cộng đồng châu Âu (viết tắt là 'TEC'), được kí kết tại Rome năm 1957 và sau này được sửa đổi, bổ sung bởi các Hiệp ước kí kết giữa các nước thành viên. Trụ cột thứ nhất của pháp luật EU chính là luật cộng đồng châu Âu (EC Law). Sau khi Hiệp ước Lisbon có hiệu lực ngày 01/12/2009, luật cộng đồng châu Âu đã trở thành luật EU.
- Trụ cột thứ hai liên quan đến chính sách ngoại giao và an ninh chung của EU ('CFSP'), hình thành theo Hiệp ước Liên minh châu Âu (viết tắt là 'TEU') kí kết tại Maastricht năm 1992.
- Trụ cột thứ ba liên quan đến hợp tác về cảnh sát và tư pháp trong các vấn đề hình sự (từng được gọi là vấn đề 'tư pháp và nội vụ'), hình thành theo 'TEU'.

Ba trụ cột nêu trên tạo thành luật Liên minh châu Âu ('EU Law').

5. Nguồn của luật EU

(a) Luật văn bản

Luật văn bản của EU được phân chia thành hai bộ phận: Luật 'chính yếu' ('primary' legislation) và luật 'thứ yếu' ('secondary' legislation). Các điều ước giữa các nước thành viên (luật chính yếu) là cơ sở, nền tảng điều chỉnh mọi hoạt động của EU. Luật thứ yếu bao gồm các Quy định, Chỉ thị, Quyết định v.v. được xây dựng dựa trên các nguyên tắc và mục tiêu mà các điều ước đề ra.

i) Luật chính yếu (các điều ước)

Luật chính yếu hay các điều ước, thực chất là 'hiến pháp' của EU. Chúng được hình thành trên cơ sở sự nhất trí của chính phủ các nước thành viên EU. Các điều ước đề ra những mục tiêu và các quy tắc của việc tổ chức EU, cách thức đưa ra quyết định, mối quan hệ giữa EU và các nước thành viên, những chính sách cơ bản của EU, các thủ tục lập pháp và các quyền hạn của EU. Điều ước là bản thoả thuận ràng buộc giữa các nước thành viên EU. Theo các điều ước của EU, các thiết chế của EU có quyền ban hành pháp luật và các nước thành viên sau đó phải thực hiện.

Các điều ước chính của EU bao gồm:[15]

- Hiệp ước thành lập Cộng đồng than thép châu Âu ('ECSC'), kí kết tại Paris năm 1951 và bắt đầu có hiệu lực vào năm 1952. Mục đích của Hiệp ước này là tạo ra sự phụ thuộc lẫn nhau về than và thép giữa các nước thành viên, nhờ đó đảm bảo rằng không nước thành viên nào có thể huy động sức mạnh vũ trang mà không bị các nước thành viên khác biết được. Hiệp ước này cũng loại bỏ các rào cản trong thương mại than thép và thiết lập thị trường chung cho sản phẩm này. ECSC hết hiệu lực năm 2002.
- Các hiệp ước thành lập Cộng đồng kinh tế châu Âu - ECC ('TEC'), thành lập Cộng đồng năng lượng nguyên tử châu Âu - EURATOM, kí kết tại Rome năm 1957 và bắt đầu có hiệu lực vào năm 1958. TEC vạch ra các nguyên tắc cơ bản của Cộng đồng, các thiết chế của Cộng đồng và tạo ra pháp luật cộng đồng điều chỉnh chính sách trong các lĩnh vực nông nghiệp, vận tải và cạnh tranh.
- Đạo luật châu Âu thống nhất 1986. Mục đích của đạo luật này là tái cơ cấu các thiết chế để chuẩn bị cho sự gia nhập của Bồ Đào Nha và Tây Ban Nha vào thời điểm đó, đồng thời đẩy nhanh tiến trình ra quyết định, chuẩn bị cho sự ra đời của một thị trường thống nhất.
- Hiệp ước Liên minh châu Âu ('TEU') được kí kết tại Maastricht ngày 29/7/1992 và có hiệu lực kể từ ngày 01/01/1993. Mục đích của TEU là chuẩn bị cho sự ra đời của Liên minh tiền tệ châu Âu, đồng thời đề cập đến các yếu tố của một liên minh chính trị, như quốc tịch và chính sách chung về đối nội và đối ngoại.
- Hiệp ước Amsterdam sửa đổi Hiệp ước Liên minh châu Âu, Hiệp ước thành lập Cộng đồng châu Âu và các đạo luật liên quan, được kí kết tại Amsterdam vào ngày 10/10/1997, bắt đầu có hiệu lực vào năm 1999.

[15] Văn bản chính thức của các hiệp ước này được truy cập miễn phí tại 'Europa' (*xem* http://eur-lex.europa.eu). Các nguồn tư liệu bằng giấy có thể tìm thấy trong *Encyclopedia of European Union Law: Consitutional Texts* và *Blackstone's EU Treaties and Legislation*.

- Hiệp ước Nice sửa đổi Hiệp ước Liên minh châu Âu, Hiệp ước thành lập Cộng đồng châu Âu và các đạo luật liên quan, được kí kết tại Nice vào ngày 10/3/2001, bắt đầu có hiệu lực kể từ năm 2003.

- Hiệp ước Lisbon sửa đổi Hiệp ước Liên minh châu Âu, Hiệp ước thành lập Cộng đồng châu Âu, được kí kết tại Lisbon vào ngày 13/12/2007, có hiệu lực kể từ ngày 01/12/2009.

Hiệp ước Lisbon sửa đổi hai hiệp định nền tảng của EU là Hiệp ước Liên minh châu Âu ('TEU') và Hiệp ước thành lập Cộng đồng châu Âu ('TEC'). TEC được đổi tên thành Hiệp ước về hoạt động của Liên minh châu Âu (viết tắt là 'TFEU'). Ngoài ra, kèm theo Hiệp ước này còn có một số nghị định thư và tuyên bố. Hiệp ước này được kì vọng sẽ nâng cao tính hiệu quả, dân chủ, minh bạch của EU, sự thống nhất của EU trên trường quốc tế cũng như sự chắc chắn của một tiếng nói chung.

Các phụ lục, nghị định được ban hành kèm theo các hiệp ước cũng được coi là nguồn pháp luật chính yếu.

Cần lưu ý rằng, mặc dù vào năm 2004, nguyên thủ các nước thành viên EU đã kí Hiệp ước về Hiến chương của châu Âu, nhưng Hiệp ước này sau đó đã không được phê chuẩn.

ii) Luật thứ yếu

Luật thứ yếu của EU nhằm quy định cách thức thực hiện các mục tiêu của các hiệp ước (luật chính yếu). Nghị viện châu Âu, Ủy ban châu Âu và Hội đồng bộ trưởng được các hiệp ước trao quyền lập pháp trong tất cả các vấn đề thuộc thẩm quyền của EU. Các cơ quan này ban hành pháp luật thứ yếu, bao gồm: Quy định ('Regulation'), Chỉ thị ('Directives'), Quyết định ('Decisions'), Khuyến nghị ('Recommendations'), Ý kiến ('Opinions') và thoả thuận liên thiết chế ('Inter-institutional agreement').

'*Quy định*' ('Regulation') là loại văn bản pháp luật có hiệu lực ràng buộc do Ủy ban châu Âu ban hành và được phê chuẩn bởi Hội đồng bộ trưởng. Nó được áp dụng đầy đủ trên toàn lãnh thổ các nước thành viên EU. 'Quy định' được áp dụng trực tiếp cho các nước thành viên, không cần 'nội luật hoá' vào luật quốc gia của nước thành viên. *Ví dụ,* Quy định của Uỷ ban (EC) No. 2/2009 ngày 05/01/2009 thiết lập các giá trị nhập khẩu chuẩn để xác định giá đầu vào của một số loại rau và hoa quả.

'*Chỉ thị*' ('Directive') là loại văn bản pháp luật do Ủy ban châu Âu ban hành và được Hội đồng bộ trưởng phê chuẩn, vạch ra mục tiêu mà tất cả các thành viên EU phải đạt được nhưng cho phép các thành viên quyết định cách thức đạt được mục tiêu đó. Các nước thành viên phải ban hành văn bản pháp luật nhằm thực hiện các chỉ thị của EU trong một thời hạn được ấn định. *Ví dụ*, Chỉ thị về giờ làm việc quy định làm việc ngoài giờ quá nhiều là bất hợp pháp. Chỉ thị này đề ra mức thời gian nghỉ ngơi tối thiểu và mức thời gian làm việc tối đa, nhưng cho phép mỗi thành viên quyết định cách thực thi quy định này.

'*Quyết định*' ('Decision') là loại văn bản pháp luật do Toà án công lí hoặc Ủy ban châu Âu ban hành, có hiệu lực ràng buộc và được áp dụng trực tiếp đối với các chủ thể mà quyết định đề cập, có thể là nước thành viên EU hoặc một công ty riêng lẻ. *Ví dụ:* Quyết định số 2009/78/EC của Ủy ban châu Âu về việc thành lập Uỷ ban điều chỉnh chứng khoán châu Âu ngày 23/01/2009.

'*Khuyến nghị*' ('Recommendation') là loại văn bản không có tính ràng buộc. Thông qua việc ban hành khuyến nghị, các thiết chế của EU có thể thể hiện quan điểm của mình và đưa ra những gợi ý hành động mà không áp đặt nghĩa vụ pháp lí lên chủ thể mà khuyến nghị hướng đến. *Ví dụ:* Khuyến nghị của Uỷ ban ngày 11/02/2009 về thực hiện kiểm soát hạt nhân bởi các nhà máy hạt nhân.

'*Ý kiến*' ('Opinion') cũng là một loại văn bản không có tính ràng buộc. Nó có thể được ban hành bởi tất cả các thiết chế chính của EU (như Ủy ban châu Âu, Hội đồng châu Âu, hay Nghị viện châu Âu), Ủy ban các vùng và Ủy ban kinh tế và xã hội châu Âu. *Ví dụ,* Ủy ban các vùng đã ban hành Ý kiến về cách thức đóng góp của các vùng vào các mục tiêu về năng lượng của EU.

(b) Án lệ của Toà án công lí EU[16]

Các án lệ của 'Toà án công lí EU', bao gồm 'Toà án công lí' và 'Toà án chung', cũng là nguồn luật quan trọng có tính ràng buộc đối với các thiết chế của EU và các nước thành viên, đóng góp quan trọng vào việc tạo nên trật tự pháp luật EU. Tất cả các phán quyết của Toà án công lí EU đều có thể được truy cập miễn phí tại website Curia trong Europa.[17]

Luật án lệ có nhiều công lao trong việc tạo ra các nguyên tắc cơ bản của luật EU. Bắt đầu từ án lệ nổi tiếng *Van Gend en Loos v. Nederlanse*

[16] EU, http://curia.europa.eu

[17] EU, http://curia.europa.eu

Administratie der Belastingen [1963],[18] Toà án công lí châu Âu (ECJ), nay là Toà án công lí, đã đưa ra nguyên tắc 'hiệu lực trực tiếp của luật cộng đồng', theo đó luật cộng đồng được áp dụng trực tiếp trong trật tự pháp luật quốc gia của các nước thành viên, cho phép công dân các nước EU áp dụng trực tiếp luật EU để khởi kiện trước toà án quốc gia của nước mình. Theo án lệ *Costa v. ENEL* [1964][19], nguyên tắc 'tính tối cao của pháp luật cộng đồng' so với luật quốc gia của nước thành viên được thừa nhận. Năm 1991, với án lệ *Francovich* [1991] và các án lệ khác, ECJ đã phát triển những khái niệm và nguyên tắc mới cho luật EU - đó là 'trách nhiệm bồi thường của nước thành viên dành cho cá nhân do nhà nước vi phạm luật cộng đồng'.

Luật án lệ cũng rất có ý nghĩa trong việc củng cố pháp luật về thị trường nội khối EU. Kể từ sau án lệ *Cassis de Dijon* [1979] - khẳng định nguyên tắc tự do dịch chuyển hàng hoá, các thương nhân có thể nhập khẩu vào nước mình bất cứ sản phẩm gì của nước khác trong nội bộ EU, nếu sản phẩm đó được sản xuất hợp pháp và đưa vào thị trường nước đó, và nếu không có lí do nào rất quan trọng liên quan đến bảo vệ sức khỏe hoặc môi trường nhằm ngăn cản nhập khẩu vào nước có nhu cầu tiêu thụ. Nguyên tắc tự do dịch chuyển người lao động cũng được khẳng định trong một số án lệ đáng chú ý, như án lệ *Kraus* [1993] và án lệ *Bosman* [1995]. Ngoài ra, ECJ cũng đã ra một số phán quyết nhằm bảo đảm quyền tự do cung ứng dịch vụ, bảo đảm đối xử bình đẳng nam nữ và các quyền xã hội khác. Trong án lệ *Defrenne v. Sabena* [1976],[20] một nữ chiêu đãi viên hàng không (tên là Defrenne) đã khởi kiện người sử dụng lao động (hãng hàng không Sabena của Bỉ) vì đã phân biệt đối xử trong việc trả tiền lương, theo đó đồng nghiệp nam, làm cùng một loại công việc, được trả lương cao hơn. Trong án lệ *BECTU* [2001], ECJ đã phán quyết rằng quyền được trả lương trong thời gian nghỉ phép hàng năm là một quyền xã hội của mọi người lao động được quy định trong luật cộng đồng. Vụ này xuất phát từ năm 1999, BECTU - một tổ chức công đoàn ở Anh, đã khởi kiện về việc luật của Anh không thừa nhận quyền được trả lương trong thời gian nghỉ phép của người lao động hợp đồng ngắn hạn, trên cơ sở theo đó luật này không phù hợp với một Chỉ thị của Cộng đồng về tổ chức thời gian làm việc.

[18] Toà án công lí châu Âu (ECJ), nay là Toà án công lí, Case 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen* [1962].

[19] Toà án công lí châu Âu (ECJ), nay là Toà án công lí, Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585, 593.

[20] Toà án công lí châu Âu (ECJ), nay là Toà án công lí, C-43/75 *Defrenne v. Sabena* [1976] ECR 455.

Án lệ của 'Toà án chung' cũng rất quan trọng trong điều chỉnh lĩnh vực IP (án lệ *Henkel v. OHIM* [2001]), lĩnh vực cạnh tranh (các án lệ *Piau v. Commission* [2005], *Airtours v. Commission* [2002], *HFB and Others v. Commission* [2002]), trợ cấp của nhà nước (án lệ *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission* [2003]).

(c) Các nguồn luật khác

Các nguồn luật khác của luật EU bao gồm các hiệp định kí kết giữa các thiết chế của EU với nước ngoài, tập quán quốc tế, những nguyên tắc cơ bản của luật quốc gia ('in foro domestico') và những nguyên tắc cơ bản của luật quốc tế.

3. Các nguyên tắc của luật EU

(a) Tính tối cao của luật EU

Trong trường hợp có sự không thống nhất giữa luật EU và luật quốc gia của nước thành viên, luật EU sẽ được ưu tiên áp dụng. Luật EU có hiệu lực cao hơn luật quốc gia trong rất nhiều lĩnh vực, đặc biệt là các lĩnh vực liên quan đến chính sách kinh tế-xã hội và thậm chí có hiệu lực cao hơn cả hiến pháp của các nước thành viên. Nguyên tắc 'tính tối cao của luật EU' xuất phát từ án lệ *Costa v. ENEL* [1964] của ECJ.[21]

(b) Luật EU có hiệu lực trực tiếp

Nguyên tắc 'hiệu lực trực tiếp của luật cộng đồng' bắt nguồn từ án lệ *Van Gend en Loos v. Nederlanse Administratie der Belastingen* [1963],[22] theo đó luật cộng đồng được áp dụng trực tiếp trong trật tự pháp luật quốc gia của các nước thành viên, cho phép công dân các nước EU áp dụng trực tiếp luật EU để khởi kiện trước toà án quốc gia của nước mình.

Có hai loại hiệu lực trực tiếp: Hiệu lực trực tiếp theo 'chiều ngang' và hiệu lực trực tiếp theo 'chiều dọc'.

i) Hiệu lực trực tiếp theo 'chiều ngang': Một số văn bản pháp luật của EU, *ví dụ:* Hiệp ước hoặc Quy định, có hiệu lực trực tiếp theo chiều ngang. Nghĩa là, mặc dù các nước thành viên không cần 'nội luật hoá' các hiệp ước hoặc quy định của EU vào luật quốc gia, các công dân vẫn có thể trực tiếp dựa trên các văn bản pháp luật này để khởi kiện lẫn nhau.

[21] Toà án công lí châu Âu (ECJ), nay là Toà án công lí, Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585, 593.

[22] Toà án công lí châu Âu (ECJ), nay là Toà án công lí, Case 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen*.

ii) Hiệu lực trực tiếp theo 'chiều dọc': Khác với Hiệp ước và Quy định, Chỉ thị là loại văn bản có hiệu lực trực tiếp theo chiều dọc. Các chỉ thị cho phép các nước thành viên lựa chọn việc 'nội luật hoá' như thế nào. Thông thường, các thành viên thực hiện điều này bằng việc ban hành một hoặc một số đạo luật, *ví dụ:* dưới hình thức 'luật của nghị viện' hay 'các văn bản quy phạm pháp luật' ở Anh Quốc. Các công dân không thể viện dẫn Chỉ thị của EU để khởi kiện, nhưng có thể kiện 'dọc' chính phủ của mình vì không tuân thủ đúng Chỉ thị đó.

Ngoài ra, một số nguyên tắc khác cũng có ý nghĩa quan trọng trong quá trình phát triển của luật EU như nguyên tắc bổ trợ ('subsidiarity'), nguyên tắc tương xứng ('proportionality'), nguyên tắc hội ý ('conferral'), nguyên tắc phòng ngừa ('precaution').

Để đạt tới EU như ngày hôm nay, các nước thành viên EU đã phải trao một phần quyền lực của mình cho các thiết chế của EU, chấp nhận tính tối cao của pháp luật Liên minh so với pháp luật của các nước thành viên và hiệu lực trực tiếp của pháp luật Liên minh trong trật tự pháp luật các nước thành viên.

B. *Tổng quan về các quan hệ thương mại đối ngoại của EU*

Là một trong những khu vực thương mại dẫn đầu trên thế giới, EU rất quan tâm đến vấn đề mở cửa thị trường và xây dựng khuôn khổ pháp luật rõ ràng, đồng thời cần củng cố khả năng cạnh tranh của mình trên thị trường thế giới. Ngoài ra, EU còn có nghĩa vụ trước các công dân của mình cũng như với phần còn lại của thế giới. Các quan hệ thương mại đối ngoại, hay chính sách thương mại của EU, là chính sách công điều chỉnh quan hệ thương mại giữa EU với các nước, cần được phân biệt với chính sách điều chỉnh các quan hệ trong thị trường nội khối.

Ưu tiên mới và cách tiếp cận mới của EU - 'Châu Âu toàn cầu: Cạnh tranh trên thế giới', được trình bày trong một kế hoạch hành động đầy tham vọng, bao gồm cả các khía cạnh đối nội và đối ngoại. Kế hoạch này sẽ cho phép chính sách thương mại EU đáp ứng các mục tiêu tăng trưởng và việc làm được vạch ra trong Chiến lược Lisbon, cũng như đối phó với những thách thức mà toàn cầu hoá đặt ra. Nội dung cơ bản của kế hoạch này là việc nói không với chủ nghĩa bảo hộ ở châu Âu, mở cửa ra các thị trường chính ở bên ngoài châu Âu, và thống nhất các chính sách đối nội và đối ngoại của EU.

Đối diện với những thách thức của toàn cầu hoá, EU cần củng cố khả năng cạnh tranh của mình thông qua việc áp dụng các quy định minh bạch và hiệu quả. Chính sách cạnh tranh của châu Âu *trước tiên* dựa trên các chính sách đối nội, bao gồm chính sách về các thị trường cạnh tranh, mở cửa kinh tế, công bằng xã hội; *thứ hai* là dựa trên các cam kết mở cửa ra các thị trường nước ngoài ở các quốc gia 'mới nổi' - một yếu tố đóng góp vào tăng trưởng thương mại toàn cầu.

1. Các mục tiêu của các quan hệ thương mại đối ngoại hay chính sách thương mại của EU

(a) Hai mục tiêu chính của chính sách thương mại của EU

Thứ nhất, hạ thấp các rào cản đối với xuất khẩu hàng hoá và đầu tư của EU thông qua đàm phán và giải quyết tranh chấp khi cần thiết;

Thứ hai, tạo thuận lợi cho các nhà kinh doanh của các nước thứ ba nhập khẩu vào EU (đặc biệt là từ các DCs).

(b) Các mục tiêu khác

- Không chỉ sử dụng thuế quan mà cả các rào cản khác trong các quan hệ thương mại đối ngoại, như tiêu chuẩn sản phẩm, thủ tục cấp phép, thuế nội địa, mua sắm chính phủ, IPRs, v.v.. Các cam kết liên quan đến mua sắm chính phủ và IPRs trở thành các điều khoản được đưa vào các hiệp định thương mại tự do song phương (viết tắt là 'BFTAs') và các hiệp định thương mại tự do khu vực ('regional FTAs') của EU. Tăng cường đối thoại chính trị về IPRs.
- Những vấn đề mới trong chính sách thương mại của EU là mối quan hệ giữa thương mại với môi trường, giữa thương mại với quyền của người lao động và giữa thương mại với nhân quyền.

2. Các cấp độ của chính sách thương mại của EU

(a) Cấp độ đa phương

Liên quan đến vấn đề đối ngoại, EU duy trì cam kết về chủ nghĩa đa phương. Theo đó, EU đề xuất các biện pháp nhằm loại bỏ các rào cản trong thương mại. WTO là khuôn khổ để EU đạt được những mục đích này và EU ủng hộ việc tiếp tục tiến hành đàm phán thương mại tại Vòng đàm phán Doha.

(b) Cấp độ song phương

Cùng với chủ nghĩa đa phương, EU nỗ lực thúc đẩy thương mại tự do tiến nhanh hơn và toàn diện hơn trong khuôn khổ các quan hệ thương mại song phương. Các BFTAs sẽ đóng vai trò chủ đạo để đạt đến mục tiêu này. Bên cạnh đó còn có các thoả thuận đối tác thương mại (Economic Partnership Agreements - viết tắt là 'EPAs') đang được EU đàm phán với các nước châu Phi, Ca-ri-bê và Thái Bình Dương ('ACP countries'), hay các thoả thuận liên kết ('Association agreements') kí với các nước Mỹ La-tinh và Cộng đồng Andes.

EU cần phải xác định các tiêu chí kinh tế làm cơ sở cho đàm phán và kí kết các BFTAs cũng như để xác định các đối tác của mình, *ví dụ:* xác định tiềm năng của các thị trường dựa trên yếu tố quy mô và tăng trưởng kinh tế, mức độ bảo hộ áp dụng đối với hàng hoá xuất khẩu từ EU v.v.. Các đối tác thoả mãn những tiêu chí này đang được hưởng ưu đãi của EU là: các nước ASEAN, Hàn Quốc và Ấn Độ, cũng như MERCOSUR, Nga, Hội đồng hợp tác Vùng Vịnh và Trung Quốc. Về nội dung, các thoả thuận này cần phải toàn diện hơn, tham vọng hơn và phạm vi điều chỉnh rộng hơn để bao quát cả lĩnh vực thương mại dịch vụ, đầu tư và IPRs.

Thương mại xuyên Đại Tây Dương là vấn đề trung tâm trong các quan hệ thương mại song phương của EU, đặc biệt là với mục đích đối phó với các thách thức toàn cầu. EU sẽ tiếp tục khuyến khích việc loại bỏ các rào cản thương mại phi thuế quan, tạo ra lợi ích kinh tế của tự do hoá thương mại toàn diện giữa các đối tác.

EU và các đối tác cần thống nhất về việc hành động nhiều hơn để tôn trọng IPRs**.** Liên quan đến các đàm phán gia nhập, những đối tác chính cần đặc biệt quan tâm trong lĩnh vực này là Trung Quốc, Nga, các nước ASEAN, Hàn Quốc, MERCOSUR, Chile, Ukraine và Thổ Nhĩ Kỳ.

(c) Cấp độ đơn phương

EU tiếp tục chính sách áp dụng chế độ thuế quan ưu đãi phổ cập ('GSP') đối với các DCs, nếu các nước này đáp ứng các điều kiện về nhân quyền và quản lí tốt.

EU đã tích cực ban hành pháp luật về các biện pháp khắc phục thương mại, như các quy định về chống bán phá giá, chống trợ cấp và biện pháp tự vệ. *Ví dụ*, Quy định của Hội đồng bộ trưởng (EC) số 1225/2009 ngày 30/11/2009 về bảo hộ chống lại hàng nhập khẩu bán phá giá từ các nước ngoài Cộng đồng châu Âu; Quy định của Hội đồng bộ trưởng (EC) số 597/2009 ngày 11/6/2009 về bảo hộ chống lại hàng hoá nhập khẩu được trợ cấp từ các nước ngoài Cộng đồng châu Âu.

EU cũng ban hành các quy định áp dụng chung về xuất nhập khẩu, *ví dụ*, Quy định của Hội đồng Bộ trưởng (EC) số 1061/2009 ngày 19/10/2009 ban hành các quy định áp dụng chung đối với hàng hoá xuất khẩu; Quy định của Hội đồng Bộ trưởng (EC) số 260/2009 ngày 26/02/2009 ban hành các quy định áp dụng chung đối với hàng hoá nhập khẩu; và đặc biệt là Quy định của Hội đồng Bộ trưởng (EC) số 625/2009 ngày 07/7/2009 về các quy định áp dụng chung đối với hàng hoá nhập khẩu từ một số nước thứ ba.

Quy định của Hội đồng Bộ trưởng (EC) số 625/2009 ngày 07/7/2009 ban hành các quy định áp dụng chung đối với hàng hoá nhập khẩu vào EU có nguồn gốc từ một số nước bên ngoài EU. Quy định này cũng đặt ra các thủ tục cho phép EU áp dụng các biện pháp giám sát và tự vệ để bảo vệ lợi ích của EU. Theo Quy định này, hàng hoá nhập khẩu không phải là đối tượng của biện pháp hạn chế số lượng, nhưng có thể là đối tượng của biện pháp tự vệ. Quy định này được áp dụng đối với hàng hoá có xuất xứ từ bất cứ nước nào sau đây: Armenia, Azerbaijan, Belarus, Kazakhstan, CHDCND Triều Tiên, Nga, Tajikistan, Turkmenistan, Uzbekistan, và Việt Nam. Các sản phẩm dệt may không thuộc phạm vi điều chỉnh của Quy định này, mà được điều chỉnh bởi các quy định đặc biệt trong các quy định áp dụng chung đối với hàng hoá nhập khẩu.

2. Pháp luật về thị trường nội khối EU

A. *Thị trường nội khối - Khung pháp lí chung*

Pháp luật về thị trường nội khối là một trong các trụ cột của luật EU. Thị trường chung hay thị trường nội khối, khái niệm được định nghĩa bởi 'bốn tự do' là cốt lõi của Cộng đồng châu Âu với các chính sách về tự do dịch chuyển hàng hoá, người, dịch vụ, và tư bản, nhằm đảm bảo xây dựng một liên minh gắn bó chặt chẽ về kinh tế, tiền tệ và chính trị. Kể từ khi được thành lập năm 1993, thị trường chung đã tạo điều kiện tốt hơn cho cạnh tranh, tạo ra nhiều việc làm mới, định hình giá cả hợp lí hơn cho người tiêu dùng, và giúp cho các doanh nghiệp và người dân hưởng lợi nhờ có sự lựa chọn phong phú hơn về hàng hoá và dịch vụ. Để đảm bảo rằng một thị trường chung có thể đem lại lợi ích nhiều nhất cho tất cả mọi người, bao gồm cả người dân và doanh nghiệp, EU tập trung vào việc loại

bỏ các rào cản cản trở hoạt động của thị trường. EU cố gắng hài hoà về lập pháp để đối phó tốt hơn với những thách thức của toàn cầu hoá và sự thay đổi của công nghệ.

Theo Điều 2 TEC, *mục tiêu* ban đầu của TEC là: 'Cộng đồng sẽ có nhiệm vụ xây dựng thị trường chung và từng bước hài hoà chính sách kinh tế của các nước thành viên'.

Theo Điều 3 của TEC, nhằm đạt được mục tiêu nêu trên, các nước thành viên sẽ phải loại bỏ việc áp dụng thuế quan và các biện pháp hạn chế số lượng trong quan hệ thương mại hàng hoá giữa các nước thành viên; thiết lập biểu thuế quan chung của các nước thành viên trong quan hệ thương mại với các nước ngoài cộng đồng; loại bỏ các rào cản để tạo thuận lợi cho sự tự do dịch chuyển người, dịch vụ và tư bản ('bốn tự do') giữa các nước thành viên; chấp nhận chính sách nông nghiệp chung châu Âu, chính sách vận tải chung châu Âu; hình thành chính sách cạnh tranh của châu Âu; hài hoà hoá pháp luật giữa các nước thành viên nhằm đảm bảo sự vận hành phù hợp của thị trường chung; xây dựng Quỹ xã hội châu Âu nhằm tăng cường cơ hội việc làm cho người lao động và góp phần nâng cao mức sống của họ; thành lập Ngân hàng đầu tư châu Âu…

Sau này, Điều 26 TFEU quy định:

1. Liên minh sẽ áp dụng các biện pháp nhằm thiết lập hoặc đảm bảo sự vận hành của thị trường nội khối, phù hợp với các quy định liên quan của các hiệp ước.
2. Thị trường nội khối được cấu thành bởi một khu vực không có các rào cản bên trong, trong đó sự tự do dịch chuyển hàng hoá, người, dịch vụ và tư bản được bảo đảm, phù hợp với các quy định của các hiệp ước.

Mục đích thiết lập thị trường chung được đề cập trong TEC và các hiệp định khác, như: Đạo luật châu Âu thống nhất 1986, và TFEU. Những hiệp định này cũng thúc đẩy mạnh mẽ sự phát triển của Liên minh kinh tế và tiền tệ châu Âu.

Gần đây, Đạo luật thị trường chung được ban hành vào tháng 4/2011 nhằm cải thiện vấn đề việc làm, kinh doanh và trao đổi của người dân EU.

B. *Các quy định về 'bốn tự do cơ bản'*

Cốt lõi của chính sách kinh tế và xã hội của EU được đúc kết trong ý tưởng về 'bốn tự do cơ bản' - tự do dịch chuyển hàng hoá, người lao động, vốn và tự do cung cấp dịch vụ.

1. Thị trường chung cho hàng hoá - Tự do dịch chuyển hàng hoá

(a) Tổng quan

Sự tự do dịch chuyển hàng hoá, nhằm mục đích bảo đảm thương mại trong nội khối EU, là yếu tố quan trọng nhất của thị trường chung. Việc cấm sử dụng các biện pháp hạn chế xuất nhập khẩu giữa các thành viên và nguyên tắc công nhận lẫn nhau đảm bảo sự tuân thủ của các thành viên dưới sự giám sát của Ủy ban châu Âu. Kể từ tháng 01/1993, việc kiểm soát dịch chuyển hàng hoá trong thị trường nội khối đã được loại bỏ, biến EU trở thành lãnh thổ thống nhất, không có các biên giới nội bộ. Việc loại bỏ thuế quan thúc đẩy thương mại nội khối, đóng góp phần lớn vào tổng giá trị xuất nhập khẩu của các nước thành viên.

Tự do dịch chuyển hàng hoá bao gồm ba khía cạnh:

(i) Thành lập liên minh hải quan (Điều 23 TEC - Điều 28 TFEU)

- Cấm áp thuế quan và phí có tác động tương đương thuế quan đối với hàng hoá xuất khẩu và nhập khẩu;
- Thiết lập biểu thuế quan thống nhất áp dụng đối với hàng hoá nhập khẩu vào EU.

(ii) Cấm áp dụng các khoản thuế nội địa có tính phân biệt đối xử (Điều 90 TEC - Điều 110 TFEU).

(iii) Cấm áp dụng các biện pháp hạn chế số lượng và các biện pháp có tác động tương đương biện pháp hạn chế số lượng đối với hàng hoá xuất khẩu và nhập khẩu.

Điều 28 TEC - Điều 34 TFEU quy định: 'Các biện pháp hạn chế số lượng nhập khẩu và tất cả các biện pháp có tác động tương đương biện pháp hạn chế số lượng bị cấm áp dụng giữa các nước thành viên.'

Điều 29 TEC - Điều 35 TFEU quy định tương tự liên quan đến hàng hoá xuất khẩu. Cần lưu ý rằng các biện pháp hạn chế số lượng chỉ bị cấm áp dụng giữa các nước thành viên EU.

Điều 30 TEC - Điều 36 TFEU quy định những ngoại lệ như sau:

Các quy định của Điều 28 và Điều 29 không loại trừ việc cấm hoặc hạn chế xuất nhập khẩu hàng hoá xuất phát từ nhu cầu bảo vệ đạo đức xã hội, chính sách công hoặc an ninh công cộng; để bảo vệ sức khoẻ và đời sống con người, động vật hay thực vật; để bảo vệ các tài sản quốc gia có giá trị về nghệ thuật, lịch sử hay khảo cổ; hoặc để bảo vệ tài sản công nghiệp và thương mại. Tuy nhiên, việc cấm hoặc hạn chế đó không được tạo thành một công cụ phân biệt đối xử tuỳ tiện hoặc hạn chế thương mại trá hình giữa các nước thành viên.

Căn cứ vào Điều 30 TEC - Điều 36 TFEU, các nước thành viên EU vẫn có thể áp dụng những rào cản thương mại nhất định, trong các trường hợp đạo đức xã hội, chính sách và an ninh công cộng, sức khoẻ, văn hoá hoặc các tài sản thương mại bị đe dọa do sự loại bỏ hoàn toàn các rào cản này. Trong cuộc khủng hoảng 'dịch bò điên' ở nước Anh, nước Pháp đã áp đặt rào cản đối với thịt bò nhập khẩu từ quốc gia này.

(b) Tự do dịch chuyển hàng hoá và chính sách nông nghiệp chung

Chính sách nông nghiệp chung ('Common Agricultural Policy' - CAP) được quy định tại Tít II TEC. Khoản 1 Điều 34 quy định 'sự phối hợp bắt buộc giữa các tổ chức thị trường của các nước' với tổ chức thị trường chung của châu Âu.

CAP ra đời từ những ngày đầu của quá trình hội nhập châu Âu, khi các nước thành viên cam kết tái cơ cấu và tăng cường sản xuất lương thực, vốn đã bị tàn phá bởi Chiến tranh thế giới lần thứ II. Ngày nay, CAP vẫn có một vai trò then chốt trong EU, không chỉ vì đất nông nghiệp và rừng chiếm hơn 90% diện tích đất đai của EU, mà còn bởi nó đã trở thành cơ chế rất quan trọng để EU đối mặt với những thách thức mới về chất lượng thực phẩm, bảo vệ môi trường và thương mại.

CAP có hai mục tiêu chính: *Thứ nhất*, giúp xây dựng khả năng cạnh tranh cho người nông dân châu Âu; *thứ hai*, thúc đẩy phát triển nông thôn, đặc biệt là những vùng ít thuận lợi nhất.

Như đã đề cập ở trên, luật án lệ cũng rất có ý nghĩa trong việc củng cố pháp luật về thị trường nội khối EU. Án lệ *Cassis de Dijon* [1979] là một trong những án lệ quan trọng của luật EU khẳng định nguyên tắc tự do dịch chuyển hàng hoá.

2. Tự do dịch chuyển người lao động

Nhờ có sự loại bỏ các rào cản giữa các nước EU, người dân EU giờ đây có thể tự do dịch chuyển trong phần lớn lãnh thổ EU. Việc một người sống và làm việc tại nước EU khác cũng dễ dàng hơn. Trong 'Vùng Schengen', mọi người được tự do dịch chuyển mà không phải kiểm tra an ninh hay hải quan ở biên giới của phần lớn các nước EU. Tuy nhiên, các hoạt động kiểm soát được tăng cường ở các biên giới bên ngoài của EU và có sự hợp tác chặt chẽ hơn giữa cảnh sát các nước EU.

3. Tự do dịch chuyển vốn (tư bản)

Đạo luật châu Âu thống nhất 1986 là một bước đi quyết định đối với sự tự do dịch chuyển vốn. Nó dẫn tới việc thông qua Chỉ thị 88/361/EEC vào ngày 24/6/1988, nhằm thiết lập một khuôn khổ tài chính đầy đủ cho thị trường chung. Chỉ thị này thực thi Điều 67 TEC.

Chỉ thị 88/361/EEC đảm bảo nguyên tắc tự do hoá hoàn toàn hoạt động dịch chuyển vốn giữa các nước thành viên, có hiệu lực từ ngày 01/7/1990. Ủy ban châu Âu nỗ lực loại bỏ những thoả thuận chung có mục đích hạn chế sự dịch chuyển vốn giữa những người cư trú ở các nước thành viên. 'Dịch chuyển vốn' được hiểu là tất cả những hoạt động cần thiết để cá nhân hoặc pháp nhân có thể thực hiện việc dịch chuyển vốn, bao gồm hoạt động đầu tư trực tiếp, đầu tư bất động sản, các hoạt động liên quan đến chứng khoán và các tài khoản vãng lai và tài khoản tiền gửi, các khoản vay và tín dụng.

4. Thị trường chung cho dịch vụ - Tự do cung ứng dịch vụ và tự do thành lập doanh nghiệp

Quyền tự do cung ứng dịch vụ và quyền tự do thành lập doanh nghiệp, quy định tại Điều 49 và Điều 56 TFEU là rất cần thiết cho sự vận hành của thị trường nội khối. Với các quyền này, các nhà kinh doanh có thể tiến hành hoạt động kinh doanh liên tục và ổn định ở một hay nhiều nước EU và/hoặc tạm thời cung ứng dịch vụ ở nước EU khác mà không cần phải thành lập cơ sở kinh doanh ở đó. Năm 2006, EU thông qua Chỉ thị về dịch vụ nhằm loại bỏ các rào cản đối với thương mại và dịch vụ, tạo thuận lợi cho các hoạt động thương mại xuyên biên giới.

Điều 49 TFEU (Điều 43 TEC) quy định về quyền tự do thành lập doanh nghiệp. Những hạn chế đối với quyền tự do thành lập doanh nghiệp đều bị cấm. Quy định cấm này áp dụng đối với những hạn chế về việc thành lập chi nhánh, đại lí, công ty con của công dân của một nước thành viên tại một nước thành viên khác.

C. *Các quy định trong những lĩnh vực khác*

1. Chương về chính sách xã hội

Chương về chính sách xã hội là bộ phận của TEC quy định về vấn đề bình đẳng giới (Điều 141 TEC) và về thời gian làm việc (quy định tại Chỉ thị về thời gian làm việc). Một trong những văn bản về chống phân biệt đối xử được ban hành gần đây là Chỉ thị 2006/54/EC về thực hiện nguyên tắc bình đẳng về cơ hội và đối xử giữa nam và nữ liên quan đến việc làm và nghề nghiệp. Bên cạnh đó, án lệ *Defrenne v. Sabena* [1976] cũng là án lệ quan trọng trong lĩnh vực này.[23] Trong vụ này, một nữ chiêu đãi viên hàng không (tên là Defrenne) đã khởi kiện người sử dụng lao động (hãng hàng không Sabena của Bỉ) vì đã phân biệt đối xử trong việc trả tiền lương, theo đó đồng nghiệp nam, làm cùng một loại công việc, được trả lương cao hơn. Trong án lệ *BECTU* [2001], ECJ đã phán quyết rằng quyền được trả lương trong thời gian nghỉ phép hàng năm là một quyền xã hội của mọi người lao động được quy định trong luật cộng đồng. Vụ này xuất phát từ năm 1999, BECTU - một tổ chức công đoàn ở Anh, đã khởi kiện về việc luật của Anh không thừa nhận quyền được trả lương trong thời gian nghỉ phép của người lao động hợp đồng ngắn hạn, trên cơ sở theo đó luật này không phù hợp với một Chỉ thị của Cộng đồng về tổ chức thời gian làm việc.

2. Pháp luật cạnh tranh của EU

Ở EU, pháp luật cạnh tranh là bộ phận quan trọng, đảm bảo cho sự thành công của thị trường nội khối, với sự tự do dịch chuyển hàng hoá, dịch vụ, người lao động và vốn trong một châu Âu không biên giới.

Bốn lĩnh vực chủ yếu trong chính sách của EU về cạnh tranh bao gồm:

Thứ nhất, quy định về Cartel, hay kiểm soát hành vi thông đồng và các hành vi phản cạnh tranh khác gây tác động đến EU - quy định tại Điều 81 TEC - Điều 101 TFEU.

Thứ hai, quy định về độc quyền, hay ngăn chặn sự lạm dụng vị trí thống lĩnh thị trường của các doanh nghiệp - quy định tại Điều 82 TEC - Điều 102 TFEU.

Thứ ba, quy định về sáp nhập, kiểm soát đề xuất sáp nhập, mua lại và liên doanh liên quan đến doanh nghiệp có mức doanh thu nhất định ở EU/EEA - điều chỉnh bởi quy định của Hội đồng bộ trưởng số 139/2004 EC (Quy định về sáp nhập).

Thứ tư, quy định về hỗ trợ của nhà nước, kiểm soát các khoản hỗ trợ trực tiếp và gián tiếp mà các nước thành viên EU dành cho các doanh nghiệp - quy định tại Điều 87 TEC - Điều 107 TFEU.

Án lệ của 'Toà án chung' cũng rất quan trọng trong điều chỉnh lĩnh vực IP (án lệ *Henkel v. OHIM* [2001]), lĩnh vực cạnh tranh (các án lệ *Piau v. Commission* [2005], *Airtours v. Commission* [2002], *HFB and Others v. Commission* [2002]), trợ cấp của nhà nước (án lệ *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission* [2003]).

3. Chính sách tiền tệ

Liên minh kinh tế và tiền tệ ('EMU'), được quy định tại Tít VII TEC, đòi hỏi sự điều phối chặt chẽ về chính sách kinh tế giữa các nước thành viên ở cấp độ EU, yêu cầu các nước thành viên tránh để xảy ra thâm hụt ngân sách quá mức ('Hiệp định về ổn định và tăng trưởng'). EMU đã cho ra đời một đồng tiền chung của khối: Đồng Euro. Đồng tiền này được áp dụng từ ngày 01/01/1999.

Đồng tiền Euro là minh chứng sống động cho sự hội nhập của EU - đồng tiền này được sử dụng hàng ngày bởi khoảng 327 triệu người ở 17 trong số 28 nước EU. Các nước trong Khu vực đồng tiền chung châu Âu (Eurozone) là Áo, Bỉ, Síp, Estonia, Phần Lan, Pháp, Đức, Hy Lạp, Irland, Italia, Luxembourg, Malta, Hà Lan, Bồ Đào Nha, Slovakia, Slovenia, và Tây Ban Nha.

Đồng tiền chung đem lại rất nhiều lợi ích, *ví dụ*, loại trừ biến động tỉ giá và chi phí chuyển đổi tiền tệ. Các doanh nghiệp thuận lợi hơn khi tiến hành các hoạt động thương mại xuyên biên giới, nền kinh tế cũng ổn định hơn, nhờ đó kinh tế tăng trưởng và người tiêu dùng có nhiều lựa chọn hơn. Đồng tiền chung cũng khuyến khích người dân đi du lịch và mua sắm ở các nước EU khác. Ở cấp độ toàn cầu, đồng Euro đã trở thành một trong những đồng tiền quốc tế quan trọng nhất.

D. *Chiến lược hội nhập pháp luật*

Trong nỗ lực xây dựng một EU không có biên giới nội bộ, các thiết chế của EU đã vận dụng ba chiến lược chủ yếu nhằm tiến hành hội nhập pháp luật:

[23] Toà án công lí châu Âu (ECJ), nay là Toà án công lí, C-43/75 *Defrenne v. Sabena* [1976] ECR 455.

Thứ nhất, nhất thể hoá pháp luật: Tạo ra luật cộng đồng áp dụng thống nhất với tất cả các nước thành viên EU trong một số lĩnh vực kinh tế và thương mại, như thuế quan, thủ tục hải quan, cạnh tranh, vận tải, luật công ty, v.v..

Thứ hai, hài hoà hoá pháp luật các nước thành viên: Chiến lược này dễ được chấp nhận hơn dưới góc độ chính trị, áp dụng trong các lĩnh vực như pháp luật lao động, thuế nội địa v.v. (khoản 1 Điều 114 TFEU - khoản 1 Điều 95 TEC).

Thứ ba, công nhận lẫn nhau giữa các nước thành viên trên cơ sở có đi có lại về các tiêu chuẩn như: Tiêu chuẩn hàng hoá, bằng cấp đào tạo, v.v.. Việc công nhận đảm bảo sự tự do dịch chuyển hàng hoá và dịch vụ mà không cần phải hài hoà hoá pháp luật giữa các nước thành viên. *Ví dụ*, hàng hoá được sản xuất hợp pháp ở một nước thành viên này sẽ không bị cấm bán trên lãnh thổ của một nước thành viên khác, kể cả khi các tiêu chuẩn về kĩ thuật và chất lượng ở thị trường này khác với những tiêu chuẩn mà nhà sản xuất đã áp dụng.

EU đã trải qua hơn 60 năm hoà bình, ổn định và thịnh vượng, góp phần nâng cao điều kiện sống của người dân, cho ra đời đồng tiền chung châu Âu và từng bước xây dựng thị trường thống nhất trên toàn châu Âu, cho phép con người, hàng hoá, dịch vụ và vốn dịch chuyển tự do giữa các nước thành viên như trong nội bộ một nước. Thành tựu này không phải là món quà của Thượng đế. Các nước thành viên đã phải trao cho EU một số quyền lực lập pháp của mình trong các lĩnh vực chính sách nhất định, như nông nghiệp và thủy sản. Trong những lĩnh vực khác như văn hoá, EU và chính phủ các nước thành viên phải cùng nhau chia sẻ thẩm quyền hoạch định chính sách.

Các nước thành viên EU đã lựa chọn cả hai con đường phát triển EU theo 'chiều rộng' và theo 'chiều sâu'. EU hiện tại đã mở rộng lên 28 thành viên và đã đi vào chiều sâu bằng việc tăng cường các chính sách kinh tế và sử dụng đồng tiền chung Euro, đồng thời áp dụng chính sách chung về đối ngoại, phòng vệ và tư pháp. Ngày nay sẽ dễ dàng tìm thấy một mặt hàng 'Made in EU' hơn là 'Made in France' hay 'Made in Italy'.

EU không phải là chính phủ liên bang, cũng không phải là tổ chức liên chính phủ truyền thống. Và luật EU không phải là luật quốc tế truyền thống, cũng không phải là luật quốc gia hay luật liên bang. Đó là luật siêu quốc gia, và nó đã tạo thành một trật tự pháp luật sáng tạo và độc đáo. Trong án lệ nổi tiếng 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen* [1962], ECJ đã phán quyết rằng Cộng đồng châu Âu 'tạo nên một trật tự pháp luật mới của luật quốc tế, hướng đến lợi ích mà vì nó các nước đã tự giới hạn chủ quyền của mình trong một số lĩnh vực'.[24]

EU giờ đây là ví dụ điển hình về hội nhập kinh tế khu vực, có tiếng nói quan trọng trong rất nhiều vấn đề của thế giới.

Mục 3. HIỆP ĐỊNH THƯƠNG MẠI TỰ DO BẮC MỸ (NAFTA)

1. NAFTA là gì?

A. *Giới thiệu chung về Hiệp định thương mại tự do Bắc Mỹ*

Hiệp định thương mại tự do Bắc Mỹ, hay còn lại là 'NAFTA', là Hiệp định thương mại tự do giữa Canada, Mexico và Hoa Kỳ. Với tổng GDP năm 2010 là 17,6 nghìn tỉ USD, NAFTA là khu vực thương mại tự do lớn nhất thế giới.[25] Hiệp định NAFTA được đàm phán từ năm 1991 đến năm 1993, và được cơ quan lập pháp quốc gia của ba nước thông qua vào năm 1993, có hiệu lực pháp luật vào ngày 01/01/1994.

Hiệp định NAFTA là mô hình quan trọng của FTAs hiện đại, bởi mức độ tự do hoá rất cao của nó. Hiệp định ngay lập tức đã loại bỏ thuế quan đối với phần lớn giao dịch thương mại hàng hoá giữa ba nước, đồng thời những hạn chế khác đối với thương mại, dịch vụ và đầu tư cũng được loại bỏ trong thời hạn 15 năm.

Phần giới thiệu dưới đây về NAFTA sẽ trình bày một số nội dung chủ yếu, bao gồm: Chương 3 - Tự do hoá thương mại hàng hoá; Chương 11 - Tự do hoá đầu tư; và Chương 12 - Tự do hoá thương mại dịch vụ; và các Chương 11, 19 và 20 - Quy trình giải quyết tranh chấp.

B. *Những nội dung chủ yếu của NAFTA*

NAFTA loại bỏ hoặc áp đặt những quy tắc nghiêm ngặt đối với một số rào cản thương mại và đầu tư. Những nội dung chủ yếu của Hiệp định bao gồm:[26]

[24] Toà án công lí quốc tế (ECJ), nay là Toà án quốc tế, Case 26/62 *Van Gend en Loos v. Nederlanse Administratie der Belastingen*.

[25] Hiệp định thương mại tự do Bắc Mỹ, tháng 12/1992, nguồn: www.nafta-sec-alena.org/; Xếp hạng GDP, xem: http://en.wikipedia.org/wiki/List_of_countries_by_GDP_%28nominal%29

[26] Tóm tắt từ: http://www.usembassy-mexico.gov/bbf/bfdossier_NAFTA.htm;

- Mở cửa cơ chế mua sắm chính phủ cho các doanh nghiệp ở cả ba nước;
- Loại bỏ những hạn chế về đầu tư nước ngoài (trừ một số ít lĩnh vực bị hạn chế do mỗi bên xác định) và đảm bảo không phân biệt đối xử đối với những công ty nội địa thuộc sở hữu của những nhà đầu tư ở các nước NAFTA khác;
- Loại bỏ những hàng rào ngăn cản các công ty dịch vụ hoạt động xuyên biên giới các nước Bắc Mỹ, bao gồm các lĩnh vực chủ chốt như dịch vụ tài chính;
- Quy định các nguyên tắc toàn diện để bảo hộ IPRs; và
- Quy định ba cơ chế giải quyết tranh chấp, đó là: tranh chấp giữa chính phủ với chính phủ; tranh chấp giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư nước ngoài; và tranh chấp về các biện pháp chống bán phá giá và thuế chống trợ cấp (thuế đối kháng).

2. Tại sao nghiên cứu NAFTA?

A. *NAFTA là ví dụ điển hình về một FTA toàn diện và tự do hoá*

Các nhà bình luận đã nhận xét rằng NAFTA là một mô hình FTA hiện đại xuất hiện sớm nhất, sau đó đã trở thành khuôn mẫu cho các FTAs toàn diện và nhiều tham vọng noi theo.

> Kể từ giữa những năm 1990, các nước châu Mỹ đã đi tiên phong trong việc đàm phán NAFTA - hiệp định thương mại tự do - đặc trưng bởi tính tham vọng và mục tiêu thực hiện tự do hoá thương mại và hội nhập không chỉ đối với hàng hoá, mà còn cả dịch vụ, cũng như các yếu tố quan trọng khác, như đầu tư, sở hữu trí tuệ và mua sắm chính phủ.[27]

Một học giả người Canada nhận xét rằng Hiệp định này là một FTA toàn diện đầu tiên được thiết lập giữa các nền kinh tế phát triển và đang phát triển:

> NAFTA là sự kiện quan trọng đáng nhớ trong biên niên sử của hội nhập kinh tế và thương mại quốc tế. Lần đầu tiên từ trước đến nay, một hiệp định thương mại tự do toàn diện đã được thiết lập giữa các nước phát triển và nước đang phát triển. Hơn nữa, nó không chỉ mở rộng phạm vi của các hiệp định thương mại tự do truyền thống bằng cách bao quát các quyền sở hữu, đầu tư nước ngoài và dịch vụ, mà còn công nhận tầm quan trọng của những quyền và lợi ích về lao động và môi trường, mặc dù nó đề cập đến các vấn đề này chỉ nhằm mục đích để các nước thi hành pháp luật hiện hành của họ trong hai lĩnh vực này, hơn là đưa ra một số nguyên tắc chung và hành động thực thi.[28]

B. *NAFTA là ví dụ về một hiệp định thương mại tự do đầy ý nghĩa về thương mại*

Những nhà xuất khẩu và cung ứng dịch vụ đánh giá giá trị của một FTA bất kì trên cơ sở giá trị của những cơ hội tiếp cận thị trường mới do hiệp định đưa ra. Những thương nhân này sẽ đặt ra những câu hỏi như:

- FTA có loại bỏ nhanh chóng thuế quan ở thị trường nước ngoài đối với những sản phẩm có tầm quan trọng về thương mại hay không?
- FTA có loại bỏ những NTBs và thuận lợi hoá thủ tục như thông quan hay không?
- FTA có bao gồm nghĩa vụ nhằm bảo hộ IPRs một cách hiệu quả ở thị trường xuất khẩu hay không?
- Bằng cách nào FTA quy định về sự tiếp cận thị trường trong lĩnh vực thương mại dịch vụ? Hiệp định có quy định nghĩa vụ dành đối xử NT cho nhà cung ứng dịch vụ nước ngoài hay không?

Nội dung của văn bản hiệp định sẽ trả lời cho những câu hỏi mang tính thương mại này, và chỉ trên cơ sở những cân nhắc mang tính thương mại như vậy, thì một FTA mới có thể được đánh giá là có tạo ra cơ hội tiếp cận thị trường một cách có ý nghĩa cho nước xuất khẩu hay không? Với tư cách là luật sư hay nhà tư vấn, sự phân tích văn bản hiệp định sẽ không sâu sắc đối với khách hàng, nếu bạn không đề cập đến phần nội

[27] Stephenson, S., và M. Robert, 'Evaluating the Contributions of Regional Trade Agreements to Governance of Services Trade', *ADBI Working Paper 307*, (2011), http://www.adbi.org/working-paper/2011/08/30/4684.evaluating.contributions.regional.trade.agreements.

[28] Courchene, *FTA at 15, NAFTA at 10: A Canadian Perspective on North American Integration*, (2003), tr. 271, http://dspace.cigilibrary.org/jspui/bitstream/123456789/710/1/FTA%20at%2015% 20NAFTA%20at%2010%20a%20Canadian%20perspective%20on%20North%20American%20integration.pdf?1

dung của hiệp định liên quan đến lợi ích xuất khẩu mang tính thương mại, hoặc những lợi ích của các bên tham gia mà chính họ không mong muốn tự do hoá thị trường nội địa.

Những nhà đàm phán thay mặt quốc gia mình đàm phán để đi đến kí kết văn bản FTA có thể chấp thuận một FTA chất lượng cao, chỉ khi tất cả các chính phủ tham gia đàm phán cùng có chung tham vọng và ý chí chính trị cao để đạt được những mục tiêu này. Những cuộc đàm phán FTA chỉ có thể kết thúc thành công nếu giải quyết được cả những lợi ích xuất khẩu và những nhạy cảm về nhập khẩu của tất cả các bên. Điều này khiến việc đàm phán một hiệp định chất lượng cao trở thành thách thức lớn. Nói một cách đơn giản, những nhà đàm phán chỉ có thể nhận được từ phía đối tác sự nhượng bộ, nếu họ cũng nhượng bộ lại đối tác.

Khi phân tích những quan tâm mang tính thương mại nói trên, chúng ta thấy rằng NAFTA là một hiệp định mang tính tự do hoá cao. Thuế quan đối với hầu hết các sản phẩm đã được loại bỏ hoàn toàn trong thời gian 15 năm (chỉ còn lại thuế quan đối với một số nông sản buôn bán giữa Hoa Kỳ và Canada). Bên cạnh đó, còn có những cam kết quan trọng nhằm thúc đẩy đầu tư và thương mại trong lĩnh vực dịch vụ. Việc hiểu được rằng làm thế nào mà NAFTA đã đạt được mức độ tự do hoá cao như thế có thể giúp chúng ta hiểu được ý nghĩa thương mại của những FTA khác.

C. *NAFTA thường xuyên bị tranh chấp*

Những cơ chế giải quyết tranh chấp được đề ra trong NAFTA được chính phủ của các bên NAFTA và các nhà đầu tư của họ sử dụng thường xuyên.[29] Theo quy tắc giải quyết tranh chấp của NAFTA, phán quyết cuối cùng của cơ quan giải quyết tranh chấp (panel) được tuyên bố công khai, và các bên có thể tuyên bố cho công chúng nhiều tài liệu đã được đệ trình trong quá trình kiện tụng. Kết quả là những phán quyết được tuyên bố công khai này đã đóng góp quan trọng cho nguồn án lệ của luật thương mại quốc tế, và nhất là tạo nguồn luật trọng tài liên quan đến giải quyết tranh chấp giữa nhà đầu tư nước ngoài và chính phủ nước tiếp nhận đầu tư. Để hiểu được án lệ, cần phải hiểu những nghĩa vụ được quy định trong NAFTA.

[29] *Xem*: khoản 17 Điều 20 của NAFTA. *Xem* thêm: Những thủ tục bổ sung theo Quy tắc 35 về khả năng về thông tin trong những nguyên tắc mẫu. Nguyên tắc mẫu về thủ tục cho Chương 20 của NAFTA, nguồn: http://www.nafta-sec-alena.org/en/view.aspx?conID=657&mtpiID=ALL

D. *NAFTA là hình mẫu cho những FTAs ký kết với Hoa Kỳ sau này*

Kể từ khi NAFTA được đàm phán, Hoa Kỳ đã đàm phán FTA với 18 nước, bao gồm một số nước ở Trung Mỹ, Trung Đông, cũng như Singapore và Hàn Quốc ở châu Á.

Tuy rằng mỗi văn bản FTA sau này là sản phẩm duy nhất của quá trình đàm phán giữa các đối tác thương mại, nhưng cấu trúc và nội dung của NAFTA đã trở thành hình mẫu cho những cuộc đàm phán FTA giữa Hoa Kỳ với các nước Tây bán cầu khác.

Những nội dung như loại bỏ thuế quan toàn diện và tự do hoá thương mại dịch vụ, cũng như cam kết bảo hộ IPRs, quyền lao động và bảo vệ môi trường, là những mục tiêu đàm phán tiếp tục của Hoa Kỳ. Việc nghiên cứu nội dung văn bản NAFTA có thể giúp hiểu được vấn đề: làm thế nào để những mục tiêu này được phản ánh trong Hiệp định?

2. Tự do hoá thương mại hàng hoá trong NAFTA

A. *Những thách thức của việc đàm phán loại bỏ thuế quan*

Trọng tâm của bất kì FTA nào cũng là giảm và loại bỏ thuế quan đối với hàng hoá buôn bán giữa các bên. Biểu thuế quan hài hoà được các nước trên thế giới sử dụng bao gồm hơn 5.000 dòng thuế đối với những loại hàng hoá cụ thể ở mức 6 con số trong 96 chương. Biểu thuế quan quốc gia thường có nhiều dòng thuế hơn để mô tả cụ thể hơn về sản phẩm ở mức 8 và 10 con số (biểu thuế quan của Hoa Kỳ hiện có hơn 17.000 dòng thuế ở mức 10 con số).

Những nhà đàm phán FTA phải thương lượng về việc xử lí thuế quan đối với mỗi sản phẩm này. *Ví dụ:* nếu nước A quy định thuế nhập khẩu gạo là 20%, thì liệu thuế nhập khẩu này có được loại bỏ hoàn toàn không? Cho phép bao nhiêu năm để loại bỏ thuế quan? Việc giảm thuế quan được thực hiện đều đặn hàng năm, hay sẽ bị trì hoãn rồi sau đó sẽ giảm nhanh vào giai đoạn cuối? Những quyết định liên quan đến ứng xử về thuế quan đối với mỗi sản phẩm phải được ghi nhận trong phần phụ lục của FTA và phải công bố để các chính phủ và các bên liên quan có thể biết được những cam kết giảm thuế quan này.

Quá trình đàm phán thường xuyên dẫn đến những thoả thuận FTA không đạt được mức tự do hoá cao. *Ví dụ,* những bên có liên quan trong những ngành kinh tế nhập khẩu nhạy cảm ở nước A sẽ tìm cách

để không giảm thuế quan đối với những sản phẩm xi măng của họ, để họ sẽ không phải đối mặt với sự cạnh tranh lớn hơn của xi măng nhập khẩu theo FTA. Trong một kịch bản điển hình, những nhà đàm phán của nước B sẽ chấp thuận đề xuất của nước A, chỉ khi nào những mặt hàng ưu tiên xuất khẩu của nước B được tiếp cận thị trường nhiều hơn, hoặc khi nước B cũng không phải giảm thuế quan đối với những sản phẩm của những ngành kinh tế nhập khẩu nhạy cảm của họ.

Nếu cả nước A và nước B đều được chấp thuận không phải giảm thuế quan, thì mức độ tự do hoá có thể bị giảm rất nhanh, do số lượng thuế quan không phải giảm tăng lên. *Ví dụ*, nếu nước A tìm cách duy trì vĩnh viễn thuế quan đối với xi măng, thì nước B chỉ có thể chấp nhận điều này khi mà họ cũng được phép duy trì việc áp thuế quan đối với gạo. Quá trình này có thể giảm dần: nếu nhìn vào kết quả đàm phán về xi măng và gạo, thì ta thấy rằng nước A sẽ không thể tiếp cận thị trường gạo của nước B, do đó nước A sẽ không muốn dành mức thuế thấp đối với ngô cho nước B. Nếu quá trình này tiếp tục diễn ra, thì thoả thuận đạt được sẽ không thể tạo ra những cơ hội có ý nghĩa cho sự tăng trưởng.

B. *Loại bỏ thuế quan trong NAFTA*

NAFTA phản ánh những cam kết rất mạnh mẽ về tự do hoá thương mại, bởi nó loại bỏ thuế quan đối với hầu hết các sản phẩm được trao đổi giữa ba nước. NAFTA bao gồm cả các điều khoản của Hiệp định thương mại tự do Hoa Kỳ-Canada đã được kí kết năm 1988. FTA này cho phép duy trì vĩnh viễn thuế quan đối với những nông sản sau: thực phẩm chế biến từ sữa, gia cầm và trứng nhập khẩu từ Hoa Kỳ vào Canada; đường, thực phẩm chế biến từ sữa và lạc nhập khẩu từ Canada vào Hoa Kỳ. Tất cả các loại thuế quan khác giữa các bên NAFTA đều được loại bỏ.

Sự khó khăn trong quá trình đàm phán và thực thi việc loại bỏ thuế quan đối với tất cả các sản phẩm trong NAFTA có thể được hiểu rõ hơn khi xem xét tính nhạy cảm về xã hội, chính trị và kinh tế của một số sản phẩm và ngành dịch vụ. Trước khi đàm phán NAFTA, một số ngành kinh tế như dệt may, thép và một số loại hình công nghiệp ô-tô được hưởng lợi do thuế nhập khẩu ở mức từ 10% đến 50% hoặc cao hơn. Thuế quan đối với nông sản thường cao hơn thuế quan đối với sản phẩm công nghiệp, và một số nông sản được hưởng lợi từ hạn ngạch và trợ cấp nhằm duy trì mức giá nội địa của một số sản phẩm, như đường và lúa mì, cho chủ trang trại. Tự do thương mại có thể khiến cho việc trợ cấp và hạn chế tiếp thị trở nên rất tốn kém để duy trì mức giá nội địa cao đối với nông sản, trong khi phải cạnh tranh với những sản phẩm nhập khẩu ở mức giá thấp.

Một trong những vấn đề thuế quan phức tạp và nhạy cảm nhất, đó là việc loại bỏ thuế quan đối với mặt hàng đường và những chất làm ngọt được buôn bán giữa Hoa Kỳ và Mexico. Theo văn bản thoả thuận cuối cùng, hạn ngạch thuế quan sẽ được duy trì trong 15 năm đối với nhập khẩu đường của Mexico vào Hoa Kỳ. Sau 15 năm, hạn ngạch thuế quan và tất cả thuế quan đối với mặt hàng đường sẽ được loại bỏ. Tuy nhiên, văn bản NAFTA lúc ban đầu có một quy định có thể cho phép Mexico tiếp cận không hạn chế vào thị trường đường của Hoa Kỳ rất sớm, từ năm 2001 (thay vì năm 2008). Tuy nhiên, sau này, khi rõ ràng là Nghị viện Hoa Kỳ sẽ không thông qua một hiệp định với quy định nêu trên, Hoa Kỳ và Mexico đã phải đàm phán những điều khoản mới về mặt hàng đường thông qua một 'lá thư bên lề' ('side letter') với việc quy định hạn chế nhập khẩu mặt hàng đường của Mexico vào Hoa Kỳ ở mức 250.000 tấn một năm hoặc thấp hơn.[30]

Sau khi NAFTA được thực thi, Mexico đã cố gắng hạn chế nhập khẩu sản phẩm tương tự đường từ Hoa Kỳ. Sản phẩm này tên là 'Chất làm ngọt với lượng fructose cao làm từ ngô' (viết tắt là 'HFCS'), là một chất làm ngọt được làm từ ngô nguyên chất. HFCS có thể được dùng để làm ngọt đồ uống không cồn. Những nhà sản xuất đường tại Mexico thuyết phục Nghị viện Mexico áp mức thuế nội địa 20% đối với nước ngọt có chứa chất HFCS, trong khi nước ngọt có đường làm từ đường mía không phải chịu thuế bổ sung. Năm 2006, Hoa Kỳ đã kiện thành công vụ *Mexico-Taxes on Soft Drinks* [2006] trước Cơ quan giải quyết tranh chấp của WTO (DSB), phản đối loại thuế này, bởi đó là sự vi phạm nghĩa vụ NT trong WTO.[31]

Những cuộc đàm phán khó khăn về mặt hàng đường trong 'lá thư bên lề' của Hiệp định và tranh chấp WTO về chất làm ngọt HFCS phản ánh tính kinh tế-chính trị phức tạp của mặt hàng đường ở Hoa Kỳ và Mexico:

> … [V]ấn đề cơ bản là cả Hoa Kỳ và Mexico đều không tuân thủ nguyên tắc thị trường tự do đối với việc mua bán mặt hàng đường. Cả hai nước đều theo đuổi việc duy trì giá đường cao hơn

[30] Huffbauer, *NAFTA Revisited: Achievements and Challenges, Institute for International Economics*, (2006), tr. 326, nguồn: http://book store.piie.com/book-store/332.html

[31] WTO, vụ *Mexico-Taxes on Soft Drinks*, DS 308, ngày 06/3/2006, http://wto.org/english/tratop_e/ dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf

giá thế giới, không phải để hạn chế tiêu dùng [vì lí do sức khoẻ], mà đúng hơn là để tăng doanh thu của nhà sản xuất đường.[32]

Đối với hàng công nghiệp, NAFTA loại bỏ tất cả các loại thuế quan đối với tất cả các sản phẩm trong giai đoạn 10 năm. Thuế quan đối với ô-tô là một trong những loại thuế quan ở mức cao nhất đối với hàng công nghiệp. 'Tuyên bố về hoạt động hành chính' (viết tắt là 'SAA') do Tổng thống Hoa Kỳ Clinton trình lên Nghị viện Hoa Kỳ bao gồm bản tóm tắt về việc xử lí giảm thuế quan đối với ô-tô và phụ tùng ô-tô:

> … [T]ất cả thuế quan đối với mặt hàng ô-tô có xuất xứ Bắc Mỹ sẽ được loại bỏ trong vòng 10 năm. Mexico sẽ giảm 20% thuế quan đối với xe chở khách và xe tải nhẹ xuống 10% ngay khi thực thi NAFTA, và sẽ giảm dần 10% còn lại trong vòng 5 năm đối với xe tải hạng nhẹ và 10 năm cho xe chở khách. Hoa Kỳ cũng sẽ loại bỏ thuế quan đối với hầu hết phụ tùng do Mexico sản xuất trong quá trình thực thi Hiệp định, hoặc sau 5 năm. Thuế quan đối với một số ít phụ tùng sẽ được giảm dần trong vòng 10 năm. Thuế quan 2,5% hiện hành đối với xe chở khách sẽ được loại bỏ ngay, và thuế quan đối với xe tải hạng nhẹ [25%] sẽ được giảm xuống còn 10% ngay khi thực thi Hiệp định và được giảm dần sau 5 năm.[33]

Việc loại bỏ thuế quan đối với ô-tô và phụ tùng ô-tô trong NAFTA làm tăng thêm sự hội nhập khu vực và sự cạnh tranh của ngành công nghiệp ô-tô ở Bắc Mỹ với sản lượng hàng năm đạt hơn 12 triệu xe. Những nhà sản xuất ô-tô từ châu Á và châu Âu đã mở nhà máy ở các bên NAFTA, và một phần động cơ của họ khi đầu tư vào Bắc Mỹ là nhằm tận dụng cơ hội từ những lợi ích của Hiệp định NAFTA.[34]

C. *Loại bỏ thuế quan: So sánh NAFTA với một số FTAs của ASEAN*

Ngược lại với việc loại bỏ toàn diện hầu hết các thuế quan trong vòng 15 năm ở NAFTA, những FTAs của ASEAN, mà Việt Nam tham gia, cho phép duy trì vĩnh viễn nhiều loại thuế quan nhập khẩu.

[32] Như trên.

[33] Hoa Kỳ, *North American Free Trade Agreement Implementation Act, Statement of Administrative Action,* (1993), tr. 37, nguồn: *http://womenontheborder.org/wp/wp-content/uploads/2011/06/NAFTA- PROVISIONS.pdf*

[34] I. Studer, *IRPP Working Paper: The American Automobile Industry*, (2004), tr. 1, nguồn: http://www.irpp.org/miscpubs/archive/na_integ/wp2004-09o.pdf
D. Winter, 'North America to See Painfully Slow Climb in 2012' WardsAuto.com, Nov 28, 2011, nguồn: http://wardsauto.com/reports/2011/soi2/2011_year_NorthAmerica_111024/

Theo quy định của FTA ASEAN-Hàn Quốc (AKFTA), các bên đã thiết lập một bộ các 'thể thức' hoặc những quy tắc đàm phán cho phép mỗi bên loại trừ (exempt) khỏi bất kì nhượng bộ thuế quan nào khoảng 40 dòng thuế ở mức 6 con số. Những sản phẩm loại trừ được xác định trong phụ lục của Hiệp định có tên là 'Nhóm E (Những dòng thuế không phải nhượng bộ)'.[35]

Sử dụng những thể thức này, mỗi bên Hàn Quốc và Việt Nam đã loại trừ những sản phẩm nhạy cảm về chính trị mà nước kia đã sản xuất đủ. *Ví dụ*, Hàn Quốc không giảm thuế quan đối với thịt bò, thịt lợn, thịt gia cầm và nhiều loại hải sản, hoa quả, rau tươi, và gạo. Việt Nam không giảm thuế quan đối với một số loại thép nhất định và hầu hết xe máy, ô-tô, xe tải, xe buýt cũng như một số phụ tùng ô-tô.[36] Nếu thuế quan đối với tất cả các sản phẩm này được giảm, thì rất có thể việc buôn bán những sản phẩm này giữa hai nước sẽ tăng lên đáng kể. Việt Nam đã loại trừ những sản phẩm tương tự ra khỏi lộ trình giảm thuế quan trong FTA ASEAN-Australia-New Zealand ('AANZFTA').[37] Trong FTA ASEAN-Ấn Độ, Việt Nam cũng loại trừ vĩnh viễn một số lượng lớn sản phẩm ra khỏi lộ trình giảm thuế quan, bao gồm trứng chim, đường, thuốc lá, muối, dầu, phân bón u-rê, kính tấm, xi măng, thép, sản phẩm sữa, mô-tô, ô-tô, và phụ tùng ô-tô.[38]

Việc quy định thuế quan vĩnh viễn trong những FTAs của ASEAN khiến những hiệp định này ít ý nghĩa hơn đối với nhà xuất khẩu. *Ví dụ*, việc loại trừ vĩnh viễn một số sản phẩm ra khỏi lộ trình giảm thuế quan trong FTA ASEAN-Hàn Quốc làm cho người nông dân trồng lúa ở Việt Nam không thể tiếp cận hơn được với thị trường gạo sinh lợi ở Hàn Quốc. Tháng 12/2010, theo Tổ chức nông lương thế giới ('FAO'), giá bán lẻ trung bình 1 kg gạo ở Hàn Quốc là 1,76 USD, so với giá ở Việt Nam là 0,44 USD.[39]

[35] *ASEAN-Korea FTA, Appendix 2 Highly Sensitive List: Group E*, nguồn: http://www.aseansec.org/AKFTA%20doacuments%20signed%20at%20aem-rok,24aug06,KL-pdf/Appendix%202%20to%20 Annex%202%20-%20asean%20version%20HSL%20changes-final%20formatted,%2018aug06.pdf

[36] Như trên, *xem Danh sách những sản phẩm nhạy cảm của Việt Nam*, tr. 222.

[37] *Xem: AANZA FTA Phụ lục 1: Lộ trình cam kết thuế quan của Việt Nam*, nguồn: http://www.dfat.gov.au/fta/aanzfta/annexes/hs2007/Goods-Vietnam-AANZFTA-HS2007-Tariff-Schedule-and-Appendices-final-confirmed.pdf. Đối với thịt gà, *xem* H.S. Chapter 02.07. Đối với thép, *xem* H.S. Chapter 72. Đối với ô-tô, *xem, e.g.,* H.S. Code 8703.24.86

[38] *Xem* ASEAN-India FTA (AIFTA), Annex 1 Schedule of Tariff Commitments-Viet Nam. Đối với trứng chim (0407), đường (HS 1701), thuốc lá (HS2401), muối (HS 2501), dầu (HS 2709), phân bón u-rê (HS 3102), kính tấm (HS 7003), xi măng (HS 2523), thép sản phẩm sữa (HS 72), mô-tô (HS 8711), ô-tô (HS 8702), phụ tùng ô-tô (HS 8409). *Xem*: http://www.fta.gov.sg/fta_C_aifta.asp?hl=46

[39] 'FAO Rice Market Monitor-January 2011', tr. 22, nguồn*:* http://www.fao.org/docrep/013/am156e/am156e00.pdf

D. *Quy tắc xuất xứ của NAFTA*

1. Quy tắc xuất xứ là gì và tại sao những FTAs lại có quy tắc xuất xứ?

Quy tắc xuất xứ ('RoO') là một phần của mọi FTA, nhằm đảm bảo rằng hàng hoá xuất khẩu từ một nước thành viên được áp dụng thuế quan thấp hơn và nhận được sự đối xử ưu tiên khác. RoO cũng được xây dựng nhằm đảm bảo rằng sự đối xử ưu tiên sẽ không dành cho hàng có xuất xứ từ các nước không phải là thành viên của Hiệp định. Dưới hình thức đơn giản nhất, RoO có thể chỉ ra rằng một sản phẩm là sản phẩm 'có xuất xứ và thích hợp để được hưởng sự đối xử ưu tiên, nếu sản phẩm đó hoàn toàn được chế tạo hoặc sản xuất ra tại một nước là một bên tham gia Hiệp định. Bởi vì hiện nay, chuỗi cung ứng của rất nhiều sản phẩm đều mang tính đa quốc gia, nên các RoOs đã phát triển theo hướng cho phép một phần nguyên liệu đầu vào có thể có được ở nước thứ ba.

SAA mô tả quy tắc xuất xứ của NAFTA được áp dụng cho hầu hết các sản phẩm theo cách sau đây:

> Chương 4 quy định rằng hàng hoá được sản xuất hoặc có được hoàn toàn trên lãnh thổ của một hay nhiều bên của NAFTA (*ví dụ*, cây trồng trên đất của một bên, khoáng chất được lấy từ mỏ của thành viên đó) là 'những hàng hoá có xuất xứ' và do đó thích hợp để được áp dụng đối xử ưu tiên.
>
> Hàng hoá được sản xuất toàn bộ hoặc một phần từ những nguyên liệu không có xuất xứ (không có xuất xứ NAFTA) có thể trở thành hàng hoá có xuất xứ, nếu nguyên liệu không có xuất xứ được xử lí tại một hoặc nhiều bên của NAFTA, trong quá trình gia công hoặc lắp ráp, đủ để dẫn đến việc thay đổi đã được xác định rõ trong bảng phân loại thuế quan theo Hệ thống thuế quan hài hoà được quy định cụ thể trong Phụ lục 401. Sự thay đổi trong bảng phân loại thuế quan đảm bảo rằng quá trình gia công hoặc lắp ráp diễn ra ở các vùng lãnh thổ NAFTA dẫn đến sự thay đổi về sản phẩm, sự thay đổi có ý nghĩa về mặt vật lí và thương mại.[40]

Theo những quy tắc nêu trên, hàng hoá được coi là 'có xuất xứ' và không bị áp thuế quan, nếu chúng được sản xuất hoàn toàn tại một bên của NAFTA, hoặc nếu chúng chứa đựng những nguyên liệu không có xuất xứ NAFTA, nhưng đã được gia công hoặc láp ráp theo những cách thức dẫn đến kết quả làm thay đổi sự phân loại thuế quan, và quá trình gia công đó dẫn đến những thay đổi có ý nghĩa về mặt vật lí và thương mại.

NAFTA, giống như nhiều FTAs khác, quy định về quy tắc xuất xứ khắt khe hơn đối với những sản phẩm đặc biệt, như hàng dệt may - một sản phẩm nhập khẩu nhạy cảm quen thuộc ở nhiều nước. SAA của Hoa Kỳ mô tả quy tắc xuất xứ đặc biệt đối với hàng dệt may như sau:

> Quy tắc xuất xứ chung của NAFTA đối với hầu hết sản phẩm dệt may có thể được mô tả như là quy tắc 'từ sợi chỉ trở đi', theo đó đòi hỏi hàm lượng 'Bắc Mỹ' phải từ giai đoạn sản xuất sợi cho đến thành phẩm, trước khi một sản phẩm cụ thể được hưởng sự đối xử ưu tiên về thuế quan và các biện pháp hạn chế số lượng. *Ví dụ*, để một bộ quần áo đáp ứng được quy tắc xuất xứ của NAFTA:
>
> - Sản phẩm đó phải được cắt và khâu tại một nước NAFTA;
> - Vải may phải được sản xuất tại một nước NAFTA; và
> - Sợi dùng để sản xuất vải phải được sản xuất ở một nước NAFTA.[41]

Quy tắc xuất xứ 'từ sợi chỉ trở đi' của NAFTA cấm những nhà sản xuất quần áo sử dụng vải từ các nước bên ngoài NAFTA để sản xuất quần áo. Nếu một số loại vải không đủ cung hoặc đắt hơn trong phạm vi các nước thành viên của Hiệp định, thì quy tắc này sẽ cho phép hạn chế cơ hội xuất khẩu của các nhà sản xuất quần áo. Tương tự, có thể thấy những quy tắc xuất xứ mang tính hạn chế như vậy trong một số FTAs của ASEAN. Một nhà bình luận, sau khi phân tích quy tắc xuất xứ trong những FTAs của ASEAN, đã nhận thấy rằng hàng dệt may và ô-tô là những sản phẩm nhạy cảm nhất đối với các bên tham gia đàm phán, và những sản phẩm này đã trở thành đối tượng của những quy tắc xuất xứ khắt khe hơn.[42] Quy tắc xuất xứ áp dụng cho mặt hàng dệt may theo Hiệp định đối tác kinh tế chung ASEAN-Nhật Bản (viết tắt là 'AJCEP') rất giống quy tắc 'từ sợi chỉ trở đi' của NAFTA.[43]

[40] SAA, điểm 8, mục 41.

[41] Như trên.

[42] Medalla và Balboa, 'ASEAN Rules of Origin: Lessons and Recommendations for Best Practice', Philippine Institute for Development Studies, (2009), nguồn: http://www3.pids.gov.ph/ris/dps/pidsdps 0936.pdf
Khi so sánh quy tắc xuất xứ trong ASEAN và các FTAs ASEAN+1, những lĩnh vực sau được đánh giá là lĩnh vực nhạy cảm nhất đối với hầu hết các nước, bao gồm ô-tô, hàng dệt may.

[43] Đây là một ví dụ về RoO cho mặt hàng dệt quy định tại AJCEP:
Đối với sản phẩm 'Vải dệt từ sợi nhỏ nhân tạo' quy định tại dòng thuế 54.08, RoO cho phép chỉ tơ, nếu không có xuất xứ ở nước thứ ba, sẽ được sử dụng để sản xuất vải, chỉ khi nào chỉ tơ được xe thành sợi, hoặc được nhuộm hoặc in hoàn toàn ở một hoặc nhiều bên, và việc nhuộm hoặc in đi kèm với hai hay nhiều quy trình hoàn thiện bổ sung.

4. Tự do hoá thương mại dịch vụ trong NAFTA

A. *Nghĩa vụ đối xử quốc gia (NT) và đối xử tối huệ quốc (MFN) dành cho những nhà cung ứng dịch vụ qua biên giới theo quy định của NAFTA*

Trong Chương 12 của NAFTA, ba bên đồng ý dành đối xử MFN theo Điều 1203 và NT theo Điều 1204 cho những nhà cung ứng dịch vụ qua biên giới của các bên NAFTA.

Khoản 2 Điều 1213 đưa ra định nghĩa về thương mại dịch vụ qua biên giới như sau:

> *Cung ứng dịch vụ qua biên giới* hay *thương mại dịch vụ qua biên giới* có nghĩa là cung ứng một dịch vụ:
>
> (a) Từ lãnh thổ của một bên vào lãnh thổ của một bên khác;
>
> (b) Trong lãnh thổ của một bên bởi một người của bên đó cho một người của một bên khác;
>
> (c) Bởi công dân của một bên trong lãnh thổ của một bên khác.

Định nghĩa trên bao gồm cả việc cung ứng dịch vụ từ bên này cho bên kia. *Ví dụ,* một kiến trúc sư ở Mê-hi-cô chuẩn bị bản thiết kế toà nhà và gửi các kế hoạch thiết kế cho khách hàng của mình ở Hoa Kỳ. Định nghĩa trên cũng bao gồm việc cung ứng dịch vụ 'trên lãnh thổ của một bên khác'. *Ví dụ,* kiến trúc sư người Mê-hi-cô đi đến Hoa Kỳ để thiết kế toà nhà ở đó.

SAA tóm tắt nghĩa vụ MFN và NT như sau:

> ... [Đ]iều 1202 và Điều 1203 yêu cầu mỗi chính phủ chấp thuận không phân biệt đối xử đối với các công ty cung ứng dịch vụ từ những bên NAFTA khác… [T]heo Điều 1202, chính phủ của bên NAFTA đó không được đối xử thiên vị đối với các công ty địa phương. Ở cấp quốc gia, cấp tỉnh và địa phương, yêu cầu chính phủ phải dành cho nhà cung ứng dịch vụ từ các bên NAFTA khác sự đối xử 'không kém thuận lợi hơn' so với những công ty dịch vụ trong nước, trong những hoàn cảnh tương tự.
>
> Ngoài ra, Điều 1203 yêu cầu chính phủ các bên NAFTA phải dành đối xử 'tối huệ quốc' cho các nhà cung ứng dịch vụ từ các bên NAFTA khác. Điều đó nghĩa là một chính phủ phải đối xử với nhà cung ứng đó giống như đối xử với các công ty đến từ bất kì nước nào (bao gồm cả những nước bên ngoài NAFTA) trong những hoàn cảnh giống nhau...
>
> [T]iêu chuẩn 'không kém thuận lợi hơn' quy định tại Điều 1202 và Điều 1203 không đòi hỏi nhà cung ứng dịch vụ từ bên NAFTA khác phải nhận được sự đối xử giống hoặc thậm chí ngang bằng như dành cho những công ty trong nước hoặc những công ty nước ngoài khác. Những nhà cung ứng dịch vụ nước ngoài có thể được đối xử khác, nếu hoàn cảnh cho phép. *Ví dụ,* nếu cần thiết, một tiểu bang có thể áp đặt những yêu cầu đặc biệt đối với những nhà cung ứng dịch vụ từ Ca-na-đa và Mê-hi-cô để bảo vệ người tiêu dùng ở một mức độ giống như đối với những công ty trong nước. Những quy định không phân biệt đối xử của NAFTA cấm chính phủ các bên áp đặt luật lệ và những quy định nhằm bóp méo những quy định về cạnh tranh để ủng hộ cho những công ty trong nước; chúng không được cản trở sự phân biệt về mặt pháp luật giữa những công ty đó và nhà cung ứng dịch vụ nước ngoài.[44]

Theo Chương 12, chính phủ của các bên NAFTA được phép duy trì 'những phân biệt đối xử chính đáng theo quy định của pháp luật' giữa những nhà cung ứng dịch vụ nội địa và nước ngoài. Ngoài ra, các chính phủ được phép tiếp tục yêu cầu những nhà cung ứng dịch vụ chuyên môn, như trong lĩnh vực y khoa và pháp luật, phải có giấy phép của cơ quan có thẩm quyền ở cấp quốc gia hoặc cấp tỉnh, nơi thực hiện dịch vụ, và chính phủ của các bên NAFTA không bắt buộc phải cấp giấy phép chuyên môn tại nước của họ, đơn giản vì người đó có giấy phép chuyên môn hoặc đã được đào tạo nghề nghiệp tại một bên NAFTA khác.[45]

B. *Phương pháp tiếp cận danh mục 'chọn-bỏ' đối với tự do hoá thương mại dịch vụ trong NAFTA*

Phạm vi và nội dung của tự do hoá thương mại dịch vụ khá rộng, bởi vì NAFTA sử dụng một 'danh mục phủ định' ('chọn-bỏ') trong cấu trúc của những cam kết cho mỗi bên. Theo phương pháp 'danh mục phủ định',

Có thể xem chi tiết về quy tắc xuất xứ AJCEP trong lộ trình và ghi chú của AJCEP, nguồn: http://www.mofa.go.jp/policy/economy/fta/asean/annex2.pdf

[44] SAA, tr. 153.

[45] Khoản 2 Điều 1210 NAFTA quy định: 'Không có gì tại Điều 1203 được hiểu là đòi hỏi một bên phải công nhận nền giáo dục, kinh nghiệm, giấy phép hoặc chứng chỉ có được trên lãnh thổ của một bên khác'.

tất cả các loại dịch vụ đều được tự do hoá, trừ ngành dịch vụ được liệt kê trong 'danh mục phủ định', theo đó xác định những ngành dịch vụ không được tự do hoá. Danh mục này được ghi trong Phụ lục NAFTA về biểu cam kết dịch vụ dành cho mỗi bên. *Ví dụ,* Mexico đưa vào 'danh mục phủ định' của nước mình một dịch vụ loại ra khỏi quá trình tự do hoá thương mại, đó là dịch vụ 'Nhân sự chuyên môn của ngành vận tải hàng hải'. Dịch vụ bị loại trừ này được liệt kê như sau:

Hình thức hạn chế:

- Đối xử quốc gia (NT) (Điều 1202)
- Đối xử tối huệ quốc (MFN) (Điều 1203)
- Sự hiện diện tại địa phương (Điều 1205)

Chỉ có người có quốc tịch Mexico do sinh ra có thể làm nghề:

(a) Cơ trưởng, hoa tiêu, thuyền trưởng, thợ máy, thợ cơ khí và thủy thủ trên tàu thủy hoặc tàu bay mang cờ Mê-hi-cô;

(b) Hoa tiêu cảng, chỉ huy cảng và điều hành sân bay; và

(c) Cán bộ hải quan.[46]

Trong *ví dụ* này, Mexico đã 'hạn chế' hoặc loại trừ khỏi cam kết của mình, theo Chương 12 của NAFTA, nghĩa vụ dành NT, MFN và quyền hiện diện tại địa phương cho nhà cung ứng dịch vụ đến từ các nước khác trong NAFTA.

Ngược lại, hầu hết các FTA được đàm phán bởi ASEAN và các thành viên ASEAN đều sử dụng phương pháp 'danh mục khẳng định' ('chọn-cho'), theo đó chỉ tự do hoá những ngành dịch vụ được liệt kê cụ thể trong biểu cam kết dịch vụ.

Những FTAs có Hoa Kỳ tham gia đều theo phương pháp 'danh mục phủ định' (tất cả các dịch vụ đều được tự do hoá, trừ những ngành được liệt kê) và đã đạt được nhiều sự tự do hoá hơn. Tuy nhiên, hiệu quả tương đối của sức mạnh đàm phán của Hoa Kỳ, thông tin và những lợi ích khác của phương pháp 'danh mục phủ định' đã không được xác định rõ. Phần lớn những FTAs trong nội bộ châu Á đều không cam kết dành MFN cho các đối tác tham gia hiệp định, hoặc chỉ bao gồm những nghĩa vụ nhẹ nhàng về mặt này.[47]

[46] NAFTA, Phụ lục 1 (Mexico's Schedule of Services).

[47] Trewin và các tác giả khác, *East Asian Free Trade Agreements in Services: Facilitating Free Flow of Services in ASEAN,* (2008). Dự thảo báo cáo tại tr. xi-xii, http://pc-web01.squiz.net/_data/assets/ pdf_file/0011/95942/sub032-attachment2.pdf

Nhà cung ứng dịch vụ qua biên giới và pháp luật nhập cư:

Trong GATS, các nhà đàm phán đã thiết lập bốn phương thức cung ứng dịch vụ, trong đó phương thức 4 được hiểu là việc cung ứng dịch vụ bởi thể nhân hiện diện trên lãnh thổ của một bên khác. Nói cách khác, nếu nước A cam kết với nước B theo phương thức 4, thì điều đó nghĩa là cam kết cho người của nước B được phép làm việc ở nước A bằng cách cung ứng dịch vụ tại nước A. Nhập cư có thể là vấn đề nhạy cảm trong các cuộc đàm phán thương mại, vì vậy cam kết theo phương thức 4 có xu hướng khá hạn chế trong WTO và các FTAs.

Trong NAFTA, các bên không cam kết theo phương thức 4 liên quan đến việc cho phép thể nhân làm việc tại các nước theo biểu cam kết dịch vụ trong Chương 12. Thay vào đó, NAFTA giải quyết tất cả các vấn đề về việc làm và nhập cảnh tạm thời trong Chương 16 - 'Nhập cảnh tạm thời cho nhà kinh doanh'. Theo Chương 16, các bên đồng ý cho nhà kinh doanh, thương nhân và nhà đầu tư, người nhận chuyển nhượng trong nội bộ công ty và một số loại nghề nghiệp nhất định được phép tạm thời nhập cảnh vào lãnh thổ của các bên NAFTA bằng một loại 'thị thực không nhập cư' ('non-immigrant visa') để thực hiện hoạt động kinh doanh của mình. Những loại nghề nghiệp được cấp thị thực bao gồm kế toán, kĩ sư, luật sư, chuyên gia y tế, nhà khoa học và giáo sư đại học.[48]

5. Tự do hoá đầu tư theo NAFTA

Chương 11 của NAFTA được chia làm hai phần. Phần A quy định bốn bảo đảm cơ bản cho nhà đầu tư NAFTA, đó là: (i) Không phân biệt đối xử; (ii) Không bị yêu cầu thực hiện các biện pháp liên quan đến điều kiện đầu tư ('performance requirements'); (iii) Tự do chuyển vốn liên quan đến một khoản đầu tư; và (iv) Chỉ bị tước quyền sở hữu theo đúng pháp luật quốc tế.[49] Điều 1105 của NAFTA cũng đòi hỏi rằng nhà đầu tư phải được nhận 'sự đối xử theo tiêu chuẩn tối thiểu... [b]ao gồm sự đối xử công bằng và thoả đáng, sự bảo hộ đầy đủ và an toàn.' Những nghĩa vụ không phân biệt đối xử này tương tự như những nghĩa vụ NT và MFN dành cho nhà cung ứng dịch vụ qua biên giới được quy định tại Chương 12.

Những nghĩa vụ liên quan đến tước quyền sở hữu hợp pháp được tóm tắt trong SAA như sau:

Theo Điều 1110, chính phủ của một bên NAFTA không được

[48] NAFTA, Phụ lục 1603.D.1.

[49] SAA, tr. 141.

phép tước quyền sở hữu đối với khoản đầu tư của nhà đầu tư từ những bên NAFTA ngoài mục đích công, trên cơ sở không phân biệt đối xử và tuân thủ đúng thủ tục (due process). Khoản bồi thường thiệt hại phải được thanh toán không chậm trễ theo giá trị thị trường công bằng của khoản đầu tư bị trưng thu, cùng với bất kì khoản lãi thích hợp nào, và phải thực hiện được và chuyển nhượng được.[50]

Các bên của NAFTA không đồng ý cho phép đầu tư vào tất cả các ngành kinh tế. *Ví dụ*, Mexico đưa ra hạn chế để loại trừ những ngành sau ra khỏi quá trình tự do hoá: 'vệ tinh và liên lạc điện báo, vận tải đường sắt, năng lượng hạt nhân, sản xuất và phân phối điện năng như một ngành dịch vụ công, và các hoạt động liên quan đến việc sản xuất, phân phối và mua bán những sản phẩm năng lượng và hoá dầu cơ bản'.[51]

6. Cơ chế giải quyết tranh chấp trong NAFTA

A. Ba thủ tục giải quyết tranh chấp trong NAFTA

NAFTA có ba thủ tục giải quyết tranh chấp riêng biệt được quy định tại Chương 11, Chương 19 và Chương 20. Thủ tục thu hút sự chú ý của các học giả là hệ thống giải quyết tranh chấp giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư được quy định tại Chương 11. Thủ tục giải quyết tranh chấp giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư tương tự như thủ tục trọng tài đầu tư quốc tế được quy định tại nhiều hiệp định đầu tư song phương (viết tắt là 'BITs').

1. Giải quyết tranh chấp giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư theo Chương 11

Nếu một nhà đầu tư NAFTA thấy rằng những hoạt động của chính phủ một bên NAFTA dẫn đến việc trưng thu hay phân biệt đối xử và vi phạm những nghĩa vụ của NAFTA quy định tại Chương 11, thì nhà đầu tư có thể yêu cầu phân xử trọng tài giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư. Chương 11 cho phép nhà đầu tư yêu cầu thiết lập một hội đồng trọng tài căn cứ theo những quy tắc của Trung tâm giải quyết tranh chấp đầu tư quốc tế của Ngân hàng thế giới (viết tắt là 'ICSID') và 'Những nguyên tắc tạo thuận lợi hơn' ('Additional Facility') của ICSID, hoặc căn cứ theo những quy tắc của Uỷ ban Liên hợp quốc về luật thương mại quốc tế ('UNCITRAL').

[50] SAA, tr. 145.

[51] Như trên, tr. 144.

Căn cứ theo những quy tắc này, hội đồng trọng tài phán quyết vụ việc bao gồm một hội đồng ba luật sư được trao quyền quyết định - liệu chính phủ có bồi thường thiệt hại cho nhà đầu tư nước ngoài hay không?

Căn cứ theo Điều 1122 của NAFTA, ba chính phủ của NAFTA đều đồng ý phương thức trọng tài. Sự đồng ý này đảm bảo rằng chính phủ nước tiếp nhận đầu tư không thể chống lại cố gắng phân xử trọng tài bằng việc giữ nguyên ý kiến của riêng mình.[52] Điều 1136 của NAFTA quy định rằng 'Mỗi bên quy định việc thực thi phán quyết trọng tài trên lãnh thổ của mình'. Cả Điều 1122 và Điều 1136 đều dẫn chiếu tới Công ước New York về thi hành phán quyết trọng tài và Công ước liên Mỹ về trọng tài thương mại quốc tế,[53] theo đó đảm bảo rằng thủ tục công nhận và thi hành một phán quyết trọng tài quốc tế tại toà án quốc gia của thành viên NAFTA, được thiết lập theo những công ước này, có thể được thực hiện.

Nhà đầu tư nước ngoài tại Việt Nam có những quyền tương tự, theo đó yêu cầu phân xử trọng tài giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư có tính bắt buộc, căn cứ vào những điều khoản trong những hiệp định đầu tư ASEAN và hơn 40 BITs mà Chính phủ Việt Nam đã kí kết.

Mặc dù những quy định về giải quyết tranh chấp giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư của NAFTA tương tự như những quy định cơ bản của BITs và các FTAs khác, nhưng chúng vẫn là đối tượng được bình luận sâu rộng theo cách hàn lâm. Lí do một phần của điều này là: những quy tắc của NAFTA và quy phạm của các bên đã làm cho thủ tục kiện tụng quy định tại Chương 11 của NAFTA rất minh bạch. Theo Phụ lục 1137.4, phán quyết trọng tài cuối cùng có thể được chính phủ hoặc nhà đầu tư đang có tranh chấp công bố.

Để hiểu biết hơn về phương thức trọng tài giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư theo Chương 11 của NAFTA, chúng ta có thể xem hai án lệ, *Metalclad v. Mexico*,[54] và *Thunderbird v. Mexico*.[55]

Trong vụ *Metalclad v. Mexico*, một doanh nghiệp của Hoa Kỳ đầu tư vào Mexico để xây dựng công trình chôn lấp chất thải độc hại. Trước

[52] Như trên, tr. 147.

[53] Công ước Liên hợp quốc về công nhận và thi hành phán quyết trọng tài nước ngoài, kí tại New York, ngày 10/6/1958; Công ước liên Mỹ về trọng tài thương mại quốc tế, kí tại Panama, ngày 30/01/1975.

[54] ICSID, Vụ *Metalclad Corporation v. The United Mexican States*, Phán quyết ngày 30/8/2000, (Án lệ số ARB(AF)/97/1) được giới thiệu lại năm 2001, 16 *ICSID Review-Foreign Investment Law Journal* 168.

[55] NAFTA, vụ *International Thunderbird Gaming Corp. v. Mexico*, Phán quyết ngày 26/01/2006 (UNCITRAL/NAFTA), nguồn: www.italaw.com/documents/ThunderbirdAward.pdf

khi thực hiện đầu tư, nhà đầu tư nhận được những đảm bảo từ Chính phủ liên bang Mê-hi-cô rằng sẽ được cấp tất cả những giấy phép cần thiết cho đầu tư. Nhà đầu tư nhận được các giấy phép cấp liên bang nhưng không nhận được giấy phép xây dựng của thành phố. *Metalclad* yêu cầu cấp giấy phép xây dựng của thành phố, nhưng Hội đồng thành phố đã từ chối cấp phép sau khi họ nhận được yêu cầu 13 tháng, trong một cuộc họp Hội đồng thành phố mà *Metalclad* không được mời tham dự.[56] Ngay sau khi công trình được hoàn thành, chính quyền thành phố ngăn cản công trình hoạt động và Thống đốc bang tuyên bố khu vực xung quanh công trình là khu vực bảo tồn sinh thái, nhằm bảo vệ loài xương rồng hiếm, do đó cấm vĩnh viễn công trình xử lí chất thải hoạt động trong khu vực.[57]

Năm 2000, một toà án của NAFTA đã xác định rằng hành động của chính quyền địa phương được coi là hành động trưng thu không bồi thường thiệt hại, do đó vi phạm Điều 110 của NAFTA. Toà án cũng xác định rằng Chính phủ Mexico đã không đối xử công bằng và thoả đáng theo quy định của pháp luật quốc tế theo đòi hỏi của Điều 1105 NAFTA. Toà án đã phán quyết *Metalclad* được bồi thường 16.685.000 USD. Chính phủ Mexico đã đồng ý trả 15,6 triệu USD vào năm 2001.

Trong vụ *Thunderbird v. Mexico*, một nhà đầu tư Canađa xin cấp giấy phép kinh doanh trò chơi sử dụng máy chơi game điện tử. Luật sư của *Thunderbird* đã viết cho cơ quan quản lí đánh bạc của Mexico yêu cầu cơ quan này trả lời bằng văn bản có giá trị pháp lí, xác nhận rằng việc *Thunderbird* cung ứng các dịch vụ chơi game bằng loại máy này cho khách hàng là hợp pháp. Cơ quan quản lí của Mexico đã ban hành văn bản pháp lí trên Công báo, tuyên bố rằng nếu loại máy đó được sử dụng để chơi những trò chơi may rủi thì sẽ không được coi là hợp pháp. Tuy nhiên, nếu loại máy đó chỉ dùng để chơi những trò chơi rèn luyện kĩ năng thì được hoạt động hợp pháp. Kết quả là Chính phủ Mexico xác định loại máy này liên quan đến trò chơi may rủi, do đó là bất hợp pháp theo pháp luật về đánh bạc của Mexico. *Thunderbird* đã nộp đơn yêu cầu phân xử trọng tài và cho rằng Mexico đã vi phạm nghĩa vụ NT được quy định tại Chương 11 và đã trưng thu khoản đầu tư của *Thunderbird* vào ngành dịch vụ máy chơi game.

Trong quá trình phân xử trọng tài, Mexico đưa ra chứng cứ chứng minh rằng loại máy do *Thunderbird* sử dụng thực chất dựa vào may rủi, bởi vì loại máy đó có máy tính sử dụng hệ thống tạo ra những con số ngẫu nhiên để nhằm xác định kết quả của trò chơi.[58] Hội đồng thấy rằng bằng cách không công bố rõ chức năng thực sự của máy, *Thunderbird* đã đưa ra những thông tin không đầy đủ và không chính xác về máy chơi game, trong khi họ lại yêu cầu Chính phủ Mexico phải trả lời bằng văn bản có giá trị pháp lí.[59] Kết quả là *Thunderbird* đã không thể đòi hỏi rằng mình có 'mong ước chính đáng' ('legitimate expectation'), khi mà Công báo của Mexico tuyên bố ngăn cản các trò chơi bị coi là bất hợp pháp.[60] *Thunderbird* không được nhận tiền bồi thường do bị tước quyền sở hữu, bởi vì: '...[S]ẽ không phải bồi thường cho những hành vi tước quyền sở hữu hợp pháp, khi mà nhà đầu tư hoặc khoản đầu tư chưa bao giờ được bảo hộ trong hoạt động kinh doanh mà sau này bị cấm'.[61]

Hội đồng xác định rằng việc Mexico cấm sử dụng loại máy của *Thunderbird*, bởi chúng được coi là những máy đánh bạc bất hợp pháp, là việc sử dụng hợp pháp quyền kiểm soát trật tự công cộng và không vi phạm nghĩa vụ của Mexico trong NAFTA.

2. Giải quyết tranh chấp liên quan đến các biện pháp khắc phục thương mại theo Chương 19

Chương 19 quy định thủ tục giải quyết tranh chấp liên quan đến việc xem xét lại những phán quyết về các biện pháp khắc phục thương mại của các bên NAFTA. Thủ tục này là giải pháp thay thế cho thủ tục xem xét lại những phán quyết về các biện pháp khắc phục thương mại của toà án trong nước. Đối với Hoa Kỳ, hệ thống giải quyết tranh chấp liên quan đến các biện pháp khắc phục thương mại tại Chương 19 là hệ thống giải quyết tranh chấp duy nhất trong lĩnh vực này. Bởi vì Hoa Kỳ đã không chấp nhận đưa vấn đề khắc phục thương mại ra giải quyết theo thủ tục giải quyết tranh chấp của bất kì FTA nào, trừ NAFTA. Tuy nhiên, những phán quyết về các biện pháp khắc phục thương mại của Hoa Kỳ và tất cả các thành viên WTO khác đều là đối tượng của thủ tục giải quyết tranh chấp của WTO.

3. Giải quyết tranh chấp giữa quốc gia với quốc gia tại Chương 20

Chương 20 của NAFTA quy định thủ tục giải quyết tranh chấp giữa các chính phủ thành viên của NAFTA trong việc giải thích và áp dụng NAFTA. Những thủ tục giải quyết tranh chấp quy định tại Chương 20 tương tự như hệ thống giải quyết tranh chấp của Cơ quan giải quyết

56 NAFTA, vụ *Metalclad*, tr. 91.

57 Như trên, các đoạn 59, 91.

58 NAFTA, vụ *Thunderbird,* như trên, đoạn 136.

59 Như trên, đoạn 151.

60 Như trên, đoạn 166.

61 Như trên, đoạn 208.

tranh chấp của WTO (DSB). Các bên của NAFTA cố gắng đạt được một quyết định trọng tài theo đó xác định xem liệu những hành động của một bên NAFTA có phù hợp với NAFTA hay không, hoặc có làm vô hiệu hoá hoặc làm suy giảm những lợi ích của Hiệp định hay không (những quy định về vô hiệu hoá hoặc làm suy giảm lợi ích của Hiệp định được quy định tại Phụ lục 2004 của NAFTA).

Những nghĩa vụ pháp lí quy định trong NAFTA là nghĩa vụ 'WTO+', bởi vì chúng bao gồm những cam kết về tự do hoá bổ sung cho những cam kết mà các bên NAFTA đã cam kết trong WTO. Có thể cho rằng, Chương 20 của NAFTA quy định về một cơ quan tài phán năng động cho phân xử trọng tài, để giải quyết tranh chấp giữa chính phủ với chính phủ, bởi vì Chương 20 quy định về một cơ quan tài phán duy nhất để thực thi những nghĩa vụ 'WTO+' này. Trên thực tế, WTO là cơ quan tài phán năng động hơn nhiều trong việc giải quyết tranh chấp giữa ba nước thành viên NAFTA. Từ khi NAFTA có hiệu lực vào năm 1994, mới chỉ có ba vụ tranh chấp được giải quyết theo thủ tục trọng tài theo Điều 20. Đó là vụ tranh chấp năm 1995 về việc Canada áp thuế quan đối với một số nông sản của Hoa Kỳ; vụ tranh chấp năm 1997 liên quan đến việc Hoa Kỳ áp thuế quan tự vệ đối với cây đậu chổi; và vụ tranh chấp năm 1998 liên quan đến việc Hoa Kỳ không thực hiện nghĩa vụ mở cửa thị trường dịch vụ xe tải xuyên biên giới. Ngược lại, từ năm 1995, ba nước NAFTA đã 35 lần trình lên WTO yêu cầu tham vấn giải quyết tranh chấp giữa các nước này với nhau. Con số này cho thấy DSB là cơ quan tài phán ưa thích để giải quyết tranh chấp giữa các bên của NAFTA khi có sự lựa chọn cơ quan tài phán giữa WTO và NAFTA.

7. Kết luận

NAFTA đã thành công trong việc tự do hoá thương mại và đầu tư giữa Canada, Mexico và Hoa Kỳ. Mặc dù Hiệp định đã làm tăng thêm giao dịch thương mại và tăng cường hội nhập kinh tế của ba nước, nhưng quá trình thực hiện luôn luôn không hề dễ dàng. Kể từ khi Hiệp định có hiệu lực vào năm 1994, đã có những tranh chấp thương mại, căng thẳng chính trị, những vụ AD và những phiên xử trọng tài giữa ba nước. Tuy nhiên, thông tin tổng thể về việc thực hiện NAFTA cho thấy một FTA toàn diện và tham vọng có thể đem lại lợi ích cho những nước phát triển và DCs như thế nào.

Mục 4. PHÁP LUẬT VỀ HỘI NHẬP KINH TẾ ASEAN

Hiệp hội các nước Đông Nam Á ('ASEAN') thành lập vào ngày 08/8/1967 ở Bangkok, Thái Lan với 5 nước thành viên là Indonesia, Malaysia, Philippines, Singapore và Thái Lan. Sau đó, Brunei gia nhập ASEAN ngày 07/01/1984, Việt Nam tham gia ngày 28/7/1995, Lào và Myanmar tham gia ngày 23/7/1997, và Cam-pu-chia tham gia ngày 30/4/1999. Văn bản thành lập tổ chức này là Tuyên bố Bangkok, nêu rõ một trong các mục tiêu chính của ASEAN là thúc đẩy tăng trưởng kinh tế trong khu vực.

Các nước thành viên ASEAN đã kí kết nhiều hiệp định để đáp ứng nhu cầu hội nhập khu vực ngày càng tăng. Hoạt động kí kết điều ước trong lĩnh vực kinh tế diễn ra rất sôi động trong những năm gần đây, vì ASEAN quyết tâm nâng cao tính cạnh tranh của khu vực. Tuyên bố hoà hợp Bali năm 2003 nói rõ việc hình thành Cộng đồng kinh tế ASEAN sẽ là mục tiêu của hoạt động hội nhập kinh tế tới năm 2020. Tuyên bố này nêu:

> Trong quá trình hướng tới Cộng đồng kinh tế ASEAN, ASEAN sẽ thiết lập các cơ chế và đưa ra những biện pháp mới để tăng cường việc thực thi các sáng kiến kinh tế hiện tại, trong đó có Khu vực tự do thương mại ASEAN (AFTA), Hiệp định khung về dịch vụ (AFAS) và Khu vực đầu tư ASEAN (AIA).

Hơn nữa, Hiến chương ASEAN được thông qua năm 2007, đã quy định rõ ràng tư cách pháp lí và một cơ cấu phức tạp hơn cho tổ chức này, tạo ra cơ sở để tiến hành các nỗ lực hội nhập tích cực nhằm xây dựng các cộng đồng chính trị - an ninh, cộng đồng kinh tế và cộng đồng văn hóa - xã hội. Phần này sẽ xem xét các quy định hiện hành của ASEAN điều chỉnh hội nhập thương mại hàng hoá, thương mại dịch vụ và đầu tư trong Hiệp hội và giữa Hiệp hội với các nước bên ngoài.

1. Hội nhập kinh tế trong ASEAN

A. *Các quy định về thương mại hàng hoá*

1. Hiệp định về chương trình ưu đãi thuế quan có hiệu lực chung của Khu vực thương mại tự do ASEAN ('CEPT')

Tại Hội nghị thượng đỉnh lần thứ tư của ASEAN, vào ngày 28/01/1992, các nước thành viên ASEAN thông qua Hiệp định khung về tăng cường hợp tác kinh tế để xây dựng khung pháp lí cho hội nhập kinh tế trong

thương mại, công nghiệp, khoáng sản, năng lượng, tài chính, ngân hàng, thực phẩm, nông nghiệp, lâm nghiệp, vận tải và truyền thông. Trong khi các lĩnh vực hợp tác khác chỉ có một số cam kết mang tính khuyến khích thực hiện để thúc đẩy hội nhập, thì phần về thương mại hàng hoá của Hiệp định này nêu ra các quy định chi tiết bằng việc dẫn chiếu tới Hiệp định về chương trình ưu đãi thuế quan có hiệu lực chung của Khu vực thương mại tự do ASEAN ('CEPT') cũng được thông qua cùng ngày. CEPT là cơ chế chính để thực hiện AFTA, theo đó các nước ASEAN cam kết giảm thuế quan, loại bỏ các biện pháp hạn chế số lượng và các rào cản phi thuế quan khác. Cơ chế này áp dụng đối với mọi sản phẩm chế tạo và sản phẩm nông nghiệp được liệt kê ở bốn danh sách khác nhau trong các biểu cam kết của từng nước ASEAN.

Thứ nhất, Danh mục giảm thuế (viết tắt là 'IL') bao gồm những sản phẩm mà các nước ASEAN đã sẵn sàng cam kết giảm thuế nhập khẩu, loại bỏ các biện pháp hạn chế số lượng và các rào cản phi thuế quan khác. Lộ trình cam kết hoàn thành của các nước ASEAN-6 (Brunei, Indonesia, Malaysia, Philippines, Singapore và Thái Lan) trong danh sách của mỗi nước là không muộn hơn ngày 01/01/2010, trong khi hạn hoàn thành của các nước CLMV (Cam-pu-chia, Lào, Myanmar và Việt Nam) là không muộn hơn ngày 01/01/2015. Tuy nhiên, các nước thành viên có thể liệt kê số lượng nhất định các sản phẩm ở Danh mục loại trừ tạm thời (viết tắt là 'TEL') để tự do hoá thương mại đối với các sản phẩm này theo lộ trình chậm hơn và dần dần đưa chúng vào Danh mục IL.

Thứ hai, Nghị định thư của ASEAN về thực thi Danh mục TEL, kí kết ngày 23/11/2000, cho phép 'một nước thành viên tạm thời trì hoãn việc chuyển một sản phẩm từ Danh mục TEL của mình sang Danh mục IL', hoặc 'tạm thời ngừng các nhượng bộ của mình đối một sản phẩm đã được đưa sang Danh mục IL'. Nghị định thư này chỉ áp dụng đối với các sản phẩm chế tạo trong Danh mục TEL từ ngày 31/12/1999, hoặc ngày tương ứng đối với Cam-pu-chia, Lào, Myanmar và Việt Nam.[62] Để viện dẫn các quy định của Nghị định thư này, một nước ASEAN sẽ phải nộp đơn cho Hội đồng khu vực thương mại tự do ASEAN (Hội đồng AFTA), nêu ra thời gian yêu cầu được hoãn hay tạm thời ngừng nhượng bộ thương mại, lí do của yêu cầu đó và vấn đề thực sự đang gặp phải.[63]

Thứ ba, Danh mục nhạy cảm và nhạy cảm cao (viết tắt là 'SL') được các nước ASEAN đưa ra trong Nghị định thư về các thoả thuận đặc biệt đối với các sản phẩm nhạy cảm và nhạy cảm cao ký kết ngày 30/9/1999. Theo đó, các nước ASEAN-6 phải bắt đầu loại bỏ dần các sản phẩm nhạy cảm theo cơ chế CEPT từ ngày 01/01/2001 với sự linh hoạt nhất định, nhưng không được muộn hơn ngày 01/01/2003 và sẽ hoàn thành quá trình này vào ngày 01/01/2010.[64] Đối với Cam-pu-chia, Lào, Myanmar và Việt Nam, lộ trình được điều chỉnh theo ngày gia nhập ASEAN của họ.[65]

Cuối cùng, các nước thành viên ASEAN được phép loại trừ vĩnh viễn một số sản phẩm khỏi quá trình tự do hoá bằng cách liệt kê chúng trong Danh sách ngoại lệ chung (viết tắt là 'GEL') nhằm bảo vệ an ninh quốc gia, bảo vệ đạo đức xã hội, bảo vệ sức khoẻ của con người và động thực vật, bảo vệ các tác phẩm có giá trị nghệ thuật, lịch sử và khảo cổ học.[66]

Thực hiện các thỏa thuận trên, từ ngày 01/01/2010, các nước ASEAN-6 đã loại bỏ thuế nhập khẩu đối với 99,65% dòng thuế quan, trong khi các nước CLMV đã giảm được 98,86% dòng thuế quan của họ xuống còn 0-5%.[67] Bên cạnh giảm thuế quan, các nước ASEAN còn kí kết các hiệp định khác để loại bỏ các hàng rào thương mại phi thuế quan (NTBs) và biện pháp hạn chế số lượng, hài hoà hoá biểu thuế quan, xác định trị giá tính thuế hải quan và thủ tục hải quan, đồng thời xây dựng tiêu chuẩn chung về chứng nhận sản phẩm. Các điều ước này bao gồm Thoả thuận ưu đãi thương mại của ASEAN 1977, Hiệp định ASEAN về Hải quan 1997, Hiệp định khung của ASEAN về các thoả thuận công nhận lẫn nhau 1998, Hiệp định khung E-ASEAN 2000, Nghị định thư điều chỉnh việc thực thi hệ thống biểu thuế quan hài hoà hoá 2003, Hiệp định khung ASEAN về hội nhập các ngành ưu tiên 2004, Hiệp định thiết lập và thực thi cơ chế một cửa ASEAN 2005. Các hiệp định này góp phần thúc đẩy tự do dịch chuyển hàng hoá trong khu vực.

2. Hiệp định ASEAN về thương mại hàng hoá ('ATIGA')

Nhằm đạt được mục tiêu thiết lập một thị trường và cơ sở sản xuất thống nhất với sự tự do dịch chuyển hàng hoá trong Cộng đồng kinh tế ASEAN vào năm 2015, các ngoại trưởng ASEAN đã nhất trí vào tháng

62 *Xem*: Nghị định thư của ASEAN về thực thi Danh mục loại trừ tạm thời của cơ chế CEPT, khoản 2 Điều 1.

63 Như trên, Điều 2.

64 *Xem*: Nghị định thư về các thoả thuận đặc biệt về những sản phẩm nhạy cảm và nhạy cảm cao, Điều II.

65 Như trên.

66 *Xem*: Điều 9 của Hiệp định về chương trình ưu đãi thuế quan có hiệu lực chung của Khu vực thương mại tự do ASEAN.

67 *Xem*: Thông cáo báo chí chung của Hội nghị các ngoại trưởng kinh tế ASEAN lần thứ 42 (AEM) (Hội đồng AFTA-Các vấn đề liên quan), Đà Nẵng, Việt Nam, ngày 24-25/8/2010 (đoạn 6), http://www.aseansec.org/25051.htm.

8/2007 về việc nâng cấp cơ chế CEPT-AFTA thành một văn kiện pháp lí toàn diện hơn. Hơn nữa, rất cần thiết phải có một điều ước mới của ASEAN để tăng cường năng lực cạnh tranh của ASEAN khi ASEAN tích cực tiến hành đàm phán các hiệp định thương mại hàng hoá (viết tắt là 'TIGs') với các nước đối tác của ASEAN như Trung Quốc, Hàn Quốc, Nhật Bản, Australia và New Zealand. Bởi vậy, dựa trên các hiệp định hiện hành của ASEAN như đã nêu ở phần trước, Hiệp định ASEAN về thương mại hàng hoá (viết tắt là 'ATIGA') đã được kí kết ngày 26/02/2009 và có hiệu lực ngày 17/5/2010.

Các điểm chính của Hiệp định này là:

- Hiệp định hợp nhất mọi sáng kiến, nghĩa vụ và cam kết hiện hành về thương mại hàng hoá trong nội khối ASEAN, bao gồm cả các quy định về thuế quan và NTBs, trong một văn kiện toàn diện duy nhất. Danh sách các hiệp định bị Hiệp định ATIGA thay thế theo Điều 91(2) của Hiệp định này, như Hiệp định CEPT và một số nghị định thư, được đưa vào Phụ lục 11 của ATIGA.

- Phụ lục 2 của Hiệp định quy định lộ trình cắt giảm thuế quan cụ thể, đầy đủ và các mức thuế quan được áp dụng cho mỗi sản phẩm trong Danh mục hài hóa thuế quan của ASEAN (AHTN) theo từng năm của các thành viên ASEAN. Hiệp định ATIGA đưa thêm một yếu tố mới so với cơ chế CEPT - điều khoản về tạm thời sửa đổi và ngừng các nhượng bộ thương mại, trong đó quy định chi tiết hướng dẫn về việc bồi thường phát sinh từ bất kì biện pháp tăng thuế nhập khẩu nào trong các cam kết hiện tại (Điều 23).

- Hiệp định còn có các điều khoản đảm bảo hiện thực hoá dòng dịch chuyển hàng hoá tự do trong ASEAN như tự do hoá thuế quan (Chương 2), quy tắc xuất xứ (Chương 3), loại bỏ các NTBs (Chương 4), xúc tiến thương mại (Chương 5), hải quan (Chương 6), quy chuẩn, tiêu chuẩn kĩ thuật, các thủ tục đánh giá sự hoà hợp (Chương 7), các biện pháp vệ sinh dịch tễ (Chương 8) và các biện pháp khắc phục thương mại (Chương 9).

Hiệp định ATIGA với công thức 'tất cả trong một' nâng cao tính minh bạch và tính dễ dự đoán của khung pháp lí của ASEAN về thương mại hàng hoá. Điều ước này cũng sẽ thúc đẩy và tăng cường hơn nữa thương mại trong nội khối ASEAN. Hiệp định đã có ý nghĩa quan trọng cho việc gia tăng hội nhập kinh tế để thực hiện Cộng đồng kinh tế ASEAN năm 2015.

B. *Các quy định về thương mại dịch vụ*

Các nước ASEAN kí kết Hiệp định khung ASEAN về dịch vụ ('AFAS') vào ngày 15/12/1995 nhằm thúc đẩy thương mại dịch vụ trong khu vực.

Các mục tiêu chính của AFAS là:[68]

(a) Tăng cường hợp tác trong lĩnh vực dịch vụ giữa các nước thành viên, nhằm nâng cao tính hiệu quả và cạnh tranh, đa dạng hoá năng lực sản xuất, cung ứng và phân phối dịch vụ của các nhà cung ứng dịch vụ trong và ngoài ASEAN;

(b) Loại bỏ đáng kể các hạn chế đối với thương mại dịch vụ giữa các nước thành viên;

(c) Tự do hoá thương mại dịch vụ bằng cách mở rộng phạm vi và làm sâu sắc quá trình tự do hoá, vượt ra ngoài các cam kết mà các nước thành viên đã đưa ra trong khuôn khổ Hiệp định GATS, với mục đích thực hiện một khu vực thương mại tự do về dịch vụ.

Hiệp định AFAS đưa ra các hướng dẫn chung để các nước thành viên ASEAN dần dần cải thiện việc tiếp cận thị trường và đảm bảo áp dụng NT bình đẳng cho các nhà cung ứng dịch vụ trong các nước ASEAN ở cả bốn phương thức cung ứng dịch vụ: Phương thức 1 (cung ứng dịch vụ qua biên giới); phương thức 2 (tiêu dùng dịch vụ ở nước ngoài); phương thức 3 (hiện diện thương mại); phương thức 4 (hiện diện của thể nhân). Kế hoạch tổng thể xây dựng AEC (AEC Blueprint) yêu cầu tự do hóa đối với cả 4 phương thức cung cấp dịch vụ trên song các Gói cam kết dịch vụ của AFAS chỉ đề cập đến 3 Phương thức 1, 2, 3. Phương thức 4 được điều chỉnh riêng trong Hiệp định về di chuyển thể nhân ASEAN (MNP) ký kết ngày 19/11/2012.

Bên cạnh đó, Hiệp định AFAS cũng đặt ra các quy tắc về các khía cạnh liên quan của thương mại dịch vụ như công nhận lẫn nhau, giải quyết tranh chấp, thể chế, cũng như các lĩnh vực hợp tác khác về dịch vụ. Hiệp định AFAS hướng tới các cam kết cao hơn các cam kết của các nước thành viên trong GATS. Trong Hiệp định này, các nước ASEAN cam kết tự do hoá một số lượng đáng kể các ngành dịch vụ theo một lộ trình

[68] Điều I AFAS.

thích hợp. Kể từ năm 1996 đến nay, các nước ASEAN đã đàm phán và thông qua 9 Gói cam kết về dịch vụ, 6 Gói cam kết về dịch vụ tài chính và 8 Gói cam kết về dịch vụ vận tải hàng không. Các gói cam kết chung theo AFAS được đưa ra trong các Nghị định thư sau:

- Nghị định thư thực thi Gói cam kết ban đầu trong khuôn khổ Hiệp định AFAS kí ngày 15/12/1997;
- Nghị định thư thực thi Gói cam kết thứ hai trong khuôn khổ Hiệp định AFAS kí ngày 16/12/1998;
- Nghị định thư thực thi Gói cam kết thứ ba trong khuôn khổ Hiệp định AFAS kí ngày 31/12/2001;
- Nghị định thư thực thi Gói cam kết thứ tư trong khuôn khổ Hiệp định AFAS kí ngày 03/9/2004;
- Nghị định thư thực thi Gói cam kết thứ năm trong khuôn khổ Hiệp định AFAS kí ngày 08/12/2006;
- Nghị định thư thực thi Gói cam kết thứ sáu trong khuôn khổ Hiệp định AFAS kí ngày 19/11/2007;
- Nghị định thư thực thi Gói cam kết thứ bảy trong khuôn khổ Hiệp định AFAS kí ngày 26/02/2009.
- Nghị định thư thực thi Gói cam kết thứ tám trong khuôn khổ Hiệp định AFAS kí ngày 28/10/2010.
- Nghị định thư thực thi Gói cam kết thứ chín trong khuôn khổ Hiệp định AFAS kí ngày 27/11/2015.

Các cam kết này được áp dụng đối với rất nhiều ngành dịch vụ như các dịch vụ kinh doanh, các dịch vụ chuyên môn, xây dựng, phân phối, giáo dục, dịch vụ môi trường, y tế, vận tải biển, bưu chính viễn thông và du lịch. Sáu gói cam kết về dịch vụ tài chính đã được các bộ trưởng tài chính ASEAN kí kết và tám gói cam kết về vận tải hàng không do các bộ trưởng vận tải ASEAN kí kết.

C. *Các quy định về đầu tư nước ngoài*

Các văn bản pháp luật hiện hành của ASEAN điều chỉnh đầu tư nội khối bao gồm:[69]

- Hiệp định ASEAN về thúc đẩy và bảo hộ đầu tư (viết tắt là 'IGA') kí ngày 15/12/1987 và Nghị định thư năm 1996;
- Hiệp định khung về khu vực đầu tư ASEAN (viết tắt là 'AIA') kí ngày 07/10/1998 và Nghị định thư năm 2001;
- Nghị định thư tăng cường về cơ chế giải quyết tranh chấp kí ngày 29/11/2004.70
- Hiệp định toàn diện của ASEAN về đầu tư (viết tắt là 'ACIA') kí ngày 26/02/2009.

Hiệp định năm 1987 chứa đựng các tiêu chuẩn bảo hộ tương tự như nhiều điều ước về đầu tư khác, như bảo hộ đầy đủ, đối xử công bằng và thoả đáng, điều khoản bao trùm ('an umbrella clause'), chuyển vốn và thu nhập về nước mình, và giải quyết tranh chấp. Quy định về đối xử NT và MFN để các nhà đầu tư ASEAN có thể vào các nước ASEAN một cách thuận lợi hơn không được đặt ra trong Hiệp định năm 1987. Thay vào đó, các chế độ này được quy định tại Hiệp AIA 11 năm sau đó. Việc kí kết Hiệp định khung này nhằm thiết lập một khu vực đầu tư ASEAN mang tính cạnh tranh với môi trường đầu tư tự do và minh bạch trong ASEAN. Tuy nhiên, cả hai hiệp định cần được sửa đổi vì thuật ngữ pháp lí ở còn chung chung và mơ hồ, có thể bị giải thích theo nhiều cách. Hơn nữa, nhằm tạo ra một khung pháp lí về đầu tư cởi mở và tự do thông qua tự do hoá dần dần các quy định về đầu tư của các nước ASEAN và tăng cường sự bảo hộ đối với các nhà đầu tư trong nội khối ASEAN,[71] Hiệp định đầu tư toàn diện ASEAN (ACIA) đã được đàm phán và ký kết vào ngày 26/02/2009, bắt đầu có hiệu lực từ ngày 29/3/2012. Hiệp định này thay thế các Hiệp định năm 1987 và 1998 kể từ khi có hiệu lực và trong ba năm sau đó, Hiệp định cho phép các nhà đầu tư, nếu có các khoản đầu tư được bảo hộ bởi cả ba hiệp định, được lựa chọn viện dẫn một trong ba hiệp định này để giải quyết tranh chấp. Tuy nhiên, không có nhà đầu tư nào sử dụng quyền này.

Hiệp định ACIA nhằm 'tạo ra một khuôn khổ về đầu tư tự do và cởi mở trong ASEAN để đạt được mục tiêu cuối cùng của hội nhập kinh tế trong AEC (Cộng đồng kinh tế ASEAN)'.[72] Với 49 điều khoản và hai phụ lục, Hiệp định làm rõ và sửa đổi những điều khoản ngắn và mơ hồ của AIA và IGA về các chế độ đối xử đối với đầu tư, vấn đề chuyển tiền, và về

[69] *Xem* thêm: Trịnh Hải Yến, 'East Asian Investment Treaties in the Integration Process: Quo Vadis?,' *East Asian Economic Integration: Law, Trade and Finance*, ed. Ross Buckley, Richard W. Hu, và Douglas W. Arner, Cheltenham, Northampton: Edward Elgar Publishing Ltd, (2011).

[70] Nghị định thư này điều chỉnh các tranh chấp đầu tư giữa các quốc gia với nhau.

[71] Điều 1 ACIA.

[72] Điều 1 ACIA.

nước giải quyết tranh chấp giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư. Hiệp định cũng đưa ra các điều khoản mới về cấm các yêu cầu liên quan tới hoạt động, nhân sự quản lí cấp cao và hội đồng quản trị, để từ đó thúc đẩy dòng chảy vào của nguồn nhân lực quản lí chủ chốt từ nước ngoài.[73] ACIA cũng có những quy định về ngoại lệ chung, ngoại lệ an ninh, ngoại lệ đối với một số nghĩa vụ bảo hộ cụ thể và danh mục bảo lưu của từng nước. Nhìn chung, Hiệp định ACIA là một trong các điều ước về đầu tư hiện đại, hướng tới sự cân bằng giữa nghĩa vụ bảo hộ đầu tư và duy trì sự linh hoạt, tự do điều tiết của nước nhận đầu tư.

2. Các FTAs giữa ASEAN và các đối tác

A. *ASEAN-Trung Quốc*

Đối với Trung Quốc, các quan hệ thương mại và kinh tế giữa ASEAN và Trung Quốc đã phát triển mạnh mẽ trong những năm vừa qua. Những cuộc đàm phán về Khu vực thương mại tự do ASEAN-Trung Quốc (viết tắt là 'ACFTA') đã chính thức được tiến hành từ năm 2001. Sau 6 vòng đàm phán, hai bên đã kí kết Hiệp định khung về hợp tác kinh tế toàn diện giữa ASEAN và Trung Quốc (viết tắt là 'ACFA') tại Hội nghị cấp cao ASEAN-Trung Quốc vào ngày 04/11/2002. Hiệp định ACFA không chứa đựng các quy định chi tiết về hội nhập kinh tế mà đặt nền tảng cho việc kí kết bốn hiệp định cụ thể khác giữa các nước ASEAN và Trung Quốc nhằm thiết lập khu vực thương mại tự do giữa hai bên.

Hiệp định về thương mại hàng hoá ký kết ngày 29/11/2004 quy định phương thức giảm thuế quan và loại bỏ thuế quan trong các dòng thuế đã liệt kê trong Danh mục IL hoặc Danh mục SL. Hiệp định về thương mại dịch vụ giữa các nước thành viên ASEAN và Trung Quốc được kí kết ngày 14/1/2007 đặt ra cam kết tự do hoá cao hơn các cam kết mà các bên kí kết đưa ra trong GATS. Hiệp định về đầu tư của ASEAN và Trung Quốc được kí ngày 15/8/2009 và có hiệu lực ngày 01/01/2010. Tranh chấp giữa chính phủ với chính phủ phát sinh theo Hiệp định khung và các hiệp định liên quan do Hiệp định về cơ chế giải quyết tranh chấp của Hiệp định khung về hợp tác kinh tế toàn diện giữa ASEAN và Trung Quốc ngày 29/11/2004 điều chỉnh.

[73] Phân tích chi tiết các điều khoản của ACIA, *xem* thêm: Trịnh Hải Yến, 'State Commitments-Controlling Elements in the ASEAN Comprehensive Investment Agreement', *Trading Arrangements in the Pacific Rim: ASEAN and APEC*, ed. Paul Davidson.

B. *ASEAN-Hàn Quốc*

Sau khi hoàn thành các nghiên cứu về tính khả thi trong một năm, Hàn Quốc tuyên bố tại Hội nghị cấp cao ASEAN+3 vào tháng 12/2004 là nước này sẽ tiến hành đàm phán FTA với ASEAN vào năm 2005. Sau đó, Hiệp định khung về hợp tác kinh tế toàn diện giữa ASEAN và Hàn Quốc (viết tắt là 'AKFA') và Nghị định thư của Hiệp định đã được kí kết tại Hội nghị cấp cao ASEAN-Hàn Quốc lần thứ 9 vào ngày 13/12/2005. Tương tự như Hiệp định ACFA, Hiệp định AKFA cũng có hiệu lực ngày 01/7/2006 khi Hàn Quốc và ít nhất một nước thành viên ASEAN phê chuẩn. Hiện nay, đã có năm nước ASEAN phê chuẩn Hiệp định.[74] Trong khuôn khổ Hiệp định AKFA, bốn Hiệp định chi tiết khác đã được kí kết và là các văn kiện pháp lí thiết lập FTA của ASEAN với Hàn Quốc.[75] Hiệp định ASEAN-Hàn Quốc về thương mại hàng hoá (viết tắt là 'AKTIG'), kí ngày 24/8/2006, đặt ra các thoả thuận thương mại ưu đãi giữa mười nước thành viên ASEAN và Hàn Quốc. Hiệp định ASEAN-Hàn Quốc về thương mại dịch vụ (viết tắt là 'AKTIS'), kí ngày 21/11/2007, quy định các cam kết cao hơn các quy tắc hiện hành của GATS. Hiệp định này có thêm các ngành hay tiểu ngành mới trong danh mục cam kết và nới lỏng các hạn chế gia nhập thị trường và chế độ đối xử đối với nhiều lĩnh vực dịch vụ như kinh doanh, xây dựng, giáo dục, dịch vụ truyền thông, môi trường, dịch vụ du lịch và dịch vụ vận tải. Các điều khoản của Hiệp định ASEAN-Hàn Quốc về đầu tư (viết tắt là AKAI), kí ngày 02/6/2009, khá giống với các hiệp định khác của ASEAN về đầu tư để thiết lập môi trường pháp lí minh bạch và bảo đảm cho các nhà đầu tư của ASEAN và Hàn Quốc cũng như các khoản đầu tư của họ. Hiệp định ASEAN-Hàn Quốc về cơ chế giải quyết tranh chấp, kí ngày 13/12/2005, quy định cơ chế giải quyết tranh chấp giữa chính phủ với chính phủ phát sinh từ các hiệp định nói trên, bao gồm cả Hiệp định khung, trừ các tranh chấp giữa nhà đầu tư và chính phủ nước tiếp nhận đầu tư thì theo quy định của Hiệp định AKAI.

C. *ASEAN-Nhật Bản*

Theo Dữ liệu thống kê ASEAN FDI, kể từ tháng 5/2009, trong số các đối tác của ASEAN, Nhật Bản là nước có dòng vốn FDI vào ASEAN lớn thứ hai. Tháng 01/2002, Thủ tướng Nhật Bản Koizumi đã đề xuất ý tưởng một hiệp định đối tác toàn diện ASEAN-Nhật Bản. Hiệp định đối tác toàn diện ASEAN-Nhật Bản (viết tắt là 'AJCEP') sau đó đã được kí kết ngày

[74] *Xem*: Bảng các điều ước/hiệp định của ASEAN và việc phê chuẩn, nguồn: http://www.aseansec.org/ Ratification.pdf

[75] *Xem*: khoản 4(1) Điều 1 AKFA.

08/10/2003. Hiệp định này quy định các biện pháp thúc đẩy và hợp tác đàm phán các quy tắc về thương mại hàng hoá, dịch vụ và đầu tư giữa các bên. Các cuộc đàm phán AJCEP được bắt đầu ở Tokyo vào tháng 4/2005. Sau ba năm, ASEAN và Nhật Bản kí kết Hiệp định AJCEP vào ngày 07/4/2008. ASEAN và Nhật Bản không áp dụng cách tiếp cận của ASEAN và Trung Quốc hay Hàn Quốc. Hai bên không đàm phán các hiệp định riêng rẽ về từng lĩnh vực cụ thể. Thay vào đó, AJCEP là hiệp định toàn diện với 10 chương và 80 điều khoản, quy định các biện pháp thúc đẩy và hợp tác, cũng như tự do hoá thương mại hàng hoá, dịch vụ và giải quyết tranh chấp. Hiệp định có hiệu lực ngày 01/12/2008.

D. *ASEAN-Ấn Độ*

Hiệp định khung ASEAN-Ấn Độ về hợp tác kinh tế toàn diện, trong đó bao gồm một khu vực thương mại tự do về hàng hoá, dịch vụ và đầu tư, đã được kí kết ngày 08/10/2003. Trong khuôn khổ Hiệp định khung này, nhằm hình thành khu vực thương mại tự do giữa các nước ASEAN và Ấn Độ, Hiệp định ASEAN-Ấn Độ về thương mại hàng hoá (AITIG) và Hiệp định ASEAN-Ấn Độ về cơ chế giải quyết tranh chấp cùng được kí ngày 13/8/2009. Các Hiệp định về Đầu tư và Thương mại Dịch vụ giữa ASEAN và Ấn Độ được ký lần lượt vào ngày 12/11/2014 và 13/11/2014 và có hiệu lực từ ngày 01/7/2015.

E. *ASEAN-Australia và New Zealand*

Giống như trong mối quan hệ pháp lí về hội nhập kinh tế giữa ASEAN và Nhật Bản, các quy tắc điều chỉnh hợp tác kinh tế giữa ASEAN, Australia và New Zealand được quy định trong một văn kiện toàn diện, Hiệp định thành lập Khu vực thương mại tự do ASEAN-Australia-New Zealand (viết tắt là 'AANZFTA') kí ở Thái Lan ngày 27/02/2009 và có hiệu lực từ ngày 01/01/2010.

Hiệp định AANZFTA điều chỉnh thương mại hàng hoá và dịch vụ, thương mại điện tử, dịch chuyển của thể nhân, đầu tư, hợp tác kinh tế, giải quyết tranh chấp và các điều khoản chi tiết về thủ tục hải quan, các biện pháp vệ sinh dịch tễ, tiêu chuẩn và quy chuẩn kĩ thuật, IPRs và cạnh tranh. Các bên cam kết:[76]

- Tự do hoá dần dần thuế quan kể từ khi Hiệp định có hiệu lực và giảm thuế quan ít nhất 90% tất cả các dòng thuế quan trong các lộ trình cụ thể;
- Loại bỏ dần dần các rào cản thương mại dịch vụ và cho phép các nhà cung ứng dịch vụ của các bên kí kết khác có được khả năng tiếp cận thị trường nhiều hơn;
- Tạo thuận lợi cho sự dịch chuyển của thể nhân - là những người tham gia các hoạt động thương mại và đầu tư trong khu vực;
- Bảo hộ các khoản đầu tư trong phạm vi điều chỉnh;
- Tạo thuận lợi cho sự dịch chuyển hàng hoá bằng việc thực thi các điều khoản cụ thể về quy tắc xuất xứ, thủ tục hải quan, các biện pháp SPS; tiêu chuẩn, quy chuẩn kĩ thuật và các thủ tục đánh giá sự phù hợp.

Các phụ lục của Hiệp định AANZFTA chứa đựng các biểu cam kết cụ thể của các bên.

ASEAN đã rất tích cực trong việc đưa ra các quy tắc về hội nhập kinh tế trong khu vực và giữa ASEAN với các đối tác. Phần khái quát trên về khuôn khổ pháp lí của ASEAN cho thấy quyết tâm xây dựng Cộng đồng kinh tế ASEAN (AEC) như đã được nêu ra trong Bản kế hoạch chi tiết về AEC rằng:

> AEC là việc hiện thực hoá mục tiêu cuối cùng của hội nhập kinh tế như được nêu trong Tầm nhìn 2020, văn kiện được xây dựng trên sự hội tụ các lợi ích của các nước thành viên ASEAN, nhằm làm cho hội nhập kinh tế sâu và rộng hơn nữa thông qua các sáng kiến mới và hiện có với lộ trình rõ ràng. Khi thiết lập AEC, ASEAN sẽ hành động theo các nguyên tắc của một nền kinh tế mở, có tầm nhìn xa, mở rộng và kinh tế thị trường, phù hợp với các quy tắc đa phương cũng như tuân thủ luật pháp, nhằm đạt được sự tuân thủ và thực thi hiệu quả các cam kết kinh tế.

Mục 5. HIỆP ĐỊNH ĐỐI TÁC XUYÊN THÁI BÌNH DƯƠNG (TPP)

TPP là FTA được đàm phán bởi 12 quốc gia nằm ở khu vực xuyên Thái Bình Dương. Các quốc gia đàm phán Hiệp định bao gồm Australia, Brunei, Canada, Chile, Nhật Bản, Malaysia, Mexico, New Zealand, Peru, Singapore, Hoa Kỳ và Việt Nam; cùng với một số FTAs được đàm phán gần đây, Hiệp định bao gồm một vài chương về một số lĩnh vực đa dạng, từ áp thuế quan và các biện pháp khắc phục thương mại đến thương mại điện tử, doanh nghiệp nhà nước và chống tham nhũng.

[76] *Xem*: Ban thư kí ASEAN, *ASEAN Economic Community Factbook*, Jakarta, tháng 02/2011, tr. 89-90.

Mặc dù Hiệp định chính thức được ký kết vào ngày 04/02/2016, và hai quốc gia đã phê chuẩn bao gồm Nhật Bản và New Zealand (vào năm 2017), đầu năm 2017, Tổng thống của Hoa Kỳ, Donald J. Trump đã chính thức tuyên bố quyết định rút khỏi TPP. Tuy nhiên, trong Mục này tác giả sẽ mô tả những Chương quan trọng nhất của TPP với 'văn phong khẳng định giá trị pháp lý' ('các Bên phải', 'các Bên sẽ' như thể là Hiệp định đã có hiệu lực) xem xét các nghĩa vụ ràng buộc của Hiệp định theo cách hành văn của Hiệp định. Mặc dù không thuận lợi trong quá trình phê chuẩn và mặc dù TPP là một FTA khá 'rộng lớn' về phạm vi địa lý, Hiệp định đã tạo dựng một bản kế hoạch thú vị cho các cuộc đàm phán các hiệp định thương mại quốc tế tương lai.

Như đã giới thiệu trong *Lời nói đầu*, các Bên trong Hiệp định mong muốn 'xây dựng một hiệp định khu vực toàn diện để thúc đẩy hội nhập kinh tế' bao gồm cả tự do hoá thương mại và đầu tư, với mục đích giúp tăng trưởng kinh tế, mang lại lợi ích xã hội, các cơ hội cho các doanh nghiệp và người lao động, lợi ích cho người tiêu dùng, nâng cao tiêu chuẩn sống và tăng trưởng bền vững, từ đó giảm đói nghèo.

1. Nguyên tắc đối xử quốc gia và tiếp cận thị trường

Đầu tiên và trước hết, trong Chương đối xử quốc gia và tiếp cận thị trường, TPP bao gồm nghĩa vụ đối xử quốc gia (NT) (Điều 2.2). Trong khi điều khoản này được soạn thảo dựa trên việc tham khảo và tích hợp Điều III của GATT 1994, bao gồm các chú thích, nhưng đồng thời nó cũng giải thích rõ nguyên tắc đối xử của một bên có nghĩa là ' đối với chính quyền cấp khu vực, là nguyên tắc đối xử không kém thuận lợi hơn so với những nguyên tắc đối xử thuận lợi nhất mà chính quyền cấp khu vực áp dụng đối với hàng hóa thay thế hoặc cạnh tranh trực tiếp của Bên đó tùy trường hợp' (Điều 2.3.2).

Hai nguyên tắc chung áp dụng đối với thuế quan. *Thứ nhất*, các Bên không thể tăng thuế quan hiện hành hoặc áp dụng bất kỳ mức thuế mới đối với hàng hoá có xuất xứ, trừ khi Hiệp định có quy định khác (Điều 2.4.1). *Thứ hai*, tất cả các Bên ký kết phải xoá bỏ thuế quan theo lộ trình đối với hàng hoá có xuất xứ theo Biểu cam kết thuế quan (Điều 2.4.2). Hiệp định bao gồm một Phụ lục 2-D với Biểu cam kết thuế quan cụ thể của từng Bên.

Một điểm quan trọng về thuế quan khi cân nhắc về thực trạng hiện nay của các nền kinh tế và các thị trường hội nhập, đó là Chương quy định rằng một Bên không thể áp thuế quan đối với 'hàng hoá, bất kể xuất xứ, khi tái nhập về lãnh thổ của một Bên, sau khi hàng hoá đó đã được xuất khẩu tạm thời từ lãnh thổ của một Bên tới lãnh thổ của bên khác vì mục đích sửa chữa hoặc thay đổi, bất kể việc sửa chữa hoặc thay đổi đó có thể đã được thực hiện trên lãnh thổ của Bên mà từ đó hàng hoá được xuất đi vì mục đích sửa chữa hoặc thay đổi hoặc tăng giá trị của hàng hoá' (Điều 2.6.1). Điều khoản trọng yếu này đã mang tới một cách lý giải rõ ràng về tình trạng thương mại quốc tế đương đại, khi mà sản phẩm được sản xuất tại nhiều quốc gia.

Chương về tiếp cận thị trường cũng tham khảo và tích hợp Điều XI của GATT 1994 và trong phần chú thích liên quan tới hạn chế nhập khẩu và xuất khẩu (Điều 2.10), mở rộng các điều khoản đối với các biện pháp cấm và hạn chế đối với hoạt động nhập khẩu hàng hoá tái sản xuất (Điều 2.11).

Tương tự như trong WTO và một số FTA khác, trong TPP, nông nghiệp là một lĩnh vực nhạy cảm. Các quy tắc đặc biệt được áp dụng đối với thương mại hàng nông sản (Chương 2, Mục C), như các quy định về trợ cấp xuất khẩu (Điều 2.21). Một điểm đáng lưu ý, đó là quan ngại về tình trạng thiếu lương thực: theo Điều 2.24, các bên có khả năng áp dụng các biện pháp hạn chế hoặc cấm xuất khẩu theo Khoản 1 Điều XI (đối với thực phẩm) để ngăn ngừa hoặc giải quyết tình trạng thiếu hụt thực phẩm đáng kể.

2. Quy tắc xuất xứ và hàng dệt may

Chương 3 của TPP quy định về quy tắc xuất xứ và thủ tục xuất xứ, các quy tắc này được áp dụng nhằm phân định sản phẩm nào sẽ thuộc phạm vi điều chỉnh của Hiệp định (nhờ đó được hưởng lợi nhờ nguyên tắc đối xử ưu đãi), và các thủ tục áp dụng khi phân định và thẩm tra. Như một quy tắc chung, một sản phẩm được xem là 'một sản phẩm có xuất xứ' vì mục đích của Hiệp định, nếu sản phẩm đó được sản xuất trên lãnh thổ của một hoặc nhiều bên, từ vật liệu xuất xứ hoặc các vật liệu không xuất xứ, miễn là nó thoả mãn tiêu chuẩn được quy định trong Phụ lục 3-D (Các quy tắc đặc biệt về xuất xứ của sản phẩm) (Điều 3.2). Chương 3 cũng quy định chi tiết sản phẩm nào được xem là sản phẩm đạt được hoặc sản xuất hoàn toàn trên lãnh thổ của một hoặc nhiều bên (Điều 3.3). Chương này cũng nhận diện các vấn đề liên quan tới vật liệu được sử dụng trong sản xuất và vật liệu đóng gói, và các vấn đề về giải quyết các yêu cầu được hưởng đối xử ưu đãi (Điều 3.20), đối với việc thẩm tra xuất xứ (Điều 3.27).

Tương tự như nông nghiệp, hàng dệt may, được quy định trong Chương 4 TPP, cũng được coi là một lĩnh vực nhạy cảm khác. Về nguyên tắc, trừ khi nếu có quy định khác trong Chương 4, quy tắc xuất xứ và thủ tục xuất xứ mở rộng và áp dụng đối với hàng dệt may (Điều 4.2.1). Tuy nhiên, một số quy tắc đặc biệt được thiết lập cụ thể, trong số các mặt hàng khác, đối với hàng sản xuất thủ công và hàng truyền thống (Điều 4.2.10). Cùng với ý tưởng hàng dệt may đại diện cho một ngành của nền kinh tế quốc gia, và việc giảm hoặc loại bỏ thuế quan có thể áp dụng trong tình trạng khẩn cấp, khi những tổn hại nghiêm trọng hoặc đe doạ thực tế đối với ngành công nghiệp nội địa sản xuất mặt hàng tương tự hoặc mặt hàng có khả năng cạnh tranh hoặc thay thế trực tiếp, là đối tượng trong những điều kiện cụ thể, thì một bên có thể tăng mức thuế đối với hàng hoá nhập khẩu từ một bên hoặc nhiều bên tới một mức cụ thể nhất định (Điều 4.3). Những quy tắc đặc biệt đối với việc thẩm tra hàng dệt may (Điều 4.6), và cách thức xác định yêu cầu hưởng đối xử ưu đãi về thuế quan (Điều 4.7) đã được xác định.

3. Các biện pháp khắc phục thương mại

Đầu tiên và trước hết, Chương 6 TPP quy định về các biện pháp khắc phục thương mại tái khẳng định nghĩa vụ của các bên trong Hiệp định của WTO. Điều 6.2 quy định rằng quyền và nghĩa vụ của các bên theo Điều XIX GATT 1994 và Hiệp định SA không gây ảnh hưởng và không có quy định nào trong Hiệp định trao cho các bên quyền và nghĩa vụ đối với các hành vi theo Điều XIX GATT 1994 và Hiệp định SA. Tuy nhiên Chương 6 cũng quy định cụ thể rằng 'không có bên nào được áp dụng hoặc duy trì biện pháp tự vệ theo Chương này, đối với bất kỳ sản phẩm nào được nhập khẩu theo hạn ngạch thuế quan (TRQ) mà một bên trong Hiệp định này áp dụng' (Điều 6.2.4). Các quy tắc và tiêu chuẩn cụ thể được áp dụng đối với các biện pháp tự vệ chuyển tiếp (Điều 6.3 và 6.4) cùng với các quy tắc về điều tra, thông báo và tham vấn (Điều 6.5 và 6.6)

Khá tương tự, theo Điều 6.8, Chương 6 quy định rõ rằng các bên có quyền và nghĩa vụ theo Điều VI GATT 1994, Hiệp định ADA, Hiệp định SA, và Hiệp định SCM. Hơn nữa, theo cùng điều khoản, TPP không trao quyền và nghĩa vụ cho các bên liên quan tới thủ tục hoặc biện pháp áp dụng theo Điều khoản kể trên của GATT 1994 và các Hiệp định ADA và SCM. Để tăng cường tính minh bạch và đúng quy trình đối với các thủ tục tố tụng về các biện pháp khắc phục thương mại, Phụ lục 6-A đã chi tiết hoá các quy định mang tính thực tiễn đối với thủ tục tố tụng AD và CVD.

4. SPS và TBT

Chương 7 và Chương 8 TPP lần lượt quy định về các biện pháp vệ sinh dịch tễ và các rào cản kỹ thuật đối với thương mại.

Về các biện pháp vệ sinh dịch tễ, Chương 7 đề cập và đưa ra định nghĩa về biện pháp SPS tại Phụ lục A của Hiệp định SPS trong WTO (Điều 7.1). Chương quy định rõ về mục tiêu của biện pháp này nhằm bảo vệ sức khoẻ của con người, động thực vật trên lãnh thổ của các bên, trong khi đó vẫn tạo thuận lợi và thúc đẩy thương mại (Điều 7.2(a)). Bên cạnh đó, Chương 7 cũng có mục tiêu rõ ràng nhằm đẩy mạnh và xây dựng Hiệp định SPS của WTO (Điều 7.2(b)), vì vậy chương này vẫn tham khảo các nội dung đối với các vấn đề SPS (như đã được khẳng định trong các quy định về nghĩa vụ trong Hiệp định này theo Điều 7.4). Điểm (d) Điều 7.2 khẳng định tính cấp thiết của Chương về SPS nhằm đảm bảo việc duy trì các mục tiêu được đề cập trong Điểm (a) thông qua các biện pháp vệ sinh dịch tễ không tạo ra những trở ngại không cần thiết đối với thương mại. Chương quy định về tất cả các biện pháp SPS của một bên có thể ảnh hưởng, trực tiếp hoặc gián tiếp, thương mại giữa các Bên, đặc biệt đề cập tới việc các bên tự do quy định các yêu cầu đối với thực phẩm và các sản phẩm thực phẩm phù hợp với luật Hồi giáo (Điều 7.3). Các nguyên tắc khoa học (*ví dụ*: các biện pháp SPS của các bên phải dựa trên các nguyên tắc khoa học) có ý nghĩa quan trọng tối cao đối với toàn bộ nền kinh tế trong Chương SPS của TPP, cùng với việc các bên tự do đưa ra các mức độ bảo hộ mà họ xem là phù hợp và nghĩa vụ đánh giá, phân tích rủi ro (Điều 7.9)

Tương tự Chương 7, Chương 8 tham khảo và đưa ra định nghĩa về rào cản kỹ thuật đối với thương mại trong Phụ lục 1 Hiệp định TBT của WTO (Điều 8.1). Chương này có mục tiêu thuận lợi hoá thương mại và tăng cường tính minh bạch và hợp tác (Điều 8.2) và, cuối cùng, nhằm chuẩn bị, tiếp thu và áp dụng tất cả các quy chuẩn, tiêu chuẩn và quy trình đánh giá sự phù hợp của các cơ quan cấp trung ương có thể ảnh hưởng tới thương mại giữa các bên (Điều 8.3). Hiệp định TBT của WTO vẫn là cơ sở tham khảo quan trọng cho TPP khi TPP tích hợp một số lượng lớn các điều khoản của Hiệp định TBT (Điều 8.4). Bên cạnh các nghĩa vụ TBT, các bên phải áp dụng nguyên tắc NT đối với các cơ quan đánh giá sự phù hợp của các bên liên quan tới các thủ tục cụ thể trong việc kiểm nghiệm, chứng nhận và cấp giấy phép hoặc là thừa nhận các kết quả này (Điều 8.6). Bên cạnh đó, trong số các nghĩa vụ khác, nghĩa vụ minh bạch (Điều 8.7) và các quy định liên quan tới trao đổi thông tin và thảo luận kỹ thuật (Điều 8.10), Chương 8 còn bao gồm một số phụ lục. Những phụ lục này đã lọc ra một số lượng lớn

hạng mục các sản phẩm và đưa ra các nguyên tắc cụ thể nhất định đối với các biện pháp TBT áp dụng chúng trong nhiều khía cạnh. Phụ lục 8-A liên quan tới rượu và đồ uống có cồn. Phụ lục 8-B đề cập tới các sản phẩm công nghệ thông tin. Phụ lục 8-C quy định về dược phẩm. Phụ lục 8-D đề cập tới mỹ phẩm. Phụ lục 8-E hướng tới các thiết bị y tế; Phụ lục 8-F liên quan tới thể thức phù hợp đối với thực phẩm trước khi đóng gói và phụ gia thực phẩm; và Phụ lục 8-G bao gồm các sản phẩm hữu cơ.

5. Đầu tư

Chương 9 TPP quy định về đầu tư tại Điều 9.1. Các nội dung liên quan tới đầu tư bao gồm các doanh nghiệp, cổ phiếu, cổ phần và các hình thức góp vốn của doanh nghiệp, quyền sở hữu trí tuệ (bởi vậy cơ bản bổ sung quy định về quyền sở hữu trí tuệ quy định trong Chương 18 TPP), và, nhìn chung, là những tài sản hữu hình và vô hình, động sản và bất động sản, bao gồm tài sản cho thuê, thế chấp, cầm cố, đầu cơ. Chương 9 bao gồm các biện pháp áp dụng hoặc duy trì bởi một bên có liên quan tới các nhà đầu tư từ bên khác và các hoạt động đầu tư trên lãnh thổ của bên đó (Điều 9.2). Các biện pháp được điều chỉnh bao gồm các biện pháp được các cơ quan có thẩm quyền trung ương, khu vực hoặc địa phương của bên đó áp dụng hoặc duy trì (Điều 9.2). Hơn nữa, Chương 9 không áp dụng đối với các biện pháp quy định trong Chương 11 TPP (đối với dịch vụ tài chính) và trong trường hợp không thống nhất với Chương 9 và Chương khác trong TPP, Chương khác sẽ được ưu tiên áp dụng đối với nội dung không thống nhất đó (Điều 9.3)

Các điều khoản 9.4 và 9.5 quy định về các nguyên tắc NT và MFN tương ứng. Bên cạnh đó, theo Điều 9.6, các bên có nghĩa vụ đối xử đối với hoạt động đầu tư phù hợp với các nguyên tắc chung của luật quốc tế, bao gồm đối xử công bằng và thỏa đáng, và bảo vệ và an ninh đầy đủ'. Các quy tắc đặc biệt được thiết lập đối với NT trong trường hợp xung đột vũ trang hoặc bất ổn định dân sự (Điều 9.7), và như một thông lệ trong các BIT và các FTA liên quan đến chương về đầu tư và hành vi tước quyền sở hữu (Điều 9.8). Hơn nữa, mỗi bên có nghĩa vụ cho phép tất cả các hoạt động chuyển nhượng liên quan tới các hoạt động đầu tư thuộc phạm vi của hiệp định được thực hiện tự do không trì hoãn trong và ngoài lãnh thổ của mình (Điều 9.9), và không áp dụng các biện pháp quy định về năng suất (Điều 9.10). Những điều khoản cụ thể về công nhận tính hợp pháp của môi trường, sức khoẻ và các mục tiêu pháp lý (Điều 9.16) cùng với tầm quan trọng của các quy định của các bên về khuyến khích các doanh nghiệp hoạt động trên lãnh thổ để tuân thủ các tiêu chuẩn về trách nhiệm xã hội của các doanh nghiệp (Điều 9.17).

Một mục cụ thể (Mục B) Chương 9 quy định về phương thức giải quyết tranh chấp giữa nhà đầu tư nước ngoài và chính phủ nước tiếp nhận đầu tư. Trong khi phương thức đàm phán và thương lượng vẫn là phương thức khởi đầu trong số các phương thức giải quyết tranh chấp (Điều 9.18), 'nếu một tranh chấp đầu tư không được giải quyết trong vòng 6 tháng sau khi bị đơn nhận được yêu cầu tham vấn bằng văn bản', nguyên đơn có thể đệ trình khiếu nại khác theo Công ước Washington 1965 (Công ước về Trung tâm giải quyết tranh chấp đầu tư quốc tế (ICSID) và các Quy tắc ICSID về thủ tục tố tụng trọng tài, hoặc theo Các quy tắc trọng tài phụ trợ ICSID, hoặc Quy tắc trọng tài của Uỷ ban của Liên hợp quốc về Luật thương mại quốc tế, hoặc bất kỳ các tổ chức trọng tài khác hoặc các quy tắc trọng tài khác (Điều 9.19). Mục B Chương 9 cũng quy định chi tiết về thủ tục và quy tắc về sự đồng thuận của các bên, vấn đề lựa chọn trọng tài viên, tiến hành thủ tục trọng tài và vấn đề luật điều chỉnh, trong số các vấn đề khác.

Tương tự trường hợp của các chương khác, Chương 9 bao gồm các phụ lục khác nhau. Phụ lục 9-A liên quan tới cách giải thích của các bên về luật tập quán quốc tế. Phụ lục 9-B liên quan tới tước quyền sở hữu. Phụ lục 9-C liên quan tới trưng thu đất đai. Phụ lục 9-D đề cập tới dịch vụ văn bản. Phụ lục 9-E quy định về chuyển nhượng (một phần được quy định trong Điều 9.9). Phụ lục 9-F quy định về luật Chi lê (Decreto Ley 600). Phụ lục 9-G quy định về nợ công, trong khi các phụ lục sau cụ thể hơn.

6. Cung ứng dịch vụ qua biên giới, dịch vụ tài chính và việc nhập cảnh tạm thời của thương nhân

Chương 10 TPP quy định về cung ứng dịch vụ qua biên giới, đó là việc cung ứng dịch vụ từ lãnh thổ của một bên vào lãnh thổ của bên khác, hoặc vào lãnh thổ của bên đối với thể nhân của bên khác hoặc bởi công dân của một bên trên lãnh thổ của một bên khác (Điều 10.1). Điều khoản tương tự của Chương 10 đã chỉ rõ rằng việc cung ứng dịch vụ trên lãnh thổ của một bên từ một hoạt động đầu tư không thuộc phạm vi điều chỉnh của Chương 10. Chương quy định tất cả các biện pháp được một bên áp dụng hoặc duy trì và thương mại dịch vụ qua biên giới được tiến hành bởi nhà cung ứng dịch vụ của một Bên khác bao gồm (nhưng

không giới hạn) các biện pháp ảnh hưởng tới sản xuất, phân phối, tiếp thị, bán hàng hoặc dịch vụ giao hàng, ảnh hưởng tới việc mua bán và sử dụng, hoặc thanh toán dịch vụ, hoặc ảnh hưởng hoạt động bảo lãnh hoặc các hình thức bảo lãnh tài chính khác để thỏa mãn điều kiện đối với việc cung ứng dịch vụ (Điều 10.2).

Mỗi Bên có nghĩa vụ áp dụng đối với các dịch vụ và các nhà cung cấp dịch vụ đối xử quốc gia khác và đối xử tối huệ quốc khác (theo Điều 10.3 và 10.4). Nghĩa vụ cụ thể liên quan đến các biện pháp hạn chế hoặc hạn chế tiếp cận thị trường (Điều 10.5). Các quy tắc đặc biệt áp dụng đối với các dịch vụ nghề nghiệp (Phụ lục 10-A), dịch vụ chuyển phát nhanh (Phụ lục 10-B) và cơ chế ngăn chặn các biện pháp không phù hợp (Phụ lục 10-C).

Chương 11 quy định về dịch vụ tài chính giữa các bên, nghĩa là bất kỳ dịch vụ nào mang tính chất tài chính (Điều 11.1). Dịch vụ tài chính bao gồm tất cả các dịch vụ bảo hiểm và dịch vụ liên quan đến bảo hiểm, dịch vụ ngân hàng cũng như các dịch vụ phụ trợ hoặc trợ giúp cho một dịch vụ mang tính chất tài chính. Chương 11 bao gồm các biện pháp được thông qua hoặc duy trì bởi một bên và liên quan đến các tổ chức tài chính của bên khác, áp dụng cho các nhà đầu tư (và các khoản đầu tư của họ) của bên khác trong các tổ chức tài chính ở lãnh thổ của bên đó và đối với thương mại qua biên giới (Điều 11.2).

Chương 11 bao gồm các nghĩa vụ NT và MFN (Điều 11.3 và 11.4), và các quy tắc về tiếp cận thị trường cho các tổ chức tài chính (Điều 11.5). Các quy tắc cụ thể được quy định để xử lý một số thông tin nhất định (Điều 11.8) và ngoại lệ cho các bên (Điều 11.11).

Chương 12 áp dụng đối với các biện pháp ảnh hưởng đến việc nhập cảnh tạm thời của thương nhân của một bên vào lãnh thổ của một bên khác, trừ các biện pháp ảnh hưởng đến những thể nhân muốn tiếp cận thị trường việc làm của bên khác hoặc 'liên quan đến quốc tịch, cư trú, hoặc làm việc vĩnh viễn' (Điều 12.2). Tham khảo cụ thể trong Chương quy định về dịch chuyển vì mục đích công việc mà không có nghĩa vụ ràng buộc pháp lý trong lĩnh vực này (Điều 12.5).

7. Sở hữu trí tuệ

Chương 18 của TPP quy định về sở hữu trí tuệ với mục đích rõ ràng là góp phần thúc đẩy đổi mới công nghệ và chuyển giao và phổ biến công nghệ giữa các bên (Điều 18.2). Ngoài ra, Chương 18 bằng cách nào đó và phần nào thừa nhận tính hợp pháp của một số mục tiêu như bảo vệ sức khoẻ và dinh dưỡng cộng đồng và phát triển công nghệ (Điều 18.3).

Tương tự Hiệp định TRIPS, Chương 18 của TPP quy định các nghĩa vụ 'tối thiểu'. Trên thực tế, như được nêu rõ trong Điều 18.5, các Bên có nghĩa vụ thực hiện các quy định của Chương 18 và họ có thể (nhưng không có nghĩa vụ) bảo hộ hoặc thực thi các quyền sở hữu trí tuệ mở rộng hơn những gì được yêu cầu theo Chương 18, với điều kiện là việc bảo hộ hoặc thực thi đó không vi phạm các quy định của Chương 18. Các bên cũng đã xác nhận cam kết của mình đối với Tuyên bố về TRIPS và YTCC, do đó các nghĩa vụ liên quan đến sở hữu trí tuệ theo Chương 18 của TPP 'không nên và không được ngăn cản một bên thực hiện các biện pháp để bảo vệ sức khoẻ cộng đồng' (Điều 18.6).

Cũng cần lưu ý rằng ngoài việc tham khảo Hiệp định TRIPS của WTO, Chương 18 của TPP cũng đề cập đến một số thỏa thuận quốc tế khác liên quan đến sở hữu trí tuệ. Do đó, theo Điều 18.7, TPP trước hết tham khảo Công ước Paris 1883 về bảo hộ sở hữu công nghiệp, Công ước Berne năm 1886 về bảo hộ các tác phẩm văn học và nghệ thuật, và Hiệp ước Hợp tác về Sáng chế được sửa đổi năm 1979. Ngoài ra, quy định tương tự đề cập đến Nghị định thư năm 1989 liên quan đến Thỏa ước Madrid (Thoả ước Madrid năm 1891 về đăng ký quốc tế nhãn hiệu), Hiệp ước Budapest về công nhận quốc tế đối với việc nộp lưu chủng vi sinh nhằm tiến tới các thủ tục Patent 1977, Hiệp ước Singapore về Luật Thương hiệu, Công ước quốc tế về bảo hộ giống cây trồng mới năm 1991, Hiệp ước Bản quyền WIPO (WCT), và Hiệp ước về Biểu diễn và Thu âm của WIPO (WPPT).

Ngoài ra, Chương 18 quy định về nghĩa vụ NT (Điều 18.8) và một số nghĩa vụ minh bạch nhất định (Điều 18.9). Trong các điều khoản về quyền sở hữu trí tuệ cụ thể, Chương 18 quy định về nhãn hiệu (Mục C), bao gồm nhãn hiệu tập thể và nhãn hiệu chứng nhận (Điều 18.19), tên miền (Điều 18.28), chỉ dẫn địa lý (Mục E), bằng sáng chế (Mục F), thử nghiệm chưa được tiết lộ hoặc dữ liệu khác (cùng với các bằng sáng chế trong Mục F), với các quy định đặc biệt về các sản phẩm hóa học nông nghiệp và các sản phẩm dược phẩm (tiểu mục B và tiểu mục C tương ứng), kiểu dáng công nghiệp (Mục G), bản quyền và các quyền liên quan (Mục H), bí mật thương mại (Điều 18.78), và bảo vệ các tín hiệu vệ tinh và tín hiệu cáp mang chương trình mã hoá (Điều 18.79). Đặc biệt chú ý đến các biện pháp bảo vệ công nghệ (TPMs) và thông tin quản lý quyền (RMI) (các Điều 18.68 và 18.69). Thực thi (Phần I) cũng như quy định về cung cấp dịch vụ internet (Phần J) được quy định trong các mục cụ thể.

8. Kết luận

Như nhấn mạnh từ phần mở đầu của Mục này, mặc dù TPP đã không có hiệu lực do một số thay đổi chính trị, nó vẫn là một trải nghiệm thú vị trong đàm phán thương mại và thương mại quốc tế. Mặc dù, tất nhiên, TPP đề cập, xây dựng và tích hợp một số điều khoản của các Hiệp định WTO, nhưng cũng sáng tạo trong nhiều khía cạnh. Việc bổ sung các chương cụ thể về môi trường (Chương 20), hợp tác và tăng cường năng lực (Chương 21), phát triển (Chương 23), thống nhất về quy định (Chương 25), tính minh bạch và chống tham nhũng (Chương 26), bên cạnh và bất kể thực tế ý nghĩa thực chất của các quyền và nghĩa vụ được quy định, cấu thành nên một FTA 'thế hệ cuối cùng'.

Hơn nữa, phạm vi địa lý, tham vọng và văn bản cuối cùng của hiệp định đã mang lại các *ví dụ* thú vị về sự khác biệt, và đôi khi cạnh tranh về lợi ích (kinh tế, văn hoá, xã hội, v.v ...) có thể được tổng hợp lại. Rõ ràng, tầm quan trọng của TPP vượt xa phạm vi kinh tế và thương mại, bao hàm nhu cầu hội nhập sâu hơn ở tất cả các cấp giữa các nước hiện nay. Vị thế chính trị đóng một vai trò quan trọng trong việc đàm phán và thậm chí có thể là lớn hơn việc không phê chuẩn hiệp định.

Mục 6. VIỆT NAM HỘI NHẬP KINH TẾ KHU VỰC

1. Việt Nam hội nhập ASEAN

A. *Việt Nam tham gia Khu vực thương mại tự do ASEAN ('AFTA') và Hiệp định về Chương trình thuế quan ưu đãi hiệu lực chung ('CEPT')*

Việt Nam tham gia AFTA, thực hiện CEPT từ ngày 01/01/1996 và cam kết giảm thuế quan đối với 6.130 mặt hàng xuống 0-5% trước ngày 01/01/2006. Danh mục hàng hoá thực hiện CEPT của Việt Nam được xây dựng theo các nguyên tắc cơ bản sau đây:

- Không gây ảnh hưởng lớn đến nguồn thu ngân sách;
- Bảo hộ hợp lí sản xuất nội địa;
- Tạo điều kiện khuyến khích việc chuyển giao kĩ thuật và đổi mới công nghệ cho sản xuất nội địa;
- Hợp tác với các nước ASEAN trên cơ sở các quy định của CEPT để tranh thủ ưu đãi, mở rộng thị trường cho xuất khẩu và thu hút đầu tư nước ngoài.

Tại thời điểm nêu trên, Việt Nam đã hoàn thành nghĩa vụ giảm thuế quan theo cam kết. Tính đến năm 2010, Việt Nam đã hoàn thành giảm thuế nhập khẩu cho 10.054 dòng thuế xuống mức 0-5%, chiếm 97,8% số dòng thuế, trong đó có 5.488 dòng thuế ở mức thuế suất 0%.

B. *Việt Nam tham gia xây dựng và phát triển Cộng đồng kinh tế ASEAN (AEC)*

Những năm gần đây, các nước thành viên ASEAN đã tích cực đẩy mạnh tiềm năng, thế mạnh của ASEAN. Tại Hội nghị cấp cao ASEAN lần thứ 9 tại Bali, Indonesia vào tháng 10/2003, lãnh đạo của 10 nước ASEAN đã kí kết Tuyên bố hoà hợp ASEAN II (còn gọi là Tuyên bố Bali II) thông qua khuôn khổ xây dựng Cộng đồng ASEAN, bao gồm ba trụ cột là Cộng đồng an ninh-chính trị, Cộng đồng kinh tế và Cộng đồng văn hoá-xã hội.

Tại Hội nghị cấp cao ASEAN lần thứ 13 tại Singapore tháng 11/2007, ASEAN đã thông qua Kế hoạch tổng thể và lộ trình chiến lược thực hiện Cộng đồng kinh tế ASEAN ('AEC'), được coi là 'kim chỉ nam' của ASEAN cho mục tiêu thiết lập AEC.

Năm 2009, năm đầu tiên Hiến chương ASEAN được thực hiện với nhiều mục tiêu, trong đó có việc xây dựng một Cộng đồng kinh tế ASEAN ('AEC') vào năm 2015. ASEAN chủ trương xây dựng AEC dựa trên sự liên kết về chất giữa các ngành chủ chốt, đang có ưu thế hoặc nhiều tiềm năng phát triển trong nền kinh tế ASEAN bằng các biện pháp cụ thể như: Đẩy nhanh tự do hoá thương mại các sản phẩm, dịch vụ liên quan, hài hoà tiêu chuẩn, đơn giản hoá thủ tục hải quan, thuận lợi hoá thương mại v.v.. Một số ngành được lựa chọn ưu tiên đẩy nhanh hội nhập trong ASEAN bao gồm: Sản phẩm gỗ, nông sản, ô-tô, sản phẩm cao su, điện tử, dệt may, thủy sản, ASEAN điện tử, vận tải hàng không, du lịch và y tế.

Các chương trình liên kết và tự do hoá thương mại của ASEAN trong khuôn khổ của AEC đều được thể chế hoá bằng các hiệp định như: Hiệp định thương mại hàng hoá ASEAN ('ATIGA'), thay thế cho CEPT; Hiệp định khung về thương mại dịch vụ của ASEAN ('AFAS'); Hiệp định đầu tư toàn diện ASEAN ('ACIA')…

Trong những năm qua, Việt Nam đã tham gia xây dựng AEC với thái độ chủ động và tích cực:

- Đến năm 2010, Việt Nam đã giảm thuế nhập khẩu cho 10.054 dòng thuế xuống mức 0-5% theo CEPT/AFTA, chiếm 97,8% số dòng thuế trong biểu thuế, trong đó có 5.488 dòng thuế ở mức thuế suất 0%.

- Việt Nam hoàn thành việc chuyển dần các sản phẩm trong Danh mục nhạy cảm vào Kế hoạch cắt giảm thuế theo Hiệp định CEPT và giảm thuế quan đối với những sản phẩm này xuống mức 0-5% vào ngày 01/01/2013.77

- Việt Nam tham gia hợp tác một cách toàn diện với các nước thành viên ASEAN trong các lĩnh vực như: Thương mại hàng hoá, dịch vụ, đầu tư, nông nghiệp, giao thông vận tải, viễn thông, bảo hộ IPRs, chính sách cạnh tranh, bảo vệ người tiêu dùng. Đến nay, Việt Nam là một trong bốn thành viên ASEAN có tỉ lệ hoàn thành tốt nhất các cam kết trong Lộ trình tổng thể thực hiện AEC.

- AEC vẫn được Việt Nam lựa chọn là một nội dung quan trọng nhất trong Chương trình nghị sự của ASEAN trong năm 2010. Tại Hội nghị cấp cao ASEAN lần thứ 16 tại Hà Nội, dưới sự chủ trì của Việt Nam, các nhà lãnh đạo ASEAN đã ra Tuyên bố về phục hồi và phát triển bền vững, khẳng định quyết tâm củng cố và xây dựng Cộng đồng kinh tế ASEAN vào năm 2015.

Hội đồng AEC nhất trí xây dựng công cụ mới là Biểu đánh giá thực hiện AEC là một cơ chế giám sát minh bạch và chặt chẽ tiến độ thực hiện AEC của từng thành viên. Năm 2010, lần đầu tiên, Biểu đánh giá AEC cho giai đoạn 2007-2010 đã được hoàn thành.

C. *Việt Nam tham gia chương trình loại bỏ các biện pháp phi thuế quan (NTBs)*

Song song với Chương trình giảm thuế quan, Việt Nam cần phối hợp với các nước ASEAN triển khai Chương trình loại bỏ các NTBs. Cụ thể như:

- Các biện pháp hạn chế số lượng nhập khẩu (quota, cấm nhập khẩu) được loại bỏ khi thuế suất của mặt hàng đó đã được giảm xuống dưới 20% theo lộ trình giảm thuế quan;

- Các NTBs khác được loại bỏ dần trong vòng 5 năm tiếp theo, nhưng không muộn hơn năm 2006.

77 *Lộ trình xây dựng Cộng đồng ASEAN 2009-2015*, Nxb. Thời đại, tr. 53-54.

Các NTBs đã được Việt Nam loại bỏ tương đối nhanh. Trước năm 2000, Việt Nam áp dụng khá nhiều NTBs để quản lí xuất nhập khẩu nông sản như: Đầu mối và hạn ngạch xuất khẩu đối với gạo; giấy phép nhập khẩu đối với gạo, cà phê; đầu mối xuất khẩu cao su tại cửa khẩu đối với Trung Quốc; hạn chế nhập khẩu ngoại tệ đối với nhập khẩu hàng tiêu dùng. Đến năm 2006, về cơ bản Việt Nam hoàn thành việc loại bỏ các biện pháp hạn chế số lượng đối với hàng hoá trao đổi trong khuôn khổ Hiệp định CEPT và tiến tới loại bỏ các NTBs khác. Việt Nam chỉ còn áp dụng biện pháp giấy phép theo chế độ hạn ngạch thuế quan đối với bốn mặt hàng: Muối, đường (tinh luyện, thô), trứng gia cầm và thuốc lá nguyên liệu.78

Việc loại bỏ các NTBs cũng là một trong các nội dung quan trọng của tiến trình AEC. Các nước thành viên ASEAN, trong đó có Việt Nam, sẽ tập trung vào việc loại bỏ hoàn toàn các NTBs vào năm 2015, đặc biệt tăng cường tính minh bạch trong việc phát triển và ứng dụng các tiêu chuẩn kĩ thuật và thủ tục đánh giá tính hợp chuẩn phù hợp với Hiệp định TBT và Hướng dẫn chính sách ASEAN về tiêu chuẩn và hợp chuẩn.

D. *Việt Nam tham gia chương trình thống nhất hoạt động hải quan*

Việt Nam đã tham gia tích cực Chương trình thống nhất hoạt động hải quan của ASEAN với các nội dung cụ thể sau đây:

- Điều hoà thống nhất danh mục biểu thuế: Từ ngày 01/7/2003, Việt Nam áp dụng Danh mục biểu thuế quan chung trong ASEAN (viết tắt là 'AHTN'), thay cho Danh mục biểu thuế quan hiện hành để tính thuế đối với hàng xuất nhập khẩu (xây dựng hệ thống danh mục biểu thuế ASEAN thống nhất ở cấp độ 8 chữ số theo quy định của Công ước HS của WCO).

- Điều hoà thống nhất hệ thống xác định trị giá tính thuế hải quan theo quy định của Hiệp định CVA.

- Điều hoà thống nhất quy trình thủ tục hải quan: Hải quan các nước ASEAN đã thống nhất quy định về 'hành lang xanh', nhằm tạo thuận lợi cho hàng hoá lưu thông theo quy định của CEPT. Trong đó cơ chế 'Một cửa ASEAN', như các biện pháp đơn giản hoá, hài hoà hoá và tiêu chuẩn hoá thương mại và hải quan, quy trình, thủ tục hải quan cũng như áp dụng công nghệ tin học trong tất cả các lĩnh vực liên quan đến thuận lợi

78 *Việt Nam và các tổ chức kinh tế quốc tế*, Nxb. Tài chính, (2010), tr. 131.

hoá thương mại là điểm cốt yếu để thực hiện mục tiêu cuối cùng xây dựng cơ chế 'Một cửa ASEAN'.79

- Triển khai Hiệp định hải quan ASEAN: Việt Nam đã ban hành Luật hải quan mới vào năm 2001, sửa đổi và bổ sung năm 2005, và các văn bản hướng dẫn thi hành phù hợp với thông lệ và yêu cầu của tiến trình hội nhập kinh tế khu vực và quốc tế.

Để đẩy nhanh tiến trình xây dựng AEC, việc thực hiện Tầm nhìn hải quan ASEAN cũng được thúc đẩy hướng tới mốc thời gian là 2015.

E. *Quan hệ thương mại Việt Nam-ASEAN*

AEC là lựa chọn chính sách mang tầm chiến lược của ASEAN nhưng xuất phát điểm là tận dụng, khai thác tiềm năng hội nhập của mỗi nước thành viên, trong đó có Việt Nam. Xét trên phương diện chính trị, kinh tế và thương mại, ASEAN là đối tác thương mại quan trọng hàng đầu của Việt Nam và là động lực chủ yếu giúp nền kinh tế Việt Nam duy trì tốc độ tăng trưởng và xuất khẩu trong nhiều năm qua.

Với lợi thế là một khu vực phát triển năng động, gần gũi về địa lí, quan hệ thương mại giữa Việt Nam và ASEAN có mức tăng trưởng cao. So với năm 2002, thương mại hai chiều ASEAN và Việt Nam đã tăng hơn 3 lần, đạt gần 30 tỉ USD vào năm 2008, chiếm 25% tổng kim ngạch của Việt Nam. Cũng trong giai đoạn này, tốc độ tăng trưởng xuất khẩu trung bình của Việt Nam sang ASEAN là 28,4% và nhập khẩu khẩu là 27%. Kim ngạch xuất khẩu của Việt Nam sang ASEAN tăng từ 2,9 tỉ USD năm 2003 lên tới 8,9 tỉ USD năm 2009. Năm 2009, Việt Nam đã xuất khẩu sang Singapore, Thái Lan, Philippines và Cam-pu-chia đều đã đạt trên 1 tỉ USD. Tính đến tháng 11/2011, tăng trưởng xuất khẩu của Việt Nam đã đạt được con số ấn tượng, gần 87,2 tỉ USD, tăng 34,7% so với cùng kì năm 2010, trong đó xuất khẩu sang khu vực ASEAN tăng 30,6% so với cùng kì và nhập siêu có xu hướng giảm từ khu vực này. ASEAN giữ vững vị trí đối tác thương mại lớn nhất của Việt Nam, vượt qua cả EU, Nhật Bản, Trung Quốc hay Hoa Kỳ. Cơ cấu xuất khẩu của Việt Nam sang ASEAN đang chuyển biến theo chiều hướng tích cực, cả về chất lượng và giá trị. Từ những mặt hàng nông sản sơ chế và nguyên, nhiên liệu như gạo, cà phê, cao su, dầu thô có hàm lượng chế biến thấp, Việt Nam đã xuất khẩu nhiều mặt hàng tiêu dùng, hàng công nghiệp như linh kiện máy tính, dệt may, nông sản chế biến, mỹ phẩm với giá trị cao và

79 *Việt Nam và các tổ chức kinh tế quốc tế*, Nxb. Tài chính, (2008), tr. 135-138.

ổn định. Việt Nam và các nước ASEAN khác cùng gia nhập các câu lạc bộ các nước xuất khẩu lớn nhất trên thế giới về gạo, cao su, cà phê, hạt điều, hàng dệt may.[80]

Bên cạnh những thuận lợi và cơ hội từ hội nhập ASEAN, Việt Nam cũng phải đối mặt với nhiều thách thức, đặc biệt trong việc triển khai và áp dụng các cam kết của AEC.

2. Việt Nam hội nhập APEC

A. *Mục tiêu và nguyên tắc hoạt động của APEC*

Diễn đàn hợp tác kinh tế châu Á-Thái Bình Dương ('APEC') được thành lập từ tháng 11/1989 tại Canberra (Úc), nhằm thúc đẩy tăng trưởng kinh tế và sự thịnh vượng trong khu vực, đồng thời thắt chặt các mối quan hệ trong cộng đồng châu Á-Thái Bình Dương cũng như đáp ứng xu hướng toàn cầu hoá đời sống kinh tế-thương mại thế giới. APEC có 21 thành viên, bao gồm: Australia, Hoa Kỳ, Canada, Nhật Bản, Hàn Quốc, Brunei, Indonesia, Singapore, Malaysia, Philippines, Thái Lan, New Zealand, China, Hong Kong, Taiwan, Chile, Mexico, Papua New Guinea, Việt Nam, Nga và Peru. Hiện nay, APEC đang ngừng kết nạp thành viên mới để củng cố tổ chức.

1. Nguyên tắc hoạt động cơ bản của APEC

- Toàn diện: Thực hiện tự do hoá và thuận lợi hoá trên tất cả các lĩnh vực;
- Phù hợp với GATT/WTO;
- Đảm bảo mối tương đồng giữa các thành viên trong việc thực hiện tự do hoá và thuận lợi hoá thương mại và đầu tư;
- Không phân biệt đối xử: Không chỉ áp dụng cho các thành viên APEC mà cả với các nền kinh tế không phải là thành viên;
- Minh bạch: Minh bạch hoá mọi chính sách, quy định hiện hành tại các thành viên APEC;
- Lấy mức bảo hộ hiện tại làm mốc ('Standstill'): Chỉ giảm, không tăng mức bảo hộ;

80 Bộ Công Thương, *Báo cáo tình hình hoạt động công nghiệp và thương mại tháng 11/2011*; Bộ Công Thương, *Báo cáo kế hoạch 2012 và kế hoạch 5 năm 2011-2015*.

- 'Cùng xuất phát, quá trình liên tục và thời gian biểu khác nhau': Các nền kinh tế thành viên có các thời gian biểu khác nhau và ưu tiên về thời gian đối với nền kinh tế đang phát triển là 10 năm so với nền kinh tế phát triển;

- Linh hoạt, vì trình độ phát triển kinh tế của các thành viên APEC khác nhau;

- Hợp tác kĩ thuật.

2. Các đặc điểm cơ bản của APEC

- APEC là diễn đàn đối thoại, không phải là diễn đàn thương lượng. Do vậy, xét về tổng thể, những cam kết trong khuôn khổ APEC không có tính ràng buộc cao như trong ASEAN và WTO;

- APEC gắn chặt cam kết của mình với việc thực hiện các cam kết trong khuôn khổ WTO theo hướng thực hiện sâu hơn và sớm hơn trong khuôn khổ APEC;

- Luôn gắn hoạt động của APEC với các sự kiện chính trị lớn trên thế giới, trên cơ sở quan hệ hữu nghị và hợp tác.

B. *Việt Nam tham gia APEC*

Trong APEC, Việt Nam là thành viên năng động và tích cực với việc chủ động tham gia ngày càng sâu rộng vào hầu hết các chương trình hợp tác của APEC về tự do hoá và thuận lợi hoá thương mại, đầu tư, hợp tác kinh tế-kĩ thuật và tạo thuận lợi cho cộng đồng doanh nghiệp.

Việc tham gia APEC đã mang lại nhiều lợi ích cho Việt Nam. Thực tế là những năm gần đây, Việt Nam thu hút khoảng 75% vốn FDI và hơn 50% vốn ODA từ các nền kinh tế thành viên APEC. Kim ngạch xuất khẩu sang thị trường gần 3 tỉ dân này chiếm khoảng 70% tổng kim ngạch xuất nhập khẩu của Việt Nam. Những mặt hàng Việt Nam có thế mạnh xuất khẩu hoặc mang tính chiến lược đều có nhiều đối tác nhập khẩu ở các thành viên APEC. Việt Nam cũng có nhiều đối tác quan trọng trong APEC như: Các nước ASEAN, Nhật Bản, Trung Quốc, Hoa Kỳ, Australia... Một số thành viên APEC đang dần trở thành đối tác chiến lược trong kế hoạch phát triển quan hệ kinh tế, thương mại và đầu tư chặt chẽ, toàn diện hơn của Việt Nam.

1. Lĩnh vực thuế quan và rào cản phi thuế quan (NTBs)

Việt Nam cam kết giảm thuế quan, minh bạch hoá chính sách thuế quan trong dài hạn, loại bỏ dần các NTBs gây cản trở thương mại quốc tế, phù hợp với các cam kết trong ASEAN và WTO.

2. Lĩnh vực hải quan

Việt Nam đã cùng các thành viên triển khai Kế hoạch hành động về thuận lợi hoá thương mại để giảm chi phí giao dịch trong khu vực APEC; cam kết hài hoà hoá các thủ tục hải quan phù hợp với thông lệ quốc tế, đặc biệt cam kết tuân thủ các quy định của WTO. Việt Nam cũng đã tham gia Sáng kiến về hải quan một cửa, tạo thuận lợi cho thương mại và đầu tư.

3. Lĩnh vực thương mại dịch vụ

Việt Nam cam kết liên tục giảm những hạn chế để mở cửa thị trường thương mại dịch vụ, áp dụng MFN và NT nhằm tạo thuận lợi, công bằng và minh bạch cho các nhà cung ứng dịch vụ của các nền kinh tế thành viên, cũng như cơ hội cho các nhà cung ứng dịch vụ Việt Nam hướng ra thị trường toàn khối. Việt Nam đã thực hiện bảo mật dữ liệu trong giao dịch thương mại điện tử, tham gia Chương trình thẻ đi lại của doanh nhân APEC, để tạo thuận lợi cho các doanh nhân APEC được nhập cảnh vào Việt Nam vì mục đích kinh doanh, thương mại và đầu tư.

4. Tiêu chuẩn và hài hoà hoá

Việt Nam đã dần dần đưa danh mục các tiêu chuẩn ưu tiên hài hoà trong APEC vào kế hoạch xây dựng tiêu chuẩn của Việt Nam, trong số đó đã có nhiều tiêu chuẩn được chấp nhận thành tiêu chuẩn quốc gia của Việt Nam. Cho đến nay, Việt Nam đã hài hoà được trên 200 tiêu chuẩn quốc gia với tiêu chuẩn quốc tế.

Việt Nam đã tham gia vào thoả thuận công nhận lẫn nhau về tiêu chuẩn trong APEC (APEC-MRA) đối với các sản phẩm điện, điện tử, đồ chơi, thực phẩm…, điều này giúp Việt Nam thuận lợi hơn trong việc tiếp cận các thị trường 'khó tính' của các nền kinh tế APEC như Hoa Kỳ, Nhật Bản, Australia, New Zealand, …[81]

5. Hợp tác trong thời gian tới

Việt Nam tiếp tục hợp tác với các thành viên APEC để hướng tới thực

[81] *Việt Nam và các tổ chức kinh tế quốc tế*, Nxb. Tài chính, (2008), tr. 189 và 192.

hiện mục tiêu Bogor về thương mại và đầu tư tự do và mở cửa vào năm 2020, cải thiện hơn nữa môi trường kinh doanh cho doanh nghiệp thông qua các hoạt động sau:

- Loại bỏ các rào cản tại biên giới, trong đó có việc giảm thuế quan và NTBs trong khuôn khổ Kế hoạch hành động quốc gia (viết tắt là 'IAP') để thúc đẩy thương mại, đầu tư trong khu vực APEC; phối hợp với các nền kinh tế APEC nghiên cứu hài hoà hoá quy tắc xuất xứ để tạo thuận lợi cho hàng hoá xuất khẩu; thực hiện cơ chế hải quan 'một cửa' để rút ngắn thời gian thông quan hàng hoá và giảm chi phí cho doanh nghiệp; tiếp tục tham gia chương trình tạo thuận lợi cho đi lại của doanh nhân trong khu vực APEC;
- Loại bỏ các rào cản sau biên giới thông qua việc thực hiện các chương trình cải cách cơ chế quản lí nhằm tạo thuận lợi cho môi trường kinh doanh, trong đó có việc thành lập doanh nghiệp và các thủ tục để tạo thuận lợi cho quá trình sản xuất kinh doanh của doanh nghiệp;
- Tăng cường kết nối 'qua biên giới' để tạo thuận lợi cho hoạt động vận tải hàng hoá giữa các thành viên, trong đó có việc loại bỏ các rào cản trong lĩnh vực hậu cần thương mại (logistics);
- Tăng cường hợp tác với các thành viên APEC trong việc nâng cao năng lực cho các doanh nghiệp vừa và nhỏ trong khuôn khổ hoạt động của Nhóm công tác về doanh nghiệp vừa và nhỏ của APEC ('SMEWG');
- Thúc đẩy hợp tác doanh nghiệp thông qua Hội đồng tư vấn kinh doanh APEC ('ABAC') như là kênh trao đổi thông tin và khuyến nghị giữa chính phủ và doanh nghiệp, đồng thời là đầu mối để kết nối giữa các doanh nghiệp Việt Nam và các doanh nghiệp ở các thành viên APEC.82

3. Việt Nam hội nhập ASEM

A. *Mục tiêu và nguyên tắc hoạt động của ASEM*

Diễn đàn hợp tác Á-Âu (viết tắt là 'ASEM') được thành lập tháng 3/1995 tại Bangkok (Thái Lan) nhằm thúc đẩy đối thoại chính trị để tăng cường hơn nữa sự hiểu biết lẫn nhau và thống nhất quan điểm của hai châu lục đối với các vấn đề chính trị và xã hội của thế giới; thúc đẩy trao đổi thương mại và đầu tư giữa các nước thành viên và tăng cường hợp tác trong lĩnh vực khoa học, kĩ thuật, môi trường, phát triển nguồn nhân lực ... nhằm tạo ra sự tăng trưởng bền vững ở cả châu Á và châu Âu.

1. Mục tiêu cơ bản

- Thúc đẩy giao lưu, hỗ trợ giữa các doanh nghiệp;
- Cải thiện môi trường kinh doanh nhằm thúc đẩy thương mại và đầu tư;
- Tạo sự tăng trưởng kinh tế ổn định và bền vững.

2. Một số nguyên tắc hoạt động cơ bản

- Bình đẳng, tôn trọng lẫn nhau và đôi bên cùng có lợi;
- Đồng thuận;
- Đối thoại;
- Hợp tác đồng đều trên các lĩnh vực: tăng cường đối thoại chính trị, củng cố hợp tác kinh tế và xúc tiến hợp tác trong các lĩnh vực khác;
- Tự nguyện.

B. *Việt Nam tham gia ASEM*

1. Lĩnh vực chính trị

- Việt Nam đã tham gia đầy đủ và tích cực vào các sinh hoạt chính trị của ASEM tại các hội nghị cấp cao, hội nghị bộ trưởng, các cuộc họp ASEM SOM, họp điều phối viên.
- Tham gia xây dựng các văn kiện như khuôn khổ hợp tác Á-Âu, các tuyên bố của chủ tịch hội nghị nhằm xác định mục tiêu, nguyên tắc, cơ chế, ưu tiên, định hướng cho hợp tác ASEM.
- Đề xuất đưa hợp tác ASEM, nhất là hợp tác kinh tế, đi vào thực chất tại Hội nghị cấp cao ASEM 5 và đã được các thành viên ủng hộ.

82 Phát biểu của Bộ Công Thương tại Hội nghị ABAC ngày 25/8/2009 tại Việt Nam.

- Đăng cai Hội nghị thượng đỉnh ASEM 5 tại Hà Nội năm 2004.

2. Lĩnh vực kinh tế

- Việt Nam đã tham gia xây dựng và triển khai Kế hoạch hành động thuận lợi hoá thương mại ('TFAP'): Xây dựng Danh sách các rào cản chung trong thương mại trên 8 lĩnh vực ưu tiên ban đầu của TFAP và một số rào cản chung khác.

- Việt Nam đã tham gia xây dựng và triển khai Kế hoạch hành động xúc tiến đầu tư ('IPAP'); trong đó tham gia mạng thông tin về đầu tư ASEM, cung cấp thông tin cập nhật về tình hình đầu tư nước ngoài, các văn bản pháp luật, chính sách khuyến khích đầu tư nước ngoài tại Việt Nam; cử người tham gia Nhóm chuyên gia về đầu tư ('IEG').

- Việt Nam tích cực trao đổi tài chính, tham gia các chương trình hợp tác chống rửa tiền, trao đổi kinh nghiệm về quản lí nợ công. Việt Nam đã tận dụng được Quỹ tín thác ASEM ('AFT') cho tiến trình cải cách hệ thống tài chính-ngân hàng và hệ thống an ninh xã hội với sự trợ giúp hơn 20 dự án, giá trị trên 13 triệu USD. Một số dự án triển khai có hiệu quả như: Cải cách và phát triển hệ thống ngân hàng; cải cách các doanh nghiệp nhà nước Việt Nam; thúc đẩy và cổ phần hoá các doanh nghiệp nhà nước trong khu vực giao thông vận tải; Chương trình phát triển mạng lưới bảo đảm xã hội và tạo công ăn việc làm; cơ cấu khu vực ngân hàng; cung ứng dịch vụ chăm sóc sức khoẻ cho người nghèo và đào tạo các nhà lãnh đạo và quản lí về quản trị doanh nghiệp...

3. Một số khó khăn trong hợp tác ASEM

Kể từ ASEM-5 tại Hà Nội, hợp tác kinh tế ASEM không có nhiều biến chuyển. Các hội nghị thường niên chính thức của kênh kinh tế như Hội nghị bộ trưởng kinh tế ASEM, Hội nghị các quan chức cao cấp về thương mại và đầu tư ASEM đều không thể tổ chức hoặc tổ chức không thành công do nhiều nguyên nhân khác nhau, không chỉ do sự bất đồng quan điểm về tính định hướng của một số thành viên ASEM mà còn xuất phát từ bản thân cơ chế hợp tác của ASEM.

Kể từ đầu năm 2004 đến nay, các vấn đề lớn liên quan đến nội dung kinh tế hầu như chưa được khai thông và định hướng. Chỉ có ba hội nghị chính thức của ASEM về kinh tế được tổ chức (sau khi trì hoãn nhiều lần), đó là Hội nghị các quan chức cao cấp (cấp vụ) về thương mại và đầu tư lần thứ 10 (SOMTI-10) tại Trung Quốc tháng 7/2005, Hội nghị không chính thức các quan chức cao cấp ASEM tại Hà Lan tháng 10/2005, và Hội nghị các quan chức cao cấp về thương mại và đầu tư ASEM lần thứ 11 (SOMTI-11) tại Slovenia vào tháng 4/2008, song các hội nghị này chỉ mang tính chất gặp gỡ và trao đổi.

Trong năm 2011, Việt Nam đã tham dự Hội nghị các quan chức cao cấp về thương mại và đầu tư ASEM, được tổ chức tại Brussels, Bỉ vào tháng 02/2011, và cũng đã tranh thủ vận động các thành viên ASEM nối lại hợp tác kinh tế, trong đó có việc tổ chức Hội nghị bộ trưởng kinh tế ASEM đã bị trì hoãn trong nhiều năm qua.

4. Việt Nam tham gia các FTAs

Đối với Việt Nam, FTAs không phải là sân chơi mới. Việt Nam đã tham gia AFTA từ năm 1996 và từ đó đến nay đã đàm phán, tham gia 12 FTA khu vực và song phương với nhiều hình thức và nội dung khác nhau. Đặc biệt, năm 2016, Việt Nam đã kết thúc đàm phán FTA song phương với EU, và đang tiếp tục đàm phán FTA song phương với các đối tác thương mại khác, như các nước EFTA (Na-Uy, Iceland, Liechtenstein và Thụy Sĩ) và Israel.

Trong khuôn khổ ASEAN, Việt Nam đã kí kết và triển khai thực hiện Hiệp định thương mại tự do ASEAN ('AFTA'), Hiệp định thương mại tự do ASEAN-Trung Quốc ('ACFTA'), Hiệp định thương mại tự do ASEAN-Hàn Quốc ('AKFTA'), Hiệp định đối tác kinh tế toàn diện ASEAN-Nhật Bản ('AJCEP'), Hiệp định thương mại tự do ASEAN-Australia-New Zealand ('AANZFTA'), và Hiệp định thương mại tự do ASEAN-Ấn Độ ('AIFTA'). Ngoài ra, đến thời điểm tháng 2/2012, Hiệp định thương mại tự do ASEAN-EU đang tiếp tục đàm phán.

Hiệp định đối tác kinh tế toàn diện Việt Nam-Nhật Bản là FTA song phương đầu tiên của Việt Nam, tiếp theo là FTA song phương với Chile.

Một số cam kết của Việt Nam trong FTAs đã cao hơn so với cam kết trong khuôn khổ gia nhập WTO. Trong thời gian tới, Việt Nam đứng trước cơ hội tham gia nhiều 'sân chơi' phức tạp hơn, như việc thực hiện Lộ trình hướng đến Cộng đồng kinh tế ASEAN vào năm 2015, sẵn sàng thực hiện các FTA 'thế hệ mới' (như EVFTA) khi chúng có hiệu lực. Đối với Việt Nam, việc tham gia các FTAs sẽ nhằm thực hiện đường lối, chủ trương hội nhập kinh tế quốc tế của Đảng và Nhà nước ta.

TÓM TẮT CHƯƠNG 3

Những hiệp định thương mại khu vực ('RTAs') thông thường nhằm mục đích hội nhập kinh tế, làm giảm những rào cản đối với sự dịch chuyển qua biên giới của các yếu tố kinh tế. RTAs có thể bao gồm một, một số hoặc tất cả 'bốn tự do cơ bản' - tự do dịch chuyển hàng hoá, tự do dịch chuyển dịch vụ, tự do dịch chuyển đầu tư, và tự do dịch chuyển lao động. Bên cạnh đó, các quan điểm chính trị đóng vai trò chỉ đạo trong việc kí kết các RTAs.

Một trong những câu hỏi quan trọng trong chính sách thương mại quốc tế hiện nay là mối quan hệ giữa hội nhập khu vực và hội nhập toàn cầu. Các RTAs được điều chỉnh bởi những quy định của WTO. Mối quan hệ giữa các RTAs và luật WTO thường phức tạp trong việc áp dụng cả những quy định của RTAs và luật WTO. Những quy định của WTO đảm bảo rằng các RTAs sẽ tạo thuận lợi cho thương mại hơn là làm chệch hướng thương mại. Tuy nhiên, vẫn chưa rõ ràng rằng trên thực tế RTAs làm chệch hướng hay khuyến khích thương mại toàn cầu.

Pascal Lamy, Tổng thư kí WTO đã từng nói rằng: '…[T]ôi thấy rằng cuộc tranh luận về vấn đề chủ nghĩa khu vực là tốt hay xấu vẫn chưa có kết quả. Đây không phải là vấn đề chính. Chúng ta cần xem xét cách thức RTAs hoạt động và tác động của chúng đối với việc mở rộng thương mại và việc tạo ra các cơ hội kinh tế mới…'[83]

Trên thực tế, RTAs có thể đồng thời làm chệch hướng và hỗ trợ hội nhập kinh tế toàn cầu. Hiện nay, các hiệp định khu vực và hiệp định song phương (*xem* Chương 4 của Giáo trình) là công cụ bổ trợ cho hệ thống thương mại toàn cầu, nhưng chúng không nhất thiết là công cụ thay thế. Sự thành công của hội nhập khu vực, dù là EU, NAFTA hay ASEAN, cũng phải dựa trên cơ sở thoả thuận và nhất trí được về lợi ích chính trị, kinh tế và dựa trên nền tảng pháp luật chung của các thành viên.

[83] Peter Van den Bossche, Sđd, tr. 699.

CÂU HỎI/BÀI TẬP

1. Tại sao cần nghiên cứu về RTAs?
2. Bình luận về mối quan hệ giữa hội nhập khu vực và hội nhập toàn cầu.
3. So sánh ba mô hình của Hiệp định thương mại khu vực (RTAs) - EU, NAFTA và các FTAs của ASEAN.
4. Bình luận về vấn đề hội nhập kinh tế khu vực của Việt Nam.

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CHƯƠNG 4.
CÁC HIỆP ĐỊNH HỢP TÁC THƯƠNG MẠI SONG PHƯƠNG GIỮA VIỆT NAM VÀ MỘT SỐ ĐỐI TÁC

CÁC HIỆP ĐỊNH HỢP TÁC THƯƠNG MẠI SONG PHƯƠNG GIỮA VIỆT NAM VÀ MỘT SỐ ĐỐI TÁC

Trong tiến trình chủ động và tích cực hội nhập quốc tế, những thành công trong hội nhập toàn cầu và khu vực đã thực sự là cơ hội để Việt Nam đưa các mối quan hệ thương mại song phương với nhiều đối tác đi vào chiều sâu, với việc kí kết ngày càng nhiều hiệp định hợp tác thương mại song phương. Sau đây là các hiệp định hợp tác thương mại song phương giữa Việt Nam với EU, Hoa Kỳ và Trung Quốc.

Mục 1. VIỆT NAM - LIÊN MINH CHÂU ÂU

1. Lịch sử các mối quan hệ kinh tế Việt Nam-Liên minh châu Âu

Cam kết của Việt Nam với Liên minh châu Âu ('EU') bắt đầu kể từ năm 1992 khi Việt Nam ký với Cộng đồng châu Âu ('EC', hiện được thay thế bởi EU) Hiệp định Dệt may, một trong những hiệp định thương mại đầu tiên của nước này với một đối tác phi cộng sản. Hai năm trước đó, Cộng đồng châu Âu đã thiết lập các mối quan hệ ngoại giao đầu tiên với Việt Nam, thông qua việc cung cấp hỗ trợ phát triển đối với nền kinh tế mới cải cách.

Mức độ cam kết kinh tế và chính trị giữa hai đối tác tăng dần. Ngày 17/7/1995, Việt Nam và EC ký Hiệp định khung Đối tác. Hiệp định này, bắt đầu có hiệu lực từ ngày 01/6/1996, xây dựng mối quan hệ giữa hai đối tác trên cơ sở bốn mục tiêu: (1) tăng trưởng đầu tư và thương mại song phương; (2) Hỗ trợ cho sự phát triển kinh tế bền vững của Việt Nam và cải thiện điều kiện sống cho người nghèo; (3) Hỗ trợ cho các nỗ lực tái cấu trúc kinh tế của Việt Nam và tiến tới một nền kinh tế thị trường; và (4) bảo vệ môi trường. Từ góc độ thương mại, lợi ích quan trọng nhất đối với Việt Nam là việc cho hưởng đối xử MFN dành cho các nhà xuất khẩu Việt Nam; việc này nhất quán giảm thiểu các rào cản thương mại mà các nhà sản xuất Việt Nam xuất khẩu sang EU phải đối mặt và kết quả là gia tăng dòng thương mại giữa hai nước. Hiệp định thiết lập Uỷ ban liên kết Việt Nam-EC, thành lập một diễn đàn thảo luận cấp cao về phát triển kinh tế và chính trị ở EU và Việt Nam. Đặc biệt, Uỷ ban liên kết thảo luận cách thức để cải thiện mối quan hệ đầu tư và thương mại, cách thức để nâng cao những nỗ lực của Việt Nam trong việc cải thiện các cải cách thể chế và quản lý, và cách thức để cải thiện việc hợp tác phát triển, bao gồm cả trong khoa học và công nghệ.

Nằm trong khuôn khổ khung hợp tác, EU tham gia một cách liên tục trong việc cải thiện nền kinh tế Việt Nam thông qua các dự án và các chương trình phát triển khác nhau. Một trong những lĩnh vực tập trung quan trọng nhất là thương mại quốc tế. Về điểm này, một dự án hàng đầu là Dự án hỗ trợ thương mại đa biên ('MUTRAP'), hoạt động tới năm 2012 ở giai đoạn III, sau đó được tiếp tục bằng Dự án Hỗ trợ đầu tư và chính sách thương mại của châu Âu ('EU-MUTRAP') tới hết năm 2017, đã mở đường cho sự gia nhập và hội nhập của Việt Nam vào WTO. Thực sự, EU luôn dành sự ủng hộ lớn đối với việc gia nhập WTO của Việt Nam, và EU là đối tác đầu tiên kết thúc các vòng đàm phán song phương với Việt Nam trong WTO. Đây là kết quả của sự hợp tác thương mại mức độ sâu giữa hai đối tác: thực sự, ngay trong năm 2004, EU đã ký một hiệp định mở cửa thị trường, trong đó loại bỏ toàn bộ hạn ngạch đối với các sản phẩm dệt may từ Việt Nam và nâng cao việc tiếp cận của các nhà đầu tư châu Âu và các nhà thương mại tới Việt Nam.

Ngày 11/01/2007, Việt Nam trở thành thành viên chính thức của WTO. Mối quan hệ thương mại giữa hai đối tác, kể từ thời điểm đó, được điều chỉnh bởi một hệ thống các quy định phức tạp trong các hiệp định WTO khác nhau. Điều này không ngăn cản hai nước có sự hợp tác ở một mức độ sâu hơn đối với các vấn đề thương mại. Thực tế, trong chuyến thăm chính thức đầu tiên tới Việt Nam của Chủ tịch Uỷ ban châu Âu từ ngày 25 đến ngày 27/11/2007, đã thống nhất củng cố hơn nữa các mối quan hệ song phương thông qua việc khởi động các đàm phán về một Hiệp định Hợp tác và Đối tác toàn diện ('PCA') giữa Việt Nam và EU. Vòng đàm phán đầu tiên được tổ chức vào tháng 6/2008; cho đến tháng 7/2009, Việt Nam và EU đã hoàn thành xong bốn vòng đàm phán. Trong khuôn khổ hội nghị các quan chức cấp cao ASEM tám mươi ('ASEM SOM') được tổ chức ở Bỉ vào ngày 04/10/2010, Việt Nam đã ký Hiệp định khung về hợp tác toàn diện và đối tác với EU.[1]

Từ năm 2012 đến hết năm 2017, Dự án EU-MUTRAP được triển khai với mục tiêu xúc tiến hơn nữa 'vấn đề hội nhập của Việt Nam vào hệ thống thương mại tiểu khu vực, ASEAN và toàn cầu, và để cải thiện các mối quan hệ đầu tư và thương mại giữa EU-Việt Nam [...].'[2]

[1] Tiếng nói Việt Nam, *Việt Nam-EU: Triển vọng tươi sáng,* http://english.vov.vn/Home/VietnamEU-bright-prospect/201011/121814.vov, 11:52 sáng ngày 28/11/2010.

[2] EU-MUTRAP Việt Nam, *Dự án Hỗ trợ đầu tư và chính sách thương mại của châu Âu,* http://mutrap.org.vn/index.php/en/about-eu-mutrap-2.

2. Sự tham gia của EU tại Đông Nam Á và chiến lược 'châu Âu toàn cầu'

EU thường xuyên tham gia vào các PTA với nhiều nước. Năm 2007, Uỷ ban châu Âu khởi động một chiến lược thương mại mới nhằm vào việc đàm phán các FTA đầy tham vọng với các nước đối tác chiến lược. Chiến lược châu Âu mới được chính thức thiết lập bởi Uỷ ban châu Âu trong đối thoại 'Châu Âu toàn cầu - Cạnh tranh với thế giới', trong đó thể hiện rõ chính sách sách thương mại mới của EU. Trong khuôn khổ của chính sách này, việc ký kết các FTA mới đầy tham vọng với các đối tác chiến lược là một trong các ưu tiên của EU. Về nội dung, mục tiêu của chiến lược 'Châu Âu toàn cầu' là có các FTA theo kiểu 'WTO+', mạnh mẽ và toàn diện. Các hạn chế định lượng và thuế quan cần được loại bỏ. Nhiều khả năng, điều này cần được áp dụng đối với ít nhất khoảng 90-95% dòng thuế quan và kim ngạch ngoại thương, để chắc chắn đáp ứng tiêu chí 'toàn bộ quan hệ thương mại về thực chất' tại Điều XXIV GATT ('substantially-all-trade'). Cần có tự do hoá 'sâu rộng' về dịch vụ và đầu tư. Các quy định về dịch vụ giả thiết cần phải phù hợp với tiêu chí 'bao hàm các ngành dịch vụ chủ yếu' tại Điều V GATS ('substantial sectorial-coverage'). Một hiệp định đầu tư mẫu của EU cũng đã được tính đến, với sự phối hợp giữa các thành viên EU. Cần có các quy định vượt xa các quy tắc của WTO về cạnh tranh, mua sắm chính phủ, IPR, thuận lợi hoá thương mại, lao động và các tiên chuẩn môi trường. Quy tắc xuất xứ ('RoO') cần được đơn giản hoá. Cơ bản hơn, cần có các quy tắc pháp luật mạnh mẽ và sự phối hợp được điều chỉnh bằng pháp luật, đặc biệt để đối phó với các rào cản phi thuế quan (NTBs). Điều này đòi hỏi theo đó các nghĩa vụ minh bạch cần được cải thiện, các thoả thuận công nhận lẫn nhau, hài hoà hoá các quy định pháp luật, các đối thoại pháp luật và trợ giúp kỹ thuật.

Trên cơ sở chiến lược mới này, ngày 23/4/2007, Hội đồng EU cho phép Uỷ ban EU bắt đầu đàm phán một FTA với ASEAN. Các cuộc đàm phán được chính thức khởi động tại Hội nghị tham vấn giữa các Bộ trưởng Kinh tế EU-ASEAN tổ chức tại Brunei vào ngày 04/5/2007. Các cuộc đàm phán giữa EU và ASEAN đã được dự kiến diễn ra trên cơ sở hướng tiếp cận khu vực tới khu vực, đồng thời thừa nhận và cân nhắc các mức độ phát triển khác nhau và năng lực của từng quốc gia thành viên ASEAN. Vì mức độ tiến triển trong các đàm phán EU-ASEAN còn chậm, nên cả hai bên nhất trí tạm ngừng đàm phán vào tháng 3/2009. Ngày 22/12/2009, Uỷ ban châu Âu thông báo các thành viên EU đã cho phép Uỷ ban châu Âu được theo đuổi đàm phán về FTA với từng nước thành viên ASEAN. Đàm phán FTA Việt Nam-EU bắt đầu trong khuôn khổ của chiến lược mới này và kết thúc vào năm 2016. Cho tới tháng 12/2017, FTA EU-Việt Nam ('EVFTA') đang chờ được phê chuẩn.

3. Hiệp định thương mại tự do Việt Nam - EU (EVFTA)

FTA đang ngày càng trở thành các công cụ chính sách thương mại phức tạp. Từ những năm 90, EU bắt đầu sử dụng các FTA một cách có hệ thống nhằm mở rộng phạm vi ảnh hưởng về kinh tế đối với các quốc gia láng giềng. Trải qua thời gian, FTA phát triển để xử lý cả những mối quan tâm phi thương mại. FTA 'thế hệ mới' có thể được mô tả như là các công cụ chính sách ngoại thương và kinh tế vững vàng vượt xa cả việc giảm thiểu các rào cản thương mại. Làn sóng FTA mới đàm phán trên cơ sở chiến lược 'châu Âu toàn cầu' thể hiện một cấu trúc các quy định tương đối hệ thống, mà cùng với các vấn đề thương mại truyền thống như là thương mại hàng hoá hoặc thương mại dịch vụ, còn bao gồm cả các điều khoản về môi trường, cạnh tranh, mua sắm chính phủ, và đầu tư. Mục này sẽ tập trung vào những nội dung chủ yếu của FTA EU-Việt Nam ('EVFTA').[3]

EVFTA là một công cụ phức tạp bao gồm 18 chương điều chỉnh số lượng lớn các vấn đề khác nhau, từ thương mại hàng hoá và dịch vụ tới doanh nghiệp nhà nước, sở hữu trí tuệ và minh bạch.

Các mục tiêu cụ thể của EVFTA là nhằm thuận lợi hoá thương mại và đầu tư giữa EU và Việt Nam (Điều 1.2 EVFTA). Theo đó, một khu vực thương mại tự do 'phù hợp với Điều XXIV của GATT 1994 và Điều V của GATS' được thiết lập (Điều 1.1 EVFTA). Đồng thời, như đã được nhấn mạnh tại *Lời mở đầu* (Đoạn 4) của EVFTA, EU và Việt Nam:

> quyết tâm củng cố các mối quan hệ kinh tế, thương mại và đầu tư phù hợp với mục tiêu về phát triển bền vững trong các khía cạnh kinh tế, xã hội và môi trường, và thúc đẩy thương mại và đầu tư trên cơ sở Hiệp định này theo cách thức dành sự quan tâm ở mức độ cao đối với việc bảo vệ môi trường và lao động và các tiêu chuẩn và thoả thuận được quốc tế thừa nhận có liên quan.

EVFTA cũng có kèm theo một 'điều khoản' (Điều 10) liên quan tới 'Các biện pháp cụ thể về việc quản lý đối xử ưu đãi' (liên quan tới thương mại hàng hoá và mở cửa thị trường), thông qua một Nghị định thư về Hỗ trợ hành chính lẫn nhau trong các vấn đề hải quan, và một Điều khoản ngân sách đối với việc quản lý các lỗi hành chính.

[3] Mục này xem xét EVFTA, tại http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

A. *Các vấn đề thương mại chung giữa EU và Việt Nam*

Thương mại giữa EU và Việt Nam đặc trưng ở 'chuyên môn hoá' cấp độ cao dưới góc nhìn 'theo thuyết Ricardo' của thuật ngữ này. Thực tế, trong khi các sản phẩm công nghệ cao, máy móc (như các trang thiết bị và công cụ) và dược phẩm đóng góp một lượng lớn về xuất khẩu của EU sang Việt Nam, thì xuất khẩu của Việt Nam sang EU chủ yếu trong các lĩnh vực sản phẩm điện tử, da giày và may mặc và thực phẩm (cà phê, gạo, hải sản).[4] Theo dữ liệu cập nhật tới tháng 3/2017, EU là đối tác đầu tư nước ngoài lớn thứ 5 tại Việt Nam.[5]

Trong phạm vi EVFTA, liên quan đến thuế quan, EU và Việt Nam thống nhất rằng trên 99% thuế quan sẽ được loại bỏ với các lộ trình khác nhau. EU sẽ loại bỏ thuế quan với lộ trình 7 năm, trong khi Việt Nam sẽ thực hiện điều này với lộ trình 10 năm, kể từ khi EVFTA có hiệu lực.

Sau khi chi tiết hoá các mục tiêu của nó, EVFTA lập tức điều chỉnh 'Đối xử quốc gia và Mở cửa thị trường hàng hoá' tại Chương 2, và bao gồm trong số đó các quy định cụ thể (trong phạm vi Phụ lục), cho hai ngành nhạy cảm đối với cả hai bên. Phụ lục 2-a đề cập đến dược phẩm và các thiết bị y tế; Phụ lục 2-b đề cập tới ô-tô và các bộ phận của ô-tô. Nhìn chung, hai phụ lục này khẳng định thương mại giữa EU và Việt Nam đối với những sản phẩm này phải được dựa trên sự minh bạch, công nhận lẫn nhau và sử dụng của các tiêu chuẩn quốc tế.

B. *Quy tắc xuất xứ*

Nhằm xác định đối tượng sản phẩm mà Hiệp định áp dụng, EVFTA đưa ra hàng loạt các quy định để định nghĩa 'các sản phẩm có xuất xứ', cùng với nhiều các quy định phụ, như các quy định đề cập tới xuất xứ luỹ kế trong Nghị định thư về định nghĩa khái niệm 'Các sản phẩm có xuất xứ' và các phương pháp hợp tác hành chính.

Như các yêu cầu chung, để áp dụng EVFTA, Hiệp định coi các sản phẩm có xuất xứ từ một bên là những sản phẩm mà có xuất xứ thuần tuý từ một bên (căn cứ Điều 2 và 4 của Nghị định thư), và những sản phẩm thu được tại một bên có sử dụng 'những nguyên liệu không có xuất xứ thuần tuý tại đây, miễn là những nguyên liệu này đã qua gia công hoặc xử lý đáng kể tại bên này' (theo Điều 2 và 5 của Nghị định thư).

[4] Uỷ ban châu Âu - Thương mại, *Việt Nam*, http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/.

[5] Như trên.

Thêm vào đó, quan trọng là Nghị định thư xác định một số lượng các thao tác được coi là gia công hoặc xử lý không đáng kể để một sản phẩm đạt chuẩn về 'sản phẩm có xuất xứ' (Điều 6 của Nghị định thư), và xác định các bằng chứng nhất định về xuất xứ (như là tờ khai xuất xứ hoặc các chứng nhận xuất xứ) sẽ được đưa ra để nhập khẩu sản phẩm vào Việt Nam, hoặc vào EU từ bên còn lại hưởng lợi từ EVFTA (Điều 15 của Nghị định thư).

C. *Các hàng rào phi thuế quan (NTBs)*

Các chương 6 và 7 của EVFTA lần lượt tập trung vào các hàng rào kỹ thuật đối với thương mại (TBT) và các biện pháp vệ sinh và kiểm dịch (SPS).

Tại Chương 6 về TBT, các bên tái khẳng định các quyền và nghĩa vụ tại Hiệp định TBT (Điều 1). Chương này áp dụng cho 'việc chuẩn bị, thông qua và áp dụng các tiêu chuẩn, các quy chuẩn kỹ thuật và các thủ tục đánh giá sự phù hợp như được định nghĩa tại Hiệp định TBT' (Điều 3), với mục tiêu 'ngăn ngừa, phát hiện và loại bỏ các rào cản không cần thiết đối với thương mại [...] và nâng cao việc hợp tác giữa các Bên' (Điều 2). Các điều khoản về minh bạch trong giai đoạn chuẩn bị, thông qua và áp dụng các hàng rào kỹ thuật đối với thương mại và về giám sát thị trường và các hoạt động thực thi có một vai trò trung tâm trong phạm vi Chương TBT của EVFTA (Điều 8 và 9).

Tương tự, Chương 7 về SPS áp dụng đối với việc chuẩn bị, thông qua và áp dụng các biện pháp SPS có thể trực tiếp hoặc gián tiếp ảnh hưởng tới thương mại giữa các Bên. Để đạt được mục tiêu này, Chương 7 thận trọng xác định các cơ quan có thẩm quyền tại từng bên và đặt ra các quyền và nghĩa vụ của các bên liên quan đến các yêu cầu, các thủ tục và kiểm tra nhập khẩu có liên quan đến SPS. Cần lưu ý, các bên có thể chấp nhận các biện pháp tương xứng và không phân biệt đối xử được 'dựa trên cơ sở khoa học, phù hợp với rủi ro liên quan và thể hiện các biện pháp ít hạn chế nhất có thể và dẫn đến sự cản trở thương mại ít nhất' (Điều khoản về Các yêu cầu và thủ tục nhập khẩu). Sự lặp lại của Hiệp định SPS của WTO trong Chương 7 của EVFTA là rõ ràng.

D. *Thương mại dịch vụ, đầu tư và thương mại điện tử*

Như đã nêu, các đàm phán EVFTA kết thúc năm 2016. Thời điểm ký kết không tương ứng. Thực tế, Chương 8 của EVFTA dành chung cho thương mại dịch vụ, đầu tư và thương mại điện tử. Mặc dù Chương này

được hợp thành và được chia thành các chương (phụ) khác, nó ẩn ý thừa nhận và 'ghi nhận' sự liên hệ rõ ràng (duy nhất) hiện nay và chồng chéo một phần giữa các quy định quốc tế về thương mại dịch vụ, đầu tư nước ngoài và thương mại điện tử. Thực sự, các bên 'đặt ra các kế hoạch cần thiết cho tự do hoá dần dần thương mại dịch vụ và đầu tư và cho hợp tác trong thương mại điện tử' (Điều khoản về Mục tiêu, Phạm vi và các Định nghĩa).

Hai điểm liên quan đến đầu tư cần được quan tâm. *Thứ nhất*, liên quan đến tự do hoá đầu tư, Chương này áp dụng đối với các biện pháp được cho phép hoặc duy trì bởi một bên liên quan đến việc thành lập doanh nghiệp hoặc hoạt động của nhà đầu tư của một bên vào lãnh thổ của bên còn lại (Điều 1.1, Phạm vi điều chỉnh và các Định nghĩa). Tuy nhiên, một số ngành dịch vụ được loại trừ khỏi Chương này của Hiệp định, bao gồm các dịch vụ âm thanh - truyền hình, vận tải hàng hải nội địa, buôn bán và tiếp thị các dịch vụ vận chuyển hàng không, và các dịch vụ hệ thống đặt chỗ tự động (Điều 1.2). Vì vậy, một vài ngành quan trọng nằm ngoài phạm vi các điều khoản của Hiệp định liên quan đến tự do hoá đầu tư, nhưng danh sách các ngành đặc biệt được loại trừ chỉ củng cố ý tưởng rằng thương mại dịch vụ, đầu tư và thương mại điện tử có liên hệ chặt chẽ. *Thứ hai*, Chương 8 chứa đựng các điều khoản về ngoại lệ chung cho phép các bên thông qua hoặc thực thi các biện pháp nhất định để theo đuổi các giá trị công cộng và/hoặc xã hội quan trọng mà các điều kiện nhất định cần được tuân theo. Vì vậy, EVFTA dường như có khoảng trống quy định 'mở' cho cả hai bên.

E. *Mua sắm chính phủ*

Như trong trường hợp FTA của EU với Trung Mỹ, Chile, Colombia, Iraq, Hàn Quốc, Mexico và Peru,[6] EVFTA cũng có Chương 9 về mua sắm chính phủ. Việc đưa vào một Chương riêng về mua sắm chính phủ trong EVFTA là quan trọng nhất, nếu nhận thức rằng: kể từ ngày 05/12/2012, Việt Nam là quan sát viên tại Uỷ ban mua sắm Chính phủ tại WTO, nhưng không phải là một bên của Hiệp định (nhiều bên) của WTO về mua sắm chính phủ.

Chương này áp dụng cho mua sắm công hàng hoá và dịch vụ và bất kỳ sự kết hợp nào của hai việc đó, bằng bất cứ phương thức hợp đồng nào, cho (các) giá trị tương ứng với các quy định cụ thể nêu tại Hiệp định và không bị loại trừ khỏi phạm vi áp dụng của Hiệp định (Điều II). Có thể cho rằng, những nguyên tắc quan trọng nhất áp dụng với mua sắm công là NT và MFN (Điều IV).

Mặc dù vậy, EVFTA duy trì một khoảng trống pháp luật nhất định để cho cả hai bên thao diễn, cho dù trong lĩnh vực mua sắm công, thực tế, Chương về mua sắm công chứa đựng nhiều điều khoản ngoại lệ an ninh và ngoại lệ chung (Điều III). EVFTA cũng nhấn mạnh, trong số đó, về các nghĩa vụ liên quan đến minh bạch, chia sẻ thông tin và thông báo (Điều V và VI). Những điều khoản này thực tế là chìa khoá để đạt được các các kết quả đáng kể trong việc mở cửa lĩnh vực mua sắm công và việc áp dụng các nghĩa vụ khác, như là các nghĩa vụ liên quan đến không phân biệt đối xử.

F. *Doanh nghiệp nhà nước và cạnh tranh*

Chương 10 và 11 của EVFTA lần lượt quy định về doanh nghiệp nhà nước và chính sách cạnh tranh.

Trong việc xác định doanh nghiệp nhà nước, Chương 10 sử dụng cả tiêu chuẩn 'định lượng' dựa trên vốn hoặc quyền bỏ phiếu, và cả tiêu chuẩn 'định tính' liên quan đến quyền lực để bổ nhiệm các thành viên với các vị trí phù hợp và sự thực hiện kiểm soát. Thực sự, tại Điều 1, một doanh nghiệp sở hữu nhà nước là một thực thể (bao gồm công ty con):

> tại đó một bên, trực tiếp hoặc gián tiếp: (a) sở hữu trên 50% vốn đăng ký của doanh nghiệp hoặc quyền biểu quyết gắn liền với cổ phần phát hành bởi doanh nghiệp; hoặc (b) có thể bổ nhiệm hơn phần nửa các thành viên của ban giám đốc của doanh nghiệp hoặc một bộ phận tương đương; hoặc (c) có thể thực hiện quyền kiểm soát đối với các quyết định chiến lược của doanh nghiệp.'

Bên cạnh doanh nghiệp nhà nước, Chương 10 cũng điều chỉnh các trường hợp khác bằng cách nào đó 'có thể so sánh được' như là trường hợp của các doanh nghiệp mà các quyền hoặc ưu đãi nhất định được trao cho và các tổ chức độc quyền chỉ định. Tuy nhiên, Chương 10 chỉ điều chỉnh các hoạt động thương mại của các doanh nghiệp này, cụ thể là nếu một doanh nghiệp có cả các hoạt động thương mại và phi thương mại, thì chỉ các hoạt động thương mại của doanh nghiệp này thuộc sự điều chỉnh bởi Chương 10 của EVFTA (Điều 2.2.). Tương tự, hạn mức doanh thu thiết lập theo đó các doanh nghiệp có doanh thu từ các hoạt động thương mại ít hơn 200 triệu SDR trong ba năm liên tiếp trước

[6] Uỷ ban châu Âu - Thương mại, *Mua sắm công,* http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/.

đó được loại trừ khỏi phạm vi áp dụng của Chương này (Điều 2.3). Các doanh nghiệp trong lĩnh vực quốc phòng, trật tự và an ninh công cộng cũng được loại trừ khỏi phạm vi của Chương 10 (Điều 2.4).

Nghĩa vụ quan trọng nhất liên quan tới Chương 10 có thể được cho là nghĩa vụ theo đó các bên phải đảm bảo rằng các doanh nghiệp thuộc phạm vi điều chỉnh của Chương này 'hành xử tương ứng với những tính toán thương mại khi mua hoặc bán hàng hoá và dịch vụ', và rằng các doanh nghiệp của bên kia hoặc là các khoản đầu tư của các nhà đầu tư của bên kia không bị phân biệt đối xử (Điều 4).

Nghĩa vụ chính này được kèm theo bởi một nghĩa vụ khá 'mềm' đối với các bên, theo đó phải đảm bảo rằng các doanh nghiệp thuộc phạm vi điều chỉnh của Chương 10 được tuân theo các tiêu chuẩn được thừa nhận quốc tế về quản trị doanh nghiệp (Điều 5), và tôn trọng các tiêu chuẩn về minh bạch (Điều 6).

Mặc dù được chia tách rõ ràng, các quy định về doanh nghiệp nhà nước tất nhiên liên quan trực tiếp tới các quy định của Chương 11 về chính sách cạnh tranh. Chương 11 được chia ra thành ba mục: Mục I về các hành vi hạn chế cạnh tranh; Mục II về Trợ cấp; và Mục III về các định nghĩa và các nguyên tắc chung.

Mục I, về các hành vi hạn chế cạnh tranh, giải quyết vấn đề bóp méo cạnh tranh trong các quan hệ đầu tư và thương mại các bên (Điều 1). Tuy nhiên, nghĩa vụ phát sinh từ Mục I có tính chất chung, xoay quanh Điều 2. Điều này quy định cho các bên thông qua hoặc duy trì pháp luật cạnh tranh toàn diện, giải quyết hiệu quả các thoả thuận, các quyết định hoặc các hành vi phối hợp của các doanh nghiệp nhằm ngăn chặn, hạn chế hoặc bóp méo cạnh tranh, lạm dụng vị thế thống lĩnh và tập trung giữa các doanh nghiệp cản trở cạnh tranh hiệu quả (Điều 2). Tuy nhiên, cần phải lưu ý là mặc dù các quy định có nội dung chung, Mục I của Chương 11 được loại trừ khỏi cơ chế giải quyết tranh chấp của chính EVFTA (Điều 4).

Mục II của Chương 11 điều chỉnh trợ cấp. Các bên thống nhất rằng trợ cấp có thể được trao bởi một bên khi chúng là cần thiết để đạt được mục tiêu chính sách công, nhưng về nguyên tắc, chúng không được áp dụng khi chúng gây ảnh hưởng tiêu cực hoặc có khả năng sẽ ảnh hưởng đến thương mại và cạnh tranh (Điều 1.1). Các mục tiêu chính sách công bao gồm thúc đẩy phát triển kinh tế của một số khu vực nhất định và thuận lợi hoá sự phát triển của các hoạt động kinh tế nhất định trong những khu vực kinh tế nhất định (Điều 1.2). Bên cạnh các nghĩa vụ về minh bạch và tham vấn (các Điều 4 và 5), một vài điều kiện được gắn với trợ cấp, bao gồm các thoả thuận hợp pháp theo đó chính phủ hoặc bất kỳ tổ chức công nào chịu trách nhiệm chi trả các món nợ, hoặc các khoản nợ phải trả, và khi trợ cấp được dành cho các doanh nghiệp khó khăn nhất định trong những trường hợp cụ thể (Điều 6).

Cuối cùng, Mục III bao gồm ba quy định về định nghĩa, bảo mật và hợp tác giữa các bên.

G. *Các quyền sở hữu trí tuệ (IPRs)*

Chương 12 EVFTA tập trung vào sở hữu trí tuệ. Mục tiêu rõ ràng của Chương 12 là nhằm thuận lợi hoá 'việc sáng tạo, sản xuất và thương mại hoá các sản phẩm tân tiến và sáng tạo', để đóng góp cho một nền kinh tế toàn diện và bền vững hơn giữa các bên, và 'để đạt được mức độ bảo hộ và thực thi các quyền sở hữu trí tuệ một cách thoả đáng' (Điều 1).

Chương 12 được dự tính nhằm bổ sung và cụ thể hơn nữa các quyền và nghĩa vụ của các bên theo quy định Hiệp định TRIPS của WTO (và các hiệp định khác về sở hữu trí tuệ quốc tế). EVFTA điều chỉnh thực tế các quyền sở hữu trí tuệ như được điều chỉnh bởi Hiệp định WTO (Điều 2). Cần thiết phải lưu ý ngay từ đầu rằng Chương 12 đặt ra không chỉ các nghĩa vụ mà cả các quyền cho các bên, nhằm cung cấp cho các bên khả năng thiết lập các ngoại lệ đối với các quyền sở hữu trí tuệ trong pháp luật trong nước.

Hai điều khoản chung quan trọng là Điều X liên quan tới nghĩa vụ đối xử MFN, và Điều III theo đó chỉ ra mỗi bên đều có thể tự do thiết lập 'cơ chế riêng để điều chỉnh vấn đề khai thác hết quyền sở hữu trí tuệ' ('its own regime for the exhaustion of intellectual property rights').

Từ Điều 4.1 tới 4.12 của Chương 12 điều chỉnh quyền tác giả và các quyền liên quan. Một nghĩa vụ quan trọng là nghĩa vụ cho các bên được tiếp cận (và tuân thủ) Công ước về quyền tác giả WIPO (WCT), và Công ước về biểu diễn và ghi âm của WIPO (WPPT) (Điều 4.1.2). Nghĩa vụ này đã làm rõ điều gì trở nên rõ ràng theo Điều 4.8 về việc bảo hộ đối với các biện pháp công nghệ, và Điều 4.9 về việc bảo hộ đối với quyền quản lý thông tin và các điều khoản khác: đó là ý chí muốn điều chỉnh các quy định về quyền tác giả và các quyền liên quan xét dưới khía cạnh môi trường công nghệ. Điều này được khẳng định thêm bởi Điều XX Chương 12 liên quan tới trách nhiệm của các nhà cung cấp dịch vụ trung gian.

Các dấu hiệu đặc trưng (như là nhãn hiệu hoặc chỉ dẫn địa lý) được quy định tại Điều 5 (từ Điều 5.1 tới Điều 5.6) và Điều 6 (từ Điều 6.1 đến 6.11) của Chương 12. Về mặt này, Chương 12 bao gồm các phụ lục liên quan tới chỉ dẫn địa lý đặc trưng của EU và của Việt Nam cần được bảo hộ bởi bên ký kết kia (cụ thể, theo Điều 6.3 và 6.5, dựa vào chi tiết các chỉ dẫn địa lý được liệt kê tại các Phụ lục). EVFTA cũng điều chỉnh kiểu dáng công nghiệp, sáng chế, việc bảo vệ thông tin bí mật và quyền về giống cây trồng.

Cuối cùng, EVFTA áp dụng hướng tiếp cận kiểu TRIPS, tức là việc bảo hộ về mặt nội dung đối với các IPR được hỗ trợ bởi việc thực thi hiệu quả các quyền này cả trong phạm vi lãnh thổ và cả tại biên giới. Nhìn chung, các điều khoản này dường như phản ánh rõ các nghĩa vụ dành cho các bên có từ Hiệp định TRIPS.

H. *Giải quyết tranh chấp; Thương mại và Phát triển; và các vấn đề khác*

Chương 13 EVFTA quy định về giải quyết tranh chấp, trong trường hợp xảy ra tranh chấp giữa các bên về giải thích và áp dụng EVFTA. Các phương thức giải quyết tranh chấp và thủ tục của EVFTA, theo cách nào đó, gợi nhắc tới cơ chế giải quyết tranh chấp của WTO.

Khi một tranh chấp xảy ra, một giải pháp đồng thuận giữa các bên, nếu có thể, dường như là giải pháp được ưu tiên (Điều 1). Các bên được yêu cầu tham gia tham vấn (Điều 3), và nếu tham vấn thất bại, các bên có thể yêu cầu thành lập hội đồng trọng tài (Điều 5). Chương 13 cũng điều chỉnh việc thực hiện báo cáo của hội đồng trọng tài, thủ tục để xem xét bất kỳ một biện pháp nào áp dụng để thực hiện báo cáo của hội trọng tài, và các biện pháp khẩn cấp tạm thời (như là các biện pháp khắc phục tạm thời) được cho phép áp dụng trong trường hợp không tuân thủ (các Điều 12-16).

Cùng với ý tưởng rằng một giải pháp đồng thuận giữa các bên được ưu tiên, các bên 'có thể vào bất kỳ thời điểm nào, thống nhất tham gia một thủ tục hoà giải đối với bất kỳ một biện pháp nào ảnh hưởng xấu đến thương mại và đầu tư giữa các bên (Điều 4).

Thêm vào đó, EVFTA bao gồm hai chương tập trung vào hai vấn đề quan trọng đối với cả EU và Việt Nam. *Thứ nhất*, Chương 14 bao gồm các điều khoản về NTB đối với thương mại và đầu tư trong thế hệ của năng lượng tái tạo. *Thứ hai*, Chương 15 điều chỉnh thương mại và phát triển bền vững. Cụ thể, Chương 15 thừa nhận 'tầm quan trọng của lao động đầy đủ và hiệu quả và việc làm bền vững cho tất cả' và các bên tái khẳng định nghĩa vụ phát sinh từ tư cách thành viên của Tổ chức Lao động quốc tế (Điều 3). Cũng như vậy, các mối quan tâm về môi trường được điều chỉnh thông qua việc tái khẳng định cam kết của các bên trong các hiệp định môi trường đa phương (Điều 4), trong Công ước khung của Liên hợp quốc về biến đổi khí hậu và Nghị định thư Kyoto (Điều 5), và đối với việc bảo tồn và sử dụng bền vững đa dạng sinh học trong Công ước về đa dạng sinh học và Công ước về buôn bán quốc tế các loài động thực vật hoang dã có nguy cơ tuyệt chủng (CITES) (Điều 6). Lưu ý cũng được đưa ra đối với việc quản lý rừng bền vững và buôn bán các sản phẩm lâm nghiệp (Điều 7), và đối với việc quản lý bền vững và buôn bán các nguồn hải sản sống và các sản phẩm thuỷ sản nuôi trồng (Điều 8).

Thêm vào đó, mặc dù một vài nghĩa vụ về minh bạch và hợp tác được quy định trong các chương cụ thể của EVFTA, các chương cuối cùng của EVFTA (16-18) cũng được dành cho các nội dung này.

Mục 2. VIỆT NAM-HOA KỲ

1. Khái quát về hợp tác và các hiệp định thương mại song phương giữa Việt Nam và Hoa Kỳ

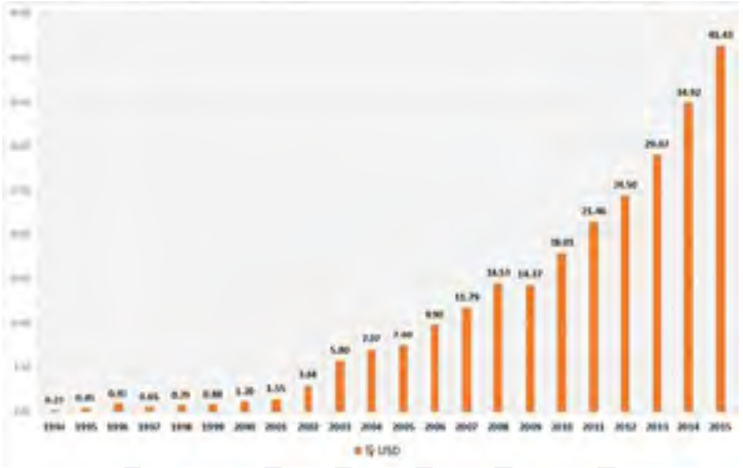
Quan hệ thương mại giữa Việt Nam và Hoa Kỳ bắt đầu phát triển từ những năm 1990. Hai bên đã kí Hiệp định giữa Chính phủ nước Cộng hoà xã hội chủ nghĩa Việt Nam và Chính phủ Hợp chúng quốc Hoa Kỳ về thiết lập quan hệ quyền tác giả vào năm 1997. Mốc quan trọng trong quan hệ thương mại Việt Nam-Hoa Kỳ là việc kí kết Hiệp định thương mại song phương (viết tắt là BTA) năm 2000 điều chỉnh tất cả các lĩnh vực chính trong hợp tác kinh tế giữa hai nước. Theo Hiệp định này, Hoa Kỳ dành cho Việt Nam đối xử MFN có điều kiện, còn gọi là 'Quy chế quan hệ thương mại bình thường' (viết tắt là 'NTR').[7]

Năm 2003, hai nước kí kết Hiệp định dệt may Việt Nam-Hoa Kỳ. Quan hệ kinh tế và thương mại của giữa hai nước được tăng cường hơn nữa khi Hoa Kỳ trao cho Việt Nam 'Quy chế quan hệ thương mại bình thường vĩnh viễn' (viết tắt là 'PNTR') vào ngày 29/12/2006, là một phần

[7] Điều 1 Chương 1 BTA.

của quá trình gia nhập WTO của Việt Nam.[8] Việt Nam chính thức yêu cầu được tham gia vào chương trình Hệ thống ưu đãi thuế quan phổ cập của Hoa Kỳ (viết tắt là 'GSP') với tư cách là 'nước đang phát triển được thụ hưởng' (viết tắt là 'BDC') từ tháng 5/2008, nhưng vẫn chưa có quyết định chính thức về đơn tham gia GSP của Việt Nam.[9] Hai nước đã kí kết Hiệp định khung về thương mại và đầu tư (viết tắt là 'TIFA') vào năm 2007 và đang đàm phán các thỏa thuận cụ thể. Với những nỗ lực như vậy, thương mại hai chiều giữa hai bên đã tăng từ khoảng 220 triệu USD năm 1994 lên hơn 47 tỷ USD vào cuối năm 2016.[10]

Mục này sẽ tập trung vào khuôn khổ pháp luật về hợp tác thương mại giữa Việt Nam và Hoa Kỳ.



Bảng 4.2.1.
Đồ thị tăng trưởng thương mại song phương Việt Nam-Hoa Kỳ.[11]

2. Hiệp định Việt Nam-Hoa Kỳ về thiết lập quan hệ quyền tác giả 1997

Hiệp định Việt Nam-Hoa Kỳ về thiết lập quan hệ quyền tác giả được kí kết vào ngày 27/6/1997. Hiệp định có hiệu lực từ ngày 23/12/1998. Hiệp định bảo hộ mọi loại tác phẩm và bản ghi âm có thể được bảo hộ quyền tác giả, bất kể hình thức định hình của chúng, bao gồm cả hình thức điện tử. Các tác phẩm được bảo hộ được định nghĩa là:

> Tác phẩm mà một công dân hoặc người thường trú của một trong các bên kí kết có những quyền kinh tế theo luật quyền tác giả tại lãnh thổ của bên kia, hoặc khi những quyền nói trên thuộc về pháp nhân do bất kì công dân hoặc người thường trú nào của bên kia kiểm soát trực tiếp, gián tiếp hoặc có quyền sở hữu đối với phần lớn cổ phần hoặc tài sản của pháp nhân, miễn là quyền sở hữu nói trên phát sinh trong vòng một năm, kể từ ngày công bố lần đầu các tác phẩm đó tại một nước thành viên của một điều ước đa phương về quyền tác giả mà một trong các bên kí kết là thành viên tại thời điểm Hiệp định này có hiệu lực.[12]

Hiệp định yêu cầu các bên đảm bảo đối xử NT, theo đó, mỗi bên, theo pháp luật và thủ tục của nước mình, sẽ dành cho các tác phẩm của những tác giả, nhà sáng tạo và nghệ sĩ là công dân hoặc người thường trú của bên kí kết kia và cho các tác phẩm công bố lần đầu tại lãnh thổ của bên kí kết kia**,** sự bảo hộ quyền tác giả không kém thuận lợi hơn sự bảo hộ mà bên đó dành cho công dân nước mình.[13] Hiệp định cũng nêu rõ những quyền độc quyền của chủ sở hữu quyền tác giả đối với tác phẩm tại Điều 5, theo đó người này sẽ có quyền độc quyền cho phép hoặc cấm:

- Việc sao chép tác phẩm, sáng tạo tác phẩm khác dựa trên tác phẩm đó và phân phối bản sao của các tác phẩm đó;
- Việc trình diễn tác phẩm trước công chúng, trong trường hợp đó là những tác phẩm văn học, âm nhạc, kịch và múa, kịch câm, phim và tác phẩm nghe nhìn; và
- Việc trình bày các tác phẩm được bảo hộ quyền tác giả trước công chúng, trong trường hợp đó là tác phẩm văn học, âm nhạc, kịch, múa, kịch câm, hội họa, đồ hoạ, tạo hình, bao gồm cả các ảnh đơn lẻ của một bộ phim hoặc tác phẩm nghe nhìn khác.

[8] Michael F. Martin, CRS Report for Congress R41550, *US-Vietnam Economic và Trade Relations: Issues for the 112th Congress*, ngày 05/4/2011, tr. 1.

[9] Michael F. Martin, CRS Report for Congress R41550, *US-Vietnam Economic và Trade Relations: Issues for the 114th Congress*, ngày 20/5/2016, tr. 20.

[10] Phan Thu, *Thúc đẩy quan hệ thương mại Việt - Mỹ*, http://www.baohaiquan.vn/Pages/Thuc-day-quan-he-thuong-mai-Viet-My.aspx, Thứ Ba, ngày 30/5/2017.

[11] Tổng Cục Thống kê, Bộ Thương mại Hoa Kỳ.

[12] Khoản 3 Điều 1 và Điều 3 Hiệp định Việt Nam-Hoa Kỳ về thiết lập quan hệ quyền tác giả.

[13] Điều 2 Hiệp định Việt Nam-Hoa Kỳ về thiết lập quan hệ quyền tác giả.

3. Hiệp định thương mại song phương Việt Nam-Hoa Kỳ 2000

Vào ngày 13/7/2000, Hiệp định Việt Nam-Hoa Kỳ về quan hệ thương mại (viết tắt là 'BTA') đã được kí kết. Hiệp định đã đưa quan hệ thương mại và đầu tư song phương giữa hai nước lên tầm cao mới.[14] Hiệp định đã tạo cơ hội cho các doanh nghiệp Việt Nam tham gia vào các thị trường lớn tại Hoa Kỳ và khuyến khích Việt Nam cải thiện môi trường kinh doanh.[15] BTA có hiệu lực từ ngày 10/12/2001, đặt nền tảng cho việc tiến hành và tăng cường các quan hệ thương mại và đầu tư. Với hơn 100 trang và bảng biểu,[16] BTA quy định các nghĩa vụ chi tiết trong các lĩnh vực hợp tác thương mại chủ yếu của hai bên, như: thương mại hàng hoá, bảo hộ quyền sở hữu trí tuệ, thương mại dịch vụ, đầu tư, tạo thuận lợi cho kinh doanh, tính minh bạch và giải quyết tranh chấp.

Các chương và phụ lục của BTA bao gồm:

- Chương I: Thương mại hàng hoá
- Chương II: Quyền sở hữu trí tuệ
- Chương III: Thương mại dịch vụ
- Chương IV: Phát triển quan hệ đầu tư
- Chương V: Tạo thuận lợi cho kinh doanh
- Chương VI: Các quy định liên quan tới tính minh bạch, công khai và quyền khiếu kiện
- Chương VII: Những điều khoản chung
- Các phụ lục bao gồm:

+ Phụ lục A: Việt Nam: Ngoại lệ đối xử quốc gia
+ Phụ lục B: Việt Nam: Thời kì chuyển tiếp (Hạn chế số lượng)
  # Phụ lục B1: Hạn chế số lượng nhập khẩu - sản phẩm nông nghiệp
  # Phụ lục B1: Hạn chế số lượng nhập khẩu - sản phẩm công nghiệp
  # Phụ lục B2: Hạn chế số lượng xuất khẩu
  # Phụ lục B3: Hàng hoá cấm nhập khẩu
  # Phụ lục B4: Hàng hoá cấm xuất khẩu
+ Phụ lục C: Việt Nam: Thời kì chuyển tiếp (Thương mại nhà nước)
  # Phụ lục C1: Hàng hoá nhập khẩu thuộc diện điều chỉnh của các quy định về thương mại nhà nước và lịch trình loại bỏ
  # Phụ lục C2: Hàng hoá xuất khẩu thuộc diện điều chỉnh của các quy định về thương mại nhà nước và lịch trình loại bỏ
+ Phụ lục D: Việt Nam: Thời kì chuyển tiếp (Quyền kinh doanh nhập khẩu và quyền phân phối)
  # Phụ lục D1: Lịch trình loại bỏ hạn chế về quyền kinh doanh nhập khẩu và quyền phân phối - Sản phẩm công nghiệp
  # Phụ lục D2: Lịch trình loại bỏ hạn chế về quyền kinh doanh xuất khẩu
+ Phụ lục E: Việt Nam: Thuế nhập khẩu nông nghiệp, thuế xuất khẩu sản phẩm công nghiệp
+ Phụ lục F: Phụ lục về dịch vụ tài chính, dịch chuyển thể nhân, viễn thông và tài liệu tham chiếu về viễn thông
+ Phụ lục G: Hoa Kỳ: Danh sách các trường hợp miễn trừ theo Điều 2 và Biểu cam kết thương mại dịch vụ cụ thể
+ Phụ lục H - Việt Nam, Hoa Kỳ - Các ngoại lệ
+ Phụ lục I - Danh mục minh họa các biện pháp đầu tư liên quan đến thương mại (TRIMs).

Các quy định chính của BTA được tóm tắt dưới đây.[17]

[14] Vietnam's Ministry of Planning, Investment's Central Institute of Economic Management and Foreign Investment Agency and the US Agency for International Development-Funded Support for Trade Acceleration (STAR) Project, *Assessment of the Five-Year Impact of the US-Viet Nam Bilateral Trade Agreement on Viet Nam's Trade, Investment, and Economic Structure*, tháng 7/2007.

[15] *Như trên*.

[16] Văn bản BTA bằng tiếng Anh có trên website của Cơ quan Đại diện thương mại Hoa Kỳ (USTR) (http://www.ustr.gov). Văn bản bằng tiếng Việt được xuất bản trong Công báo của Chính phủ Việt Nam và cũng có trên website của Uỷ ban quốc gia về hợp tác kinh tế quốc tế của Việt Nam.

[17] Ngoài văn bản BTA, phần này dựa trên tóm tắt BTA trên website của Hội đồng thương mại Việt Nam-Hoa Kỳ.

A. *Các quy định về thương mại hàng hoá*

Việt Nam và Hoa Kỳ nhất trí dành cho nhau MFN, theo đó các bên sẽ dành cho hàng hoá của nhau sự đối xử tương tự như hàng hoá tương tự sản xuất ở các nước khác. Ngoại lệ của nguyên tắc MFN bao gồm đối xử đặc biệt dành cho các nước trong cùng một FTA như AFTA hay NAFTA, và các thủ tục đặc biệt đối với thương mại ở biên giới.[18] Hơn nữa, BTA yêu cầu Việt Nam và Hoa Kỳ dành NT cho hàng nhập khẩu của nhau. Hai nước có nghĩa vụ đối xử với hàng nhập khẩu của nhau không kém thuận lợi hơn sự đối xử dành cho hàng hoá do công dân của mình sản xuất.[19] Các bên phải loại bỏ tất cả NTBs, bao gồm cả hạn chế nhập khẩu và xuất khẩu, hạn ngạch, yêu cầu cấp phép, và kiểm soát đối với tất cả các loại hàng hoá và dịch vụ, trong thời gian từ 3 đến 7 năm, tuỳ thuộc vào từng loại sản phẩm.[20] Cơ quan hải quan hay cơ quan có thẩm quyền khác của các bên không được phép áp bất cứ loại phí hay phụ phí hành chính nào liên quan đến việc nhập khẩu hay xuất khẩu hàng hóa vượt quá chi phí thực của dịch vụ được tiến hành bởi cơ quan đó.[21] Việt Nam áp thuế quan cho hàng hoá có xuất xứ từ lãnh thổ hải quan Hoa Kỳ theo cam kết tại Phụ lục E của Hiệp định.[22]

Về các biện pháp tự vệ đối với hàng nhập khẩu, Các bên nhất trí tham vấn nhanh chóng theo yêu cầu của bên kia, khi việc nhập khẩu hàng hoá có xuất xứ từ lãnh thổ của bên kí kết kia, tại thời điểm hiện tại hay tương lai, gây ra hay đe dọa gây ra, hay góp phần đáng kể làm rối loạn thị trường.

Sự 'rối loạn thị trường' ('Market disruptions') xảy ra khi việc tăng nhanh lượng nhập khẩu hàng hoá tương tự của nước khác là nguyên nhân đáng kể gây ra, hoặc đe dọa gây ra thiệt hại đáng kể cho ngành kinh tế nội địa đó.[23] Trong trường hợp các bên không thể đưa ra biện pháp khắc phục thông qua tham vấn, Hiệp định cho phép một bên bảo hộ ngành kinh tế nội địa của mình bằng cách áp dụng các biện pháp tự vệ đối với hàng nhập khẩu, dưới hình thức hạn chế số lượng, tăng thuế hoặc những hạn chế khác để chống lại sự 'rối loạn thị trường'. Về giải quyết tranh chấp thương mại giữa các thương nhân, BTA quy định nguyên tắc NT trong việc giải quyết tranh chấp tại các toà án và cơ quan hành chính trên lãnh thổ của các bên kí kết, khuyến khích giải quyết tranh

18 Điều 1 Chương I BTA.

19 Điều 2 Chương I BTA.

20 Khoản 1 Điều 3 và khoản 2 Điều 3 Chương I BTA.

21 Khoản 3 Điều 3 Chương I BTA.

22 Khoản 6 Điều 3 và Phụ lục E Chương I BTA.

23 Khoản 1 Điều 6 Chương I BTA.

chấp bằng trọng tài theo những quy tắc đã được công nhận ở tầm quốc tế và quy định việc thực thi các phán quyết trọng tài.[24]

B. *Các quy định về quyền sở hữu trí tuệ (IPRs)*

Chương II về IPRs của BTA được xây dựng theo mô hình của Hiệp định TRIPS của WTO, theo đó yêu cầu các bên tuân thủ những quy định cơ bản của Công ước Paris về bảo hộ sở hữu công nghiệp và Công ước Bern về bảo hộ tác phẩm văn học và nghệ thuật. Ngoài ra, các bên cũng phải tuân thủ những quy định kinh tế cơ bản của Công ước Geneva về bảo hộ người sản xuất bản ghi âm chống lại sự sao chép trái phép, Công ước quốc tế về bảo hộ giống thực vật mới (Công ước UPOV) và Công ước liên quan đến việc phân phối tín hiệu mang chương trình truyền qua vệ tinh (Công ước Brussels). BTA quy định NT trong việc việc xác lập, bảo hộ, hưởng và thực thi IPRs, trừ một số trường hợp nhất định.[25] Tuy nhiên, khác với Hiệp định TRIPS, BTA không yêu cầu các bên áp dụng MFN cho các nghĩa vụ trong chương này. Chương II quy định những tiêu chuẩn tối thiểu đối với việc bảo hộ và thực thi IPRs, bao gồm quyền tác giả và các quyền liên quan, tín hiệu vệ tinh mang chương trình được mã hoá, nhãn hiệu hàng hoá, sáng chế, thiết kế bố trí mạch tích hợp, thông tin bí mật (bí mật thương mại) và kiểu dáng công nghiệp. Chương này cũng yêu cầu có các biện pháp bảo đảm thực thi để đưa ra các chế tài kịp thời nhằm ngăn chặn vi phạm, và các chế tài đủ mạnh để ngăn ngừa các vi phạm có thể tái diễn trong tương lai.

C. *Các quy định về thương mại dịch vụ*

Chương III về thương mại dịch vụ được xây dựng theo mô hình của Hiệp định GATS của WTO. Hiệp định này định nghĩa thương mại dịch vụ theo bốn phương thức cung ứng:

1. Cung ứng dịch vụ qua biên giới (cung ứng dịch vụ từ lãnh thổ của bên này vào lãnh thổ của bên kia);
2. Tiêu dùng ở nước ngoài (cung ứng dịch vụ tại lãnh thổ của một bên cho người sử dụng dịch vụ của bên kia);
3. Hiện diện thương mại (một nhà cung ứng dịch vụ của một bên cung ứng một dịch vụ thông qua sự hiện diện thương mại trên lãnh thổ của bên kia); và

24 Điều 7 Chương I BTA.

25 Khoản 1 Điều 3 Chương II BTA.

4. Hiện diện của thể nhân (một nhà cung ứng dịch vụ của một bên cung ứng một dịch vụ bằng sự hiện diện của thể nhân trên lãnh thổ của bên kia).

Các bên nhất trí dành MFN cho dịch vụ và các nhà cung ứng dịch vụ của nhau.[26] Mỗi bên phải đảm bảo sự tiếp cận thị trường cho dịch vụ và các nhà cung ứng dịch vụ của bên kia theo đúng quy định trong biểu cam kết của mình. BTA cấm sáu loại hạn chế tiếp cận thị trường trong các ngành dịch vụ đã được quy định trong biểu cam kết, trong đó có: hạn chế số lượng nhà cung ứng dịch vụ; hạn chế tổng giá trị các giao dịch dịch vụ; hạn chế về tổng số lượng đầu ra của dịch vụ; và hạn chế về loại hình pháp nhân hay liên doanh thông qua đó dịch vụ được cung ứng.[27] Ngoài ra, các bên đã đưa vào Phụ lục về dịch vụ tài chính, Phụ lục về dịch chuyển của thể nhân, và Phụ lục về viễn thông của Hiệp định GATS và các tài liệu tham chiếu viễn thông của WTO.

D. *Các quy định về đầu tư*

Chương IV của BTA đặt ra các quy tắc nhằm khuyến khích đầu tư giữa hai nước. Các tiêu chuẩn chính về bảo hộ và khuyến khích đầu tư trong chương này là:

1. MFN;
2. NT;
3. Cấm trưng thu mà không bồi thường nhanh chóng, đầy đủ và hiệu quả;
4. Quyền lựa chọn các nhân viên quản lí cấp cao;
5. Chuyển vốn về nước;
6. Đảm bảo đối xử công bằng và thoả đáng, bảo vệ và an ninh đầy đủ, đối xử phù hợp với luật tập quán quốc tế, và không áp dụng các biện pháp tuỳ tiện và phân biệt đối xử; và
7. Cấm áp dụng các yêu cầu bị cấm về chuyển giao công nghệ và các TRIMs bị cấm.

Về việc giải quyết tranh chấp giữa nhà đầu tư và chính phủ nước tiếp nhận đầu tư, chương này đưa ra nhiều lựa chọn cho nhà đầu tư, bao gồm tòa án hoặc cơ quan tài phán hành chính có thẩm quyền của nước tiếp nhận đầu tư, hoặc bất kì thủ tục giải quyết tranh chấp nào đã được thoả thuận trước đó và giải quyết bằng trọng tài.

[26] Điều 2 và 7 Chương II BTA.

[27] Điều 6 Chương II BTA.

D. *Tạo thuận lợi cho kinh doanh*

Cả hai bên cam kết phát triển quan hệ đầu tư và tạo thuận lợi cho các hoạt động kinh doanh liên quan tới thương mại hàng hoá và dịch vụ. Mỗi bên đồng ý:[28]

- Cho phép các công dân và công ty của bên kia được nhập khẩu và sử dụng, phù hợp với các thực tiễn thương mại thông thường, thiết bị văn phòng và các thiết bị khác, như máy chữ, máy photocopy, máy tính, máy fax liên quan đến việc tiến hành các hoạt động của họ trên lãnh thổ của mình;
- Tùy thuộc vào pháp luật và thủ tục của mình về nhập cảnh và các cơ quan đại diện nước ngoài, cho phép các công dân và các công ty của bên kia được tiếp cận và sử dụng nơi làm việc và nơi ở trên cơ sở không phân biệt đối xử và theo giá thị trường;
- Tùy thuộc vào pháp luật, quy định và thủ tục của mình về nhập cảnh và các cơ quan đại diện nước ngoài, cho phép các công dân và công ty của bên kia thuê các đại lí, nhà tư vấn và nhà phân phối của một trong hai bên cho hoạt động sản xuất và đầu tư của họ, theo giá cả và điều kiện được thoả thuận giữa các bên.
- Cho phép các công dân và công ty của bên kia quảng cáo các sản phẩm và dịch vụ của họ (i) bằng cách thoả thuận trực tiếp với các tổ chức thông tin quảng cáo, bao gồm đài truyền hình, đài phát thanh, đơn vị kinh doanh in ấn và bảng hiệu; và (ii) bằng cách gửi thư trực tiếp, bao gồm cả việc sử dụng các phong bì thư và bưu thiếp được ghi sẵn địa chỉ đến công dân hoặc công ty đó;
- Khuyến khích sự tiếp xúc và cho phép mua bán hàng hoá và dịch vụ trực tiếp giữa các công dân và công ty của bên kia với người sử dụng cuối cùng và các khách hàng khác, và khuyến khích liên hệ trực tiếp với các cơ quan, tổ chức mà quyết định của họ sẽ ảnh hưởng đến khả năng bán hàng;

[28] Điều 1 Chương V BTA.

- Cho phép các công dân và các công ty của bên kia tiến hành nghiên cứu thị trường trên lãnh thổ của mình một cách trực tiếp hoặc thông qua hợp đồng;
- Cho phép các công dân và công ti của bên kia được dự trữ đầy đủ hàng mẫu và phụ tùng thay thế phục vụ dịch vụ sau bán hàng đối với các sản phẩm của đầu tư; và
- Cho phép các công dân và công ty của bên kia tiếp cận các sản phẩm và dịch vụ do chính phủ cung cấp, bao gồm các tiện ích công cộng, trên cơ sở không phân biệt đối xử và theo giá cả công bằng và thoả đáng (và trong mọi trường hợp, không cao hơn giá áp cho các công dân và công ty của các nước thứ ba, khi các giá đó được quy định hoặc kiểm soát bởi chính phủ liên quan đến hoạt động của các hiện diện thương mại của họ).

E. *Các quy định liên quan đến tính minh bạch và quyền khiếu kiện*

Các bên có nghĩa vụ công bố định kì và kịp thời tất cả các luật, quy định và thủ tục hành chính có tính áp dụng chung, liên quan đến bất kì vấn đề nào được quy định trong BTA.[29] Ở mức độ có thể, mỗi bên cho phép bên kia và các công dân của bên kia cơ hội đóng góp ý kiến đối với việc xây dựng pháp luật, quy định và thủ tục hành chính đó.[30] Mỗi bên cũng cho phép các công dân và công ty của bên kia được tiếp cận dữ liệu về nền kinh tế quốc dân và từng ngành kinh tế, kể cả những thông tin về ngoại thương.[31] Mỗi bên giao cho một tạp chí chính thức đăng tất cả các biện pháp có tính áp dụng chung và sẽ điều hành một cách thống nhất, vô tư và hợp lí các biện pháp đó.[32] Hai bên sẽ duy trì các cơ quan tài phán hành chính và tư pháp, nhằm xem xét và sửa đổi nhanh chóng các quyết định hành chính liên quan đến các vấn đề được quy định tại Hiệp định này, và sẽ cho phép người bị tác động bởi quyết định có liên quan được quyền khiếu kiện mà không bị trừng phạt.[33] Cuối cùng, các bên đảm bảo rằng các thủ tục cấp phép nhập khẩu, tự động và không tự động, được thực hiện theo cách thức minh bạch và có thể dự đoán trước được, và phù hợp với các tiêu chuẩn của Hiệp định của WTO về thủ tục cấp phép nhập khẩu (Hiệp định ILP).

29 Điều 1 Chương VI BTA.

30 Điều 3 Chương VI BTA.

31 Điều 2 Chương VI BTA.

32 Điều 5 và Điều 6 Chương VI BTA.

33 Điều 7 Chương VI BTA.

4. Hiệp định dệt may Việt Nam-Hoa Kỳ 2003

Trong khuôn khổ BTA, ngày 25/4/2003, sau ba tuần đàm phán, Việt Nam và Hoa Kỳ đã kí Hiệp định dệt may song phương.[34] Hiệp định này đặt ra hạn ngạch cho 38 loại sản phẩm may mặc nhập khẩu từ Việt Nam. Cả hai bên nhất trí hợp tác trong việc thực thi, bao gồm chia sẻ thông tin và tạo thuận lợi cho các chuyến thăm nhà máy, điều tra và phạt vi phạm.

Hiệp định dệt may Việt Nam-Hoa Kỳ có hiệu lực từ ngày 01/5/2003 tới ngày 31/12/2004. Hiệp định có thể gia hạn hàng năm và đã được gia hạn hai lần vào năm 2004 và năm 2005. Điều 20 của Hiệp định quy định rằng khi Việt Nam gia nhập WTO, các quy định của WTO sẽ thay thế các quy định trong thoả thuận song phương. Hiệp định này đã hết hiệu lực khi Việt Nam gia nhập WTO vào tháng 01/2007.

5. Hiệp định khung về thương mại và đầu tư Việt Nam-Hoa Kỳ 2007

Ngay sau khi Việt Nam gia nhập WTO, vào tháng 6/2007, Hiệp định khung về thương mại và đầu tư giữa Chính phủ nước Cộng hoà xã hội chủ nghĩa Việt Nam và Chính phủ Hợp chúng quốc Hoa Kỳ (viết tắt là TIFA) đã được kí kết nhằm thúc đẩy 'môi trường đầu tư hấp dẫn' và 'mở rộng và đa dạng hoá thương mại hàng hoá và dịch vụ'.[35] TIFA thành lập Hội đồng thương mại và đầu tư Việt Nam-Hoa Kỳ, cơ quan xem xét rất nhiều vấn đề về quan hệ thương mại và đầu tư giữa hai bên, bao gồm:[36]

- Thực thi các nghĩa vụ theo Hiệp định WTO và BTA;
- Bảo hộ IPRs;
- Các vấn đề chính sách gây tác động tới thương mại và đầu tư;
- Thương mại dịch vụ;
- Các vấn đề TBT;
- Các vấn đề SPS;
- Các vấn đề về quyền của người lao động được công nhận ở tầm quốc tế;

34 Mark Manyin và Amanda Douglas, CRS Report for Congress, *The Vietnam-US Textile Agreement*, ngày 18/6/2003. *Xem thêm* Nicole J. Sayres, CRS Report for Congress RL31470, *The Vietnam-US Textile Agreement Debate:Trade Patterns, Interests, and Labor Rights*, ngày 1/6//2002.

35 Điều 1 TIFA.

36 Các Điều 2 và 3 và Phụ lục TIFA.

- Các biện pháp khắc phục thương mại, bao gồm cả vấn đề coi Việt Nam là một nền kinh tế thị trường;
- GSP;
- Phối hợp trong các vấn đề về WTO và APEC mà hai bên cùng quan tâm;
- Hỗ trợ kĩ thuật và xây dựng năng lực; và
- Các lĩnh vực khác mà hai bên cùng quan tâm, nhằm thúc đẩy thương mại, đầu tư và hợp tác kinh tế giữa các bên.

Theo TIFA, Việt Nam và Hoa Kỳ tiến hành các cuộc họp và đối thoại thường xuyên để rà soát việc thực thi các cam kết WTO của Việt Nam, và xem xét các sáng kiến khác nhằm cải thiện quan hệ thương mại và đầu tư của hai bên. Hiệp định TIFA cùng với cơ chế mà Hiệp định thiết lập đã đặt nền tảng cho việc đàm phán các hiệp định toàn diện về thương mại và đầu tư giữa hai nước.

6. Các đàm phán đang tiến hành giữa Việt Nam và Hoa Kỳ về các hiệp định thương mại và đầu tư

Vào tháng 6/2008, Việt Nam và Hoa Kỳ khởi động đàm phán một hiệp định đầu tư song phương (viết tắt là 'BIT') nhằm cải thiện môi trường đầu tư cho các nhà đầu tư của hai bên. Hiệp định này nhằm thiết lập các thủ tục giải quyết tranh chấp chi tiết và bảo hộ nhà đầu tư của hai bên, để các nhà đầu tư không bị áp đặt các yêu cầu thực hiện các điều kiện đầu tư ('Performance Requirements'), hạn chế chuyển tiền về nước và bị trưng thu tuỳ tiện trên lãnh thổ của bên kia. Nhìn chung, các cuộc đàm phán của Hoa Kỳ về BIT dựa trên Hiệp định BIT mẫu hiện hành của Hoa Kỳ, mới nhất hiện nay là bản năm 2012. Tuy nhiên, kể từ khi hai bên tham gia đàm phán Hiệp định TPP, hai bên ngừng thảo luận về BIT, có lẽ vì TPP có một chương điều chỉnh toàn diện quan hệ đầu tư.[37] Với việc Hoa Kỳ rút khỏi TPP hiện nay, có thể đàm phán BIT giữa hai bên sẽ sớm được khởi động lại để phát triển khung pháp lý đã tồn tại từ khi ký kết BTA (Chương 4).

[37] Michael F. Martin, CRS Report for Congress R41550, *US-Vietnam Economic và Trade Relations: Issues for the 114th Congress*, ngày 20/5/2016, tr. 21.

Mục 3. VIỆT NAM-TRUNG QUỐC

1. Tổng quan về quan hệ thương mại Việt Nam-Trung Quốc

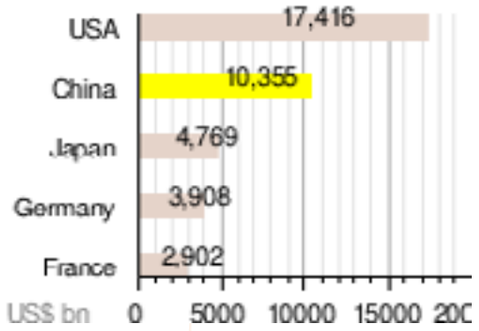
Kể từ khi khởi xướng công cuộc cải cách kinh tế năm 1978, Cộng hòa nhân dân Trung Hoa (Trung Quốc) luôn theo đuổi chính sách tự do hóa thương mại, sản xuất hướng về xuất khẩu, đạt tăng trưởng cao và xóa đói giảm nghèo, xây dựng nền kinh tế thị trường XHCN. Nền kinh tế của Trung Quốc, từ một nước nông nghiệp, đã nhanh chóng trở thành một trong những nền kinh tế sản xuất hàng hóa năng động nhất thế giới. Tính đến năm 2015, Trung Quốc là nền kinh tế phát triển nhanh nhất thế giới, với tốc độ tăng trưởng GDP trung bình hàng năm đạt 10% trong suốt hơn 30 năm.[38] Mục tiêu tăng trưởng trung bình hàng năm theo Kế hoạch 5 năm lần thứ 13 (2016-2020) là 6,5%, cho thấy sự tái cân bằng nền kinh tế và tập trung vào chất lượng tăng trưởng, đồng thời vẫn duy trì mục tiêu xây dựng một xã hội khá giả ('moderately prosperous society') tới năm 2020. Theo IMF, ước tính năm 2017, PPP (ngang giá sức mua) của Trung Quốc đạt 23,2 nghìn tỉ USD - đứng đầu thế giới, PPP/đầu người đạt 16,6 nghìn USD - đứng thứ 83, GDP danh nghĩa (tổng sản phẩm quốc nội) đạt 11.8 nghìn tỉ USD - đứng thứ hai thế giới, GDP/đầu người đạt 8,4 nghìn USD - đứng thứ 72.[39] Như vậy, Trung Quốc là nền kinh tế lớn nhất thế giới, xét trên tiêu chí PPP; và là nền kinh tế đứng thứ hai thế giới, xét trên tiêu chí GDP. Chỉ số phát triển con người (HDI) năm 2015 đạt 0,738 - đứng thứ 90 trên thế giới.[40]

[38] Nelson D. Schwartz; Rachel Abrams (24 August 2015), 'Advisers Work to Calm Fearful Investors". *The New York Times*. Retrieved 25 August 2015.

[39] IMF, 'Report for Selected Countries and Subjects: China', *World Economic Outlook*, April 2017. Retrieved 31 May 2017.

[40] UNDP, *Human Development Report 2016 (PDF)*. Retrieved 21 March 2017.

Bảng 4.3.1.
Đồ thị so sánh GDP năm 2014 của các nền kinh tế lớn (đơn vị: tỉ USD) (IMF)[41]



Trung Quốc đã gia nhập APEC năm 1991, trở thành thành viên của WTO năm 2001 (sau 16 năm đàm phán),[42] đồng thời ký kết nhiều FTA với nhiều đối tác, như: ASEAN, Australia, New Zealand, Pakistan, Hàn Quốc, Thụy Sĩ.

Thương mại quốc tế đóng vai trò chủ đạo trong nền kinh tế đang bùng nổ của Trung Quốc. Năm 2016, Trung Quốc xuất khẩu 2,09 nghìn tỉ USD, nhập khẩu 1,58 nghìn tỉ USD, với các đối tác chủ yếu như Hoa Kỳ, EU, Hong Kong, Nhật Bản, Hàn Quốc, Đài Loan, ASEAN.[43] Năm 2015, dịch vụ chiếm 12,3% tổng kim ngạch xuất khẩu và 22,9% tổng kim ngạch nhập khẩu của Trung Quốc. Trung Quốc xuất khẩu các dịch vụ như lữ hành, xây dựng, viễn thông, tài chính và các dịch vụ kinh doanh; đồng thời, Trung Quốc cũng nhập khẩu dịch vụ lữ hành. Trung Quốc vẫn là một trong những nước tiếp nhận FDI lớn nhất thế giới. Năm 2014, FDI vào Trung Quốc đạt 119,6 tỉ USD, tập trung vào các lĩnh vực như sản xuất hàng chế tạo, kinh doanh bất động sản, dịch vụ cho thuê và kinh doanh, bán buôn và bán lẻ. Trung Quốc liên tục tìm cách thu hút FDI bằng cách thuận lợi hóa các thủ tục, tăng khuyến khích FDI và tự do hóa đầu tư, với bốn Khu thương mại tự do thí điểm. Hong Kong (Trung Quốc) tiếp tục là nhà đầu tư chủ yếu vào Trung Quốc, chiếm 73% tổng FDI vào Trung Quốc năm 2015. Đứng vị trí tiếp theo là Singapore, Đài Loan, Hàn Quốc, Nhật Bản, Hoa Kỳ.[44] Đầu tư hai chiều giữa Trung Quốc và các nước

[41] IMF, 'Nominal GDP Comparison of China, Germany, France, Japan and USA', *World Economic Outlook*, October 2014. Retrieved 18 February 2015.

[42] WTO, www.wto.org, *China - Member Information*.

[43] WTO, *China - WTO Statistics Database*. Retrieved 01 March 2017.

[44] WTO, www.wto.org, Report TPR, 2016.

ASEAN tăng mạnh kể từ khi ký ACFTA năm 2002. Đến tháng 5/2017, đầu tư song phương của Trung Quốc với các nước ASEAN đạt 183 tỉ USD (trong khi năm 2002 chỉ đạt 30.1 tỉ USD).[45] Trung Quốc tiếp tục viện trợ ưu đãi đơn phương cho các LDC. Vào thời điểm tháng 12/2015, Trung Quốc đã dành ưu đãi miễn thuế cho 97% dòng thuế của 33 nước LDC.[46]

Tương tự Trung Quốc, Việt Nam bắt đầu tiến hành 'Đổi mới' từ năm 1986, với sự chuyển đổi từng bước từ nền kinh tế kế hoạch sang nền kinh tế thị trường định hướng XHCN. Nền kinh tế Việt Nam đã đạt được sự tăng trưởng nhanh chóng trong sản xuất nông nghiệp và công nghiệp, xây dựng, xuất khẩu và đầu tư nước ngoài. Từ một nước nghèo, bị chiến tranh tàn phá nặng nề và kế hoạch hóa tập trung bao cấp, khép kín, Việt Nam đã ra khỏi tình trạng LDC, trở thành nước DC có thu nhập trung bình và một nền kinh tế thị trường năng động, hội nhập mạnh mẽ, sâu rộng vào hệ thống kinh tế toàn cầu. Tăng trưởng kinh tế của Việt Nam khá cao, liên tục, ổn định. Việt Nam đã giảm tỷ lệ cực nghèo từ gần 60% trong những năm 1990 xuống dưới 3% năm 2016.[47] Việt Nam đã trở thành thành viên của WTO ngày 11/01/2007. Hiện tại, Việt Nam là một trong những nền kinh tế mở nhất của châu Á. Các đối tác thương mại chủ yếu của Việt Nam là Trung Quốc, Nhật Bản, Australia, các nước ASEAN, Hoa Kỳ và EU.

Kể từ năm 1991, khi hai nước chính thức bình thường hoá quan hệ cho đến nay, quan hệ thương mại Việt Nam-Trung Quốc đã có những phát triển vượt bậc. Hai nước đã mở lại đường hàng không, đường sắt, đường biển và đường bộ, tạo thuận lợi cho vận chuyển hàng hoá và người giữa hai nước, đồng thời mở 7 cặp cửa khẩu cấp quốc gia trong vùng biên giới giữa hai nước. Từ năm 2004, Trung Quốc đã trở thành đối tác thương mại lớn nhất của Việt Nam.

Sau chuyến thăm Trung Quốc tháng 5/2007 của Chủ tịch nước Việt Nam Nguyễn Minh Triết, các dự án trong khuôn khổ hợp tác 'hai hành lang, một vành đai kinh tế' giữa hai nước được xúc tiến thực hiện.[48]

[45] Chính phủ Trung Quốc, http://english.gov.cn/policies/infographics/2017/11/13/content_281475941282322.htm, truy cập ngày 21/11/2017.

[46] WTO, www.wto.org, Report TPR, 2016.

[47] Nhóm Ngân hàng Thế giới và Bộ Kế hoạch và Đầu tư, *Việt Nam 2035*, 2016.

[48] Đại sứ quán Việt Nam tại Trung Quốc, http://www.vnemba.org.cn/en; http://en.wikipedia.org/wiki/Foreign_relations_of_Vietnam

A. *Thương mại hàng hoá Việt Nam-Trung Quốc*

Thương mại hàng hoá giữa Việt Nam và Trung Quốc chủ yếu được thực hiện theo hai phương thức: Thương mại chính ngạch và thương mại biên giới.

Trung Quốc có lợi thế rõ rệt về quy mô kinh tế, dự trữ ngoại hối nhưng lại gặp bất ổn về năng lượng, lương thực, khiến họ phải đẩy mạnh thu mua từ Việt Nam và các nước láng giềng khác. Theo EIA, Trung Quốc là nước nhập khẩu dầu lớn nhất thế giới năm 2014. Theo WASDE, Trung Quốc là nước nhập khẩu gạo lớn nhất thế giới năm 2014.

1. Thương mại chính ngạch

Năm 1991, tổng kim ngạch thương mại hai nước chỉ đạt 32 triệu USD. Từ đó đến nay, tổng kim ngạch thương mại hai chiều đã tăng dần và tăng mạnh. Theo thống kê của Tổng cục Hải quan Việt Nam, tổng kim ngạch thương mại Việt Nam-Trung Quốc năm 2016 đạt 71,9 tỷ USD, trong đó xuất khẩu của Việt Nam sang Trung Quốc đạt 21,97 tỷ USD, nhập khẩu từ Trung Quốc là 49,93 tỷ USD, nhập siêu 27,9 tỷ USD, giảm 13,67% so với 2015. Theo thống kê của Hải quan Trung Quốc, năm 2016, Việt Nam đã vươn lên trở thành đối tác thương mại lớn thứ nhất của Trung Quốc trong khối ASEAN, và là đối tác thương mại lớn thứ 9 của Trung Quốc. Những năm gần đây, tỉ trọng nhập siêu của Việt Nam từ Trung Quốc đã giảm mạnh. Điều này có được là do tốc độ tăng trưởng kim ngạch xuất khẩu từ Việt Nam sang Trung Quốc ngày càng nhanh chóng.[49]

Bảng 4.3.2: Số liệu thương mại Việt Nam-Trung Quốc [50]

(Đơn vị tính: triệu USD)

Năm	Tổng XNK	Tăng trưởng (%)	VN XK	VN NK
2000	2.957	132,9	1.534	1.423
2001	3.047	3,04	1.418	1.629
2002	3.654	19,9	1.495	2.158
2003	4.870	33,3	1.747	3.120
2004	7.191	47,6	2.735	4.456
2005	8.739,9	21,52	2.961	5.778,9
2006	9.950	21,4	2.490	7.460
2007	15.858	51,9	3.356	12.502
2008	19.464	28,8	4.343	15.122
2009	21.048	8,1	4.747	16.301
2010	27.328	29,8	7.309	20.019
2011	35.721		11.127	24.594
2012	41.173		12.388	28.785
2013	50.171		13.233	36.938
2014	58.642		14.931	43.711
2015	66.620		17.100	49.520

Các mặt hàng xuất khẩu chính từ Việt Nam sang Trung Quốc bao gồm: (i) Máy vi tính, sản phẩm điện tử và linh kiện; (ii) Xơ, sợi dệt các loại; (iii) Dầu thô; (iv) Sắn và các sản phẩm từ sắn; (v) Gỗ và sản phẩm gỗ. Các mặt hàng nhập khẩu chính từ Trung Quốc vào Việt Nam bao gồm: (i) Máy móc, thiết bị, dụng cụ, phụ tùng khác; (ii) Điện thoại các loại và linh kiện; (iii) Vải các loại; (iv) Máy vi tính, sản phẩm điện tử và linh kiện; (v) Sắt thép các loại.[51]

2. Thương mại biên giới

Nói chung, thương mại biên giới được hiểu là sự dịch chuyển hàng hoá và dịch vụ qua biên giới quốc tế trên bộ giữa các quốc gia. Như vậy, thương mại biên giới là một phần của hoạt động thương mại quốc tế thông thường giữa các nước. Tuy nhiên, thương mại biên giới có tác động kinh tế-xã hội và chính trị sâu sắc hơn nhiều so với hoạt động thương mại thông thường diễn ra ở các cảng biển và cảng hàng không.

Việt Nam và Trung Quốc có đường biên giới trên bộ dài hơn 1.280 km, chạy qua 2 tỉnh của Trung Quốc (Vân Nam, Quảng Tây) và 7 tỉnh của Việt Nam (Quảng Ninh, Lạng Sơn, Cao Bằng, Hà Giang, Lào Cai, Lai Châu, Điện Biên), với 21 cửa khẩu, 4 cửa khẩu quốc tế, 7 cửa khẩu chính, 10 cửa khẩu phụ tiểu ngạch, 56 đường mòn, và 13 chợ biên giới. Hai tỉnh Quảng Tây và Vân Nam (Trung Quốc) có điều kiện địa lí đặc biệt thuận lợi để phát triển kinh tế-thương mại với Việt Nam. Có thể nói thương mại biên giới đóng vai trò quan trọng trong kim ngạch buôn bán hai chiều Việt Nam-Trung Quốc.

Kể từ khi thực hiện cải cách kinh tế năm 1978, Chính phủ Trung Quốc đã có chính sách ưu tiên phát triển kinh tế các vùng biên giới, coi thương mại biên giới là 'khâu đột phá', nhằm khai thác lợi thế so sánh của

[49] *Quan hệ thương mại Việt Nam - Trung Quốc phát triển tích cực*, http://bnews.vn/quan-he-thuong-mai-viet-nam-trung-quoc-phat-trien-tich-cuc/58310.html, ngày 29/9/2017.

[50] Bộ Công Thương và Dự án EU-MUTRAP, *Sổ tay Quan hệ kinh tế đối ngoại của Việt Nam*, 2015, tr. 83.

[51] Bộ Công Thương và Dự án EU-MUTRAP, *Sổ tay Quan hệ kinh tế đối ngoại của Việt Nam*, 2015, tr. 83.

các vùng này với các nước láng giềng. Hai tỉnh Vân Nam và Quảng Tây nằm trong vành đai kinh tế 'đại Tây Nam' của Trung Quốc, bao gồm Tứ Xuyên, Vân Nam, Quý Châu, Tây Tạng và Quảng Tây, trong đó Quảng Tây được xem là 'hành lang' ra biển cho toàn bộ vùng Tây Nam Trung Quốc.

Trong giai đoạn 2006-2011, tốc độ tăng trưởng thương mại biên giới Việt Nam-Trung Quốc trung bình 29%/năm,[52] góp phần quan trọng vào thương mại hai chiều giữa hai nước. Tổng thương mại biên giới hai nước đạt 2,8 tỉ USD năm 2006, trên 7,1 tỉ USD năm 2010 và trên 6,3 tỉ USD năm 2011.[53] Tổng kim ngạch xuất nhập khẩu hàng hóa qua biên giới, trong nhiều năm, chiếm tỉ trọng khá cao trong tổng kim ngạch thương mại hai nước, trung bình 25-26%. Hàng xuất khẩu của Việt Nam sang Trung Quốc theo đường sắt chủ yếu là khoáng sản (quặng sắt, tinh quặng sắt, than cám, tinh quặng chì). Những mặt hàng Việt Nam xuất khẩu theo biên giới đường bộ sang Trung Quốc chủ yếu là nông sản, cao su, hạt điều, hoa quả tươi, sắn, các loại thủy hải sản khô và đông lạnh (như cá, mực, tôm, cua), hàng thủ công mỹ nghệ, các loại gia cầm. Hàng nhập khẩu từ Trung Quốc qua các cửa khẩu vào Việt Nam gồm: máy móc phục vụ sản xuất nông nghiệp như máy móc nông nghiệp loại nhỏ, máy bơm nước, máy móc thiết bị phục vụ cho một số ngành sản xuất công nghiệp, chế biến thực phẩm, dụng cụ y tế, nguyên liệu phục vụ các ngành sản xuất thuốc lá, dệt may, các loại hóa chất phục vụ nhiều ngành sản xuất, hàng tiêu dùng như các công cụ lao động, hàng điện tử, và các loại thực phẩm rau quả.[54]

Trong những năm gần đây, thủ tục thông quan thương mại biên giới giữa hai nước đã được cải thiện đáng kể. Năm 2016, với nỗ lực chung của các ban ngành hữu quan, hai bên tái ký kết Hiệp định thương mại biên giới Việt Nam-Trung Quốc. Điều này giúp hai bên quy chuẩn hóa thêm một bước, thúc đẩy thương mại biên giới hơn nữa, đồng thời cơ bản giải quyết vấn đề ùn tắc hàng hóa nông sản của doanh nghiệp và người dân vùng biên tại cửa khẩu trong nhiều năm qua.[55]

Thương mại biên giới Việt Nam-Trung Quốc có những điểm đáng chú ý sau:

- Tình trạng buôn lậu khá phổ biến và rất khó kiểm soát chính xác việc buôn bán tiểu ngạch dọc biên giới giữa hai nước, nên thống kê giữa hai nước về loại hình thương mại này không chính xác và số liệu thường không giống nhau;
- Doanh nghiệp, nhất là doanh nghiệp Việt Nam, thường bị động do cơ chế chính sách giữa hai nước còn nhiều điểm chưa tương đồng, đặc biệt do phía Trung Quốc thường xuyên thay đổi cơ chế, chính sách thương mại;
- Trong thời gian dài, chính sách thương mại biên giới với Trung Quốc và quản lý nhà nước chưa tạo ra sự cạnh tranh công bằng giữa các doanh nghiệp Việt Nam.

Nhìn chung, thương mại biên giới Việt Nam-Trung Quốc phát triển có tác động quan trọng làm thay đổi diện mạo nghèo nàn của khu vực biên giới, mở rộng thương mại quốc tế, nâng cao đời sống cho nhân dân biên giới hai nước. Tuy nhiên, trong quan hệ thương mại biên giới giữa hai nước cũng nảy sinh những vấn đề phức tạp, đòi hỏi sự quản lí và những điều chỉnh kịp thời bằng chính sách và các quy định pháp luật của cả hai nước nhằm ổn định và phát triển các hoạt động thương mại khá đặc thù này, vì lợi ích của cả hai nước và tuân thủ các quy định pháp luật quốc tế, nhất là khi Việt Nam và Trung Quốc đều đã trở thành thành viên chính thức của WTO và cùng tham gia vào Hiệp định ACFTA. Cần xây dựng một chiến lược dài hạn và hiệu quả nhằm phát triển thương mại biên giới Việt Nam-Trung Quốc, hỗ trợ hoạt động xuất khẩu của cả hai nước.

B. *Thương mại dịch vụ Việt Nam-Trung Quốc*

Hợp tác du lịch Việt Nam-Trung Quốc cũng là điểm nổi bật trong quan hệ thương mại giữa hai nước. Hiệp định hợp tác du lịch hai nước ngày 08/4/1994 đã tạo cơ sở pháp lí cho quan hệ hợp tác du lịch giữa hai nước. Lượng khách Trung Quốc đến Việt Nam ngày càng gia tăng. Từ năm 1996 đến nay, Trung Quốc luôn đứng đầu và vượt xa nước đứng thứ hai trong danh sách các nước và vùng lãnh thổ có số khách đến Việt Nam đông nhất. Số người Việt Nam đi du lịch Trung Quốc cũng ngày một tăng.

Thương mại dịch vụ dự đoán sẽ phát triển nhanh. Trong số các

[52] *2006-2011 Sino-Vietnamese Border Trade with An Average Annual Growth Rate of 29%*, http://www.bdex.cn.

[53] QĐND, *Boosting Vietnam-China Border Trade*, Chủ nhật, ngày 20/11/2011, 20:56 (GMT+7), http://www.qdnd.vn.

[54] Lê Đăng Minh, *Quan hệ thương mại Việt Nam-Trung Quốc: Thực trạng, vấn đề và giải pháp*, Van Hien University Journal of Science, Vol. 4, No. 3, 2016.

[55] 'Thương mại Việt Nam-Trung Quốc sắp cán mốc 100 tỷ USD', *Thế giới và Việt Nam*, ngày 13/01/2017, http://baoquocte.vn/thuong-mai-viet-nam-trung-quoc-sap-can-moc-100-ty-usd-42680.html

lĩnh vực dịch vụ thương mại, dịch vụ vận tải, kho ngoại quan và cảng biển sẽ phát triển rất nhanh, đặc biệt là sau 2010.

C. *Quan hệ đầu tư Việt Nam-Trung Quốc*

Việt Nam và Trung Quốc đã ký kết BIT ngày 02/12/1992, có hiệu lực ngày 01/9/1993. Kể từ đó đến nay, quan hệ đầu tư song phương Việt Nam-Trung Quốc tiếp tục phát triển.

Tính đến năm 2016, Trung Quốc có 1.529 dự án đầu tư vào Việt Nam với số vốn thỏa thuận là 10,14 tỷ USD, đứng thứ 8 trong số các nước và vùng lãnh thổ đầu tư vào Việt Nam. Nhiều dự án có quy mô lớn và chất lượng cao đã được thực hiện. *Ví dụ*: khu công nghiệp Vân Trung (tỉnh Bắc Giang);[56] dự án thép Fuco tại Bà Rịa-Vũng Tàu, với tổng vốn đầu tư 180 triệu USD; Công ty TNHH khoáng sản và luyện kim Việt-Trung, vốn đầu tư 175 triệu USD; khu công nghiệp An Dương (Hải Phòng), vốn đầu tư 175 triệu USD. Riêng năm 2016, FDI của Trung Quốc vào Việt Nam là gần 5 tỉ USD, đứng thứ tư trong số các nước ASEAN tiếp nhận đầu tư của Trung Quốc, sau Singapore, Indonesia, Lào.[57] Tuy nhiên, FDI của Trung Quốc chỉ chiếm khoảng 3% tổng vốn đầu tư vào Việt Nam, ở khoảng cách xa so với các nhà đầu tư lớn ở Việt Nam (như: Nhật Bản, Hàn Quốc, Đài Loan, Singapore). Nguyên nhân chính của thực trạng FDI nói trên là do Trung Quốc đã hiện diện chủ yếu trong các dự án đầu tư với vai trò nhà thầu, nhất là đối với các dự án nhiệt điện ở Việt Nam.[58] Các lĩnh vực đầu tư chính từ Trung Quốc sang Việt Nam: (i) Chế biến, chế tạo; (ii) Sản xuất điện, khí, nước, điều hòa; (iii) Xây dựng.[59]

Theo thống kê của Trung Quốc, đến tháng 9/2016, Việt Nam có 518 dự án đầu tư vào Trung Quốc với số vốn là 120 triệu USD. Thực tế những năm gần đây, tuy số lượng các dự án đầu tư của Việt Nam vào Trung Quốc tăng nhanh, nhưng chưa tương xứng với tiềm năng và hiện trạng phát triển hợp tác kinh tế thương mại hai nước. Nguyên nhân có thể là do các doanh nghiệp Việt Nam chưa quen với thị trường Trung Quốc và truyền thông Việt Nam đưa tin về thị trường Trung Quốc chưa nhiều. Những năm gần đây, Hà Nội Milk là doanh nghiệp luôn nỗ lực thâm nhập thị trường Trung Quốc với các sản phẩm sữa chất lượng cao. Năm 2016, doanh nghiệp này đầu tư xây dựng nhà máy tại khu ngoại quan Bằng Tường (Quảng Tây), trở thành doanh nghiệp sản xuất sữa đầu tiên của Việt Nam tại Trung Quốc.[60]

Quan hệ đầu tư Việt Nam-Trung Quốc có một số đặc điểm sau:

Thứ nhất, khác với quan hệ xuất nhập khẩu giữa hai nước là quan hệ hai chiều, quan hệ đầu tư chủ yếu chỉ có một chiều từ phía Trung Quốc vào Việt Nam. Bởi vì so với Việt Nam, Trung Quốc là nước có tiềm lực kinh tế mạnh hơn. Việt Nam đầu tư vào Trung Quốc không đáng kể, chỉ tập trung tại hai tỉnh Vân Nam và Quảng Tây.

Thứ hai, số lượng và tốc độ đầu tư đạt mức trung bình. Cho đến nay, Trung Quốc không phải là nhà đầu tư lớn tại Việt Nam.

Thứ ba, các chỉ tiêu chất lượng của đầu tư chưa cao.

Thứ tư, bên cạnh việc đầu tư theo hình thức FDI, Trung Quốc còn viện trợ phát triển cho Việt Nam theo các dự án ODA.

Thứ năm, đầu tư của Trung Quốc vào Việt Nam đã góp phần nhất định vào sự phát triển kinh tế của Việt Nam. Tuy nhiên, xét cả về tiềm năng lẫn sự phát triển mọi mặt của quan hệ hai bên, lượng đầu tư như vậy chưa tương xứng với tiềm năng của thương mại hai nước, đặc biệt là của phía Trung Quốc.

Trung Quốc đã là 'thành viên của câu lạc bộ nghìn tỉ đô-la GDP'. Tuy nhiên, con số về đầu tư của Trung Quốc vào Việt Nam trong những năm qua chưa tương xứng với vị thế địa-kinh tế của Việt Nam - nước được coi là cầu nối thị trường Trung Quốc khổng lồ đầy tiềm năng với Đông Nam Á.

2. Khái quát về các hiệp định thương mại giữa Việt Nam và Trung Quốc

Hai nước đã kí kết trên 50 hiệp định, đặt cơ sở pháp lí cho quan hệ hợp tác lâu dài giữa hai nước, trong đó có các hiệp định tạo hành lang pháp

[56] 'Thương mại Việt Nam-Trung Quốc sắp cán mốc 100 tỷ USD', *Thế giới và Việt Nam*, ngày 13/01/2017, http://baoquocte.vn/thuong-mai-viet-nam-trung-quoc-sap-can-moc-100-ty-usd-42680.html

[57] Chính phủ Trung Quốc, http://english.gov.cn/policies/infographics/2017/11/13/content_281475941282322.htm, truy cập ngày 21/11/2017.

[58] 'Tương quan kinh tế Việt Nam-Trung Quốc', Thứ năm, ngày 15/5/2014, https://kinhdoanh.vnexpress.net/tin-tuc/doanh-nghiep/tuong-quan-kinh-te-viet-nam-trung-quoc-2990777.html

[59] Sổ tay Chính sách kinh tế đối ngoại của Việt Nam.

[60] 'Thương mại Việt Nam-Trung Quốc sắp cán mốc 100 tỷ USD', *Thế giới và Việt Nam*, ngày 13/01/2017, http://baoquocte.vn/thuong-mai-viet-nam-trung-quoc-sap-can-moc-100-ty-usd-42680.html

lí cơ bản cho quan hệ thương mại hai nước, như Hiệp định thương mại; Hiệp định mua bán hàng hoá tại vùng biên giới; Hiệp định hợp tác du lịch; Hiệp định về thành lập Uỷ ban hợp tác kinh tế; Hiệp định thanh toán; các hiệp định về giao thông, vận tải đường sắt, đường bộ, đường hàng không. Từ tháng 02/2002, Trung Quốc đã dành cho Việt Nam đối xử MFN về thuế suất đối với hàng xuất khẩu vào thị trường Trung Quốc, tạo thuận lợi cho các doanh nghiệp Việt Nam tăng cường xuất khẩu vào thị trường đầy tiềm năng này.

Trong quan hệ hợp tác thương mại song phương, Việt Nam và Trung Quốc đã kí kết một số hiệp định điều chỉnh quan hệ thương mại biên giới, như: Hiệp định mậu dịch Việt Nam-Trung Quốc 1991; Hiệp định về mua bán hàng hoá ở vùng biên giới giữa Việt Nam và Trung Quốc 1998; Hiệp định về lĩnh vực bảo vệ và kiểm dịch thực vật Việt Nam-Trung Quốc 2007, … Năm 2016, hai bên tái ký kết Hiệp định thương mại biên giới Việt-Trung. Ngoài ra, hai nước còn ký kết nhiều hiệp định quan trọng khác như: Hiệp định đầu tư song phương Việt Nam-Trung Quốc 1992, Hiệp định tránh đánh thuế hai lần 1995. Ngày 11/11/2006, hai bên ký kết Thỏa thuận thành lập Ủy ban chỉ đạo hợp tác song phương Việt Nam-Trung Quốc.

Năm 2017, hai nước đã nhất trí tiếp tục mở rộng và làm sâu sắc hơn quan hệ hợp tác kinh tế, thương mại thông qua tiếp tục kí kết 'Quy hoạch phát triển 5 năm hợp tác kinh tế-thương mại Việt-Trung giai đoạn 2017-2021'. Quy hoạch này sẽ tạo xung lực mới cho hợp tác kinh tế, thương mại giữa hai nước. Mục tiêu chủ yếu của quy hoạch là tiếp tục mở rộng và làm sâu sắc hơn quan hệ hợp tác kinh tế-thương mại Việt Nam-Trung Quốc, đồng thời làm phong phú thêm nội dung hợp tác, tạo ra phương thức hợp tác mới; nghiên cứu những biện pháp nhằm giảm mức độ mất cân bằng trong cán cân thương mại giữa hai nước. Theo thoả thuận được kí kết, hai bên xác định 7 lĩnh vực hợp tác trọng điểm, bao gồm: (i) Nông nghiệp và nghề cá; (ii) Giao thông-vận tải; (iii) Năng lượng; (iv) Khoáng sản; (v) Công nghiệp chế tạo và công nghiệp phụ trợ; (vi) Dịch vụ; và (vii) Hợp tác 'Hai hành lang, một vành đai kinh tế'.[61]

Trong số các hiệp định song phương được ký kết trong thời gian gần đây (tháng 01/2017) phải kể đến:

- Hiệp định khung hợp tác cửa khẩu biên giới đất liền giữa Bộ Quốc phòng Việt Nam và Tổng cục Hải quan Trung Quốc.
- Bản ghi nhớ về hợp tác triển khai viện trợ không hoàn lại chuyên về lĩnh vực y tế công cộng giữa Bộ Kế hoạch và Đầu tư Việt Nam với Bộ Thương mại Trung Quốc.
- Bản ghi nhớ giữa Bộ Công thương Việt Nam và Tổng cục Giám sát chất lượng, kiểm nghiệm kiểm dịch quốc gia Trung Quốc về việc tăng cường hợp tác trong lĩnh vực hàng rào kỹ thuật thương mại.
- Thỏa thuận hợp tác thả giống nuôi trồng nguồn lợi thủy sinh khu vực Vịnh Bắc Bộ Việt Nam - Trung Quốc.
- Kế hoạch hợp tác du lịch Việt Nam-Trung Quốc giai đoạn 2017-2019.
- Biên bản ghi nhớ giữa Ngân hàng Đầu tư phát triển Việt Nam và Ngân hàng Phát triển Trung Quốc về việc hợp tác tài trợ dự án và cho vay song phương trung, dài hạn giai đoạn 2017-2019.

3. Pháp luật trong nước của Việt Nam và Trung Quốc liên quan đến quan hệ thương mại song phương giữa hai nước

Thứ nhất, cần lưu ý pháp luật điều chỉnh chung quan hệ thương mại giữa hai nước, như: Luật ngoại thương năm 2004 của Trung Quốc, Luật quản lý ngoại thương năm 2017 của Việt Nam.

Thứ hai, cần lưu ý một số lĩnh vực pháp luật của Trung Quốc có liên quan đến thương mại song phương giữa hai nước. Kể từ ngày 01/6/2009, Luật An toàn thực phẩm của Trung Quốc đã chính thức có hiệu lực, thay thế Luật Vệ sinh thực phẩm trước đó. Trong lĩnh vực hải quan, Trung Quốc tiếp tục cố gắng thuận lợi hóa thương mại bằng việc đưa ra hàng loạt các cải cách, nhằm làm cho thủ tục hải quan hiệu quả hơn đối với cả hoạt động nhập khẩu và xuất khẩu. Thủ tục thông quan phi giấy tờ được thực hiện khắp Trung Quốc từ năm 2014, trừ những mặt hàng đòi hỏi có giấy phép và có những hạn chế khác. Trong những năm 2014-2016, việc áp dụng các biện pháp khắc phục thương mại (AD, CVD, tự vệ) giảm. Tuy nhiên, các biện pháp này vẫn chủ yếu áp dụng đối với một số ít lĩnh vực, nhất là sản phẩm hóa chất (chiếm hơn 60% các vụ điều tra AD).[62]

[61] Khánh An, 'Việt Nam-Trung Quốc: Năm 2012 có nhiều việc phải làm', *The World & Vietnam Report - Thế giới và Việt Nam*, Báo Xuân 2012, thứ năm, ngày 19/01/2012, 3:29 PM, http://www.tgvn.com.vn

[62] WTO, *Báo cáo rà soát chính sách thương mại của Trung Quốc (China's TPR Report)*, 2016. www.wto.org.

Thứ ba, về pháp luật điều chỉnh thương mại biên giới giữa hai nước.

Trên cơ sở Hiệp định về mua bán hàng hoá ở vùng biên giới giữa Việt Nam và Trung Quốc 1998, mỗi nước đều ban hành các quy định pháp luật điều chỉnh thương mại biên giới Việt Nam-Trung Quốc với các mục tiêu cơ bản như sau:

- Thúc đẩy hợp tác thương mại ở vùng biên giới giữa hai nước trên cơ sở bình đẳng, cùng có lợi;
- Khuyến khích, thúc đẩy hoạt động mua bán hàng hoá ở vùng biên giới phát triển lành mạnh, liên tục, ổn định và có biện pháp tăng cường phối hợp chống buôn lậu, gian lận thương mại;
- Tạo điều kiện thuận lợi cho các hoạt động xúc tiến thương mại, thúc đẩy mua bán hàng hoá ở vùng biên giới giữa hai nước;
- Hoạt động mua bán hàng hoá ở vùng biên giới phải được tiến hành trên cơ sở phù hợp với các cam kết của hai nước và pháp luật của mỗi nước.

Thứ tư, hệ thống thương mại biên giới của Trung Quốc chịu sự quản lí kết hợp của cả trung ương và địa phương. Mặc dù chính quyền địa phương có vai trò quan trọng trong việc quản lí thương mại biên giới nhưng cũng phải tuân thủ sự quản lí thống nhất của trung ương, vì thương mại biên giới cũng là bộ phận của ngoại thương Trung Quốc. Thương mại biên giới đã trở thành sức mạnh kinh tế chủ đạo và đóng vai trò cơ bản trong việc thực hiện mục tiêu của Nhà nước Trung Quốc - là 'tăng cường sức sống cho vùng biên giới, xây dựng xã hội phong lưu, mang lại lợi ích cho nhân dân và ổn định đất nước'. Cơ sở pháp lí chủ yếu của chính sách thương mại biên giới của Trung Quốc là Luật về khu tự trị dân tộc thiểu số và Luật Ngoại thương năm 2004. Điều 42 của Luật Ngoại thương năm 2004 Trung Quốc quy định theo đó Nhà nước áp dụng các biện pháp linh hoạt và tạo thuận lợi cho thương mại giữa các thị xã ở các vùng biên giới và các thị xã của các nước láng giềng, cũng như thương mại của cư dân biên giới.

Quan hệ thương mại biên giới Việt Nam-Trung Quốc được đặc trưng bởi các thoả thuận thương mại quy mô nhỏ và linh hoạt.[63]

[63] Hao Hongmay, 'Chapter 6. China's Trade and Economic Relations with CLMV', tr. 171-208, *http://www.eria.org.*

Thứ năm, theo Quyết định số 1151/QĐ-TTg của Thủ tướng Chính phủ Việt Nam ngày 30/8/2007 về việc phê duyệt Quy hoạch xây dựng vùng biên giới Việt-Trung đến năm 2020, Việt Nam đã ban hành hàng loạt các chính sách và văn bản pháp luật điều chỉnh các quan hệ thương mại diễn ra ở khu vực biên giới Việt Nam-Trung Quốc. Hành lang pháp luật thông thoáng mà Việt Nam xây dựng đã tạo thuận lợi và thúc đẩy các hoạt động thương mại biên giới Việt Nam-Trung Quốc phát triển.

Quan hệ thương mại của Việt Nam với các nước nói chung cũng như các quan hệ thương mại biên giới nói riêng không thể không chịu sự tác động mạnh mẽ của quá trình hội nhập sâu rộng và mạnh mẽ của Việt Nam, sau khi Việt Nam gia nhập WTO và cả hai nước đã cùng tham gia vào Hiệp định ACFTA. Trước đây, hoạt động xuất nhập khẩu giữa hai nước chủ yếu dựa vào quan hệ song phương. Hiện nay, các quan hệ đó còn phải được tiến hành trên cơ sở các cam kết chặt chẽ trong khuôn khổ WTO và các liên kết khu vực. Do vậy, Việt Nam cũng như Trung Quốc phải điều chỉnh chính sách và pháp luật về thương mại của mình nhằm thực hiện các nguyên tắc cơ bản của pháp luật thương mại quốc tế (như các nguyên tắc MFN, NT, mở cửa thị trường, thương mại công bằng và minh bạch hoá) đối với tất cả các hoạt động thương mại, không phân biệt là hoạt động đó diễn ra ở đâu, biên giới hay trong nội địa, không phân biệt đối tác là ai, bạn hàng Trung Quốc hay bạn hàng đến từ các nước thành viên WTO khác.

Tiềm năng phát triển của mối quan hệ Việt Nam-Trung Quốc là rất lớn. Trung Quốc tiếp tục là đối tác thương mại lớn nhất của Việt Nam. Đồng thời, Việt Nam cũng đã trở thành đối tác thương mại lớn nhất của Trung Quốc so với các nước ASEAN, và là đối tác thương mại lớn thứ 9 của Trung Quốc so với các đối tác thương mại khác.[64] Với sự cố gắng chung của cả hai nước, mối quan hệ đó sẽ không ngừng được củng cố và phát triển tốt đẹp hơn với phương châm 'láng giềng hữu nghị, hợp tác toàn diện, ổn định lâu dài, hướng tới tương lai', nhằm hướng tới việc đưa hai nước trở thành 'láng giềng tốt, bạn bè tốt, đồng chí tốt, đối tác tốt'. Trong xu hướng phát triển chung đó, hoạt động thương mại Việt Nam-Trung Quốc giữ vai trò quan trọng trong việc thúc đẩy giao lưu và hợp tác, không chỉ trong lĩnh vực thương mại mà còn trong các lĩnh vực văn hoá, xã hội, chính trị giữa hai nước.

[64] 'Quan hệ thương mại Việt Nam-Trung Quốc phát triển tích cực', ngày 29/9/2017, http://bnews.vn/quan-he-thuong-mai-viet-nam-trung-quoc-phat-trien-tich-cuc/58310.html

TÓM TẮT CHƯƠNG 4

Quan hệ thương mại song phương Việt Nam-EU đã và đang phát triển vững chắc từ những năm 1990. EU đã và đang là đối tác thương mại và đầu tư quan trọng hàng đầu của Việt Nam trong tiến trình hội nhập kinh tế toàn cầu. Hàng xuất khẩu của Việt Nam sang thị trường EU được hưởng ưu đãi GSP, một trong những yếu tố góp phần tạo nên thành tích xuất khẩu ấn tượng của Việt Nam. EU tiếp tục cung cấp nguồn vốn FDI quan trọng cho Việt Nam. EU đã và đang ủng hộ Việt Nam trong hành trình hội nhập quốc tế đầy khó khăn, thông qua các chương trình hợp tác, trong đó có Dự án hỗ trợ chính sách thương mại và đầu tư của châu Âu (EU-MUTRAP) - là công cụ hỗ trợ cho những cố gắng của Việt Nam trong giai đoạn thực thi các cam kết gia nhập WTO.

Hiệp định thương mại hàng dệt may giữa Việt Nam và Cộng đồng châu Âu (nay là EU) 1992 là hiệp định thương mại đầu tiên giữa Việt Nam và EU. Hiệp định này được tiếp nối bằng Hiệp định khung về hợp tác kinh tế 1995 với phạm vi rộng hơn, theo đó trao cho Việt Nam đối xử MFN trong quan hệ thương mại với EU. EU là người ủng hộ đáng tin cậy trong quá trình Việt Nam gia nhập WTO. Tháng 10/2004, EU là đối tác thương mại lớn đầu tiên kết thúc đàm phán song phương trong thủ tục gia nhập WTO của Việt Nam, tạo động lực quan trọng cho toàn bộ tiến trình xin gia nhập WTO. Tiếp theo, trong Hiệp định tiếp cận thị trường kí kết tháng 12/2004, EU đã đồng ý loại bỏ hoàn toàn việc áp dụng các biện pháp hạn chế số lượng đối với hàng dệt may của Việt Nam xuất khẩu sang thị trường EU kể từ ngày 01/01/2005. Đây là một bước rất quan trọng giúp Việt Nam tiến tới gia nhập WTO. Đổi lại, Việt Nam cũng đồng ý mở cửa thị trường cho một số lĩnh vực thương mại mà EU có lợi ích. Để tiếp tục quan hệ hợp tác song phương, ngày 04/10/2010, Việt Nam và EU đã kí kết Hiệp định khung về quan hệ đối tác và hợp tác toàn diện, nhằm củng cố các hoạt động thương mại song phương theo chiều sâu, đồng thời mở rộng các thỏa thuận thương mại và tài trợ sang các lĩnh vực mới. Thêm vào đó, EVFTA ký năm 2016 sẽ là cột mốc quan trọng trong quan hệ Việt Nam-EU và tạo cơ hội tiếp cận thị trường cho cả hai bên, đồng thời góp phần làm sâu sắc thêm tiến trình tự do hóa thương mại ở phạm vi khu vực và toàn cầu.[65]

Đối với đối tác Hoa Kỳ, kể từ khi hai nước Việt Nam và Hoa Kỳ bình thường hóa quan hệ ngoại giao năm 1995, quan hệ thương mại giữa hai nước ngày càng phát triển. Người tiêu dùng Hoa Kỳ đã biết đến hàng dệt may, giày dép, cà phê, đồ gỗ, tôm, cá của Việt Nam; và người Việt Nam cũng biết Citibank, Intel, Microsoft, GE, Chevron, máy bay Boeing… của Hoa Kỳ. Đạt được những thành công bước đầu ấy là nhờ có Hiệp định thương mại song phương 2000 ('BTA'), Quy chế thương mại bình thường vĩnh viễn 2006 ('PNTR'), Hiệp định khung về thương mại và đầu tư 2007 ('TIFA'), và nhiều hiệp định khác được kí kết giữa hai nước. Trong tương lai, hai nước sẽ ký kết Hiệp định đầu tư song phương ('BIT'). Trong quan hệ thương mại Việt Nam-Hoa Kỳ, vẫn còn một số vấn đề cần tiếp tục phát triển, như đàm phán về quy chế nền kinh tế thị trường (ME) của Việt Nam, và việc hàng hóa của Việt Nam được hưởng ưu đãi GSP từ phía Hoa Kỳ.

Trong quan hệ thương mại song phương Việt Nam-Trung Quốc, đến thời điểm năm 2017, hai nước đã kí kết trên 50 hiệp định, đặt cơ sở pháp lí cho quan hệ hợp tác lâu dài giữa hai nước, trong đó có các hiệp định tạo hành lang pháp lí cơ bản cho quan hệ thương mại hai nước, như Hiệp định thương mại; Hiệp định mua bán hàng hoá tại vùng biên giới; Hiệp định hợp tác du lịch; Hiệp định về thành lập Uỷ ban hợp tác kinh tế; Hiệp định thanh toán; các hiệp định về giao thông, vận tải đường sắt, đường bộ, đường hàng không. Không giống quan hệ thương mại song phương với EU hay Hoa Kỳ, bên cạnh thương mại chính ngạch, giữa Việt Nam và Trung Quốc còn có một bộ phận rất quan trọng nữa của thương mại quốc tế - đó là thương mại biên giới. Hai nước đã kí kết một số hiệp định điều chỉnh quan hệ thương mại biên giới, như: Hiệp định mậu dịch Việt Nam-Trung Quốc 1991; Hiệp định về mua bán hàng hoá ở vùng biên giới giữa Việt Nam và Trung Quốc 1998; Hiệp định về lĩnh vực bảo vệ và kiểm dịch thực vật Việt Nam-Trung Quốc 2007, … Hai nước đã nhất trí tiếp tục mở rộng và làm sâu sắc hơn quan hệ hợp tác kinh tế-thương mại thông qua việc kí kết 'Quy hoạch phát triển 5 năm hợp tác kinh tế-thương mại giai đoạn 2017-2021'. Quy hoạch này đã tạo xung lực mới cho hợp tác kinh tế-thương mại giữa hai nước, với mục tiêu chủ yếu là tiếp tục mở rộng và làm sâu sắc hơn quan hệ hợp tác kinh tế-thương mại Việt Nam-Trung Quốc, đồng thời làm phong phú thêm nội dung hợp tác, tạo ra phương thức hợp tác mới; nghiên cứu những biện pháp nhằm giảm mức độ mất cân bằng trong cán cân thương mại giữa hai nước.

Tiếp tục chính sách đa phương hóa, đa dạng hóa quan hệ đối ngoại, trong những năm tới, về quan hệ thương mại song phương, Việt Nam sẽ ưu tiên phát triển quan hệ hợp tác và hữu nghị truyền thống

[65] Phái đoàn EU tại Việt Nam, http://eeas.europa.eu/delegations/vietnam/eu_vietnam/political_relations/index_en.htm

với các nước láng giềng có chung biên giới (Trung Quốc, Lào, và Cam-pu-chia), đồng thời nỗ lực làm sâu sắc hơn nữa quan hệ với các đối tác thương mại chủ chốt, trên cơ sở đảm bảo lợi ích của cả Việt Nam và các đối tác trong quan hệ thương mại song phương.

CÂU HỎI/BÀI TẬP

1. Tác động của các quy định về TBT của EU đối với Việt Nam là gì? Việt Nam cần có chiến lược gì để vượt qua các rào cản này?
2. FTA Việt Nam-EU sẽ điều chỉnh vấn đề AD như thế nào? Vấn đề chủ yếu đối với Việt Nam là gì?
3. Bình luận về các hiệp định điều chỉnh quan hệ thương mại Việt Nam-Hoa Kỳ.
4. Bình luận về các hiệp định điều chỉnh quan hệ thương mại Việt Nam-Trung Quốc.

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PHẦN 2.
LUẬT THƯƠNG MẠI QUỐC TẾ CÓ SỰ THAM GIA CHỦ YẾU CỦA THƯƠNG NHÂN

CHƯƠNG 5.
PHÁP LUẬT ĐIỀU CHỈNH QUAN HỆ MUA BÁN HÀNG HOÁ QUỐC TẾ

PHÁP LUẬT ĐIỀU CHỈNH QUAN HỆ MUA BÁN HÀNG HOÁ QUỐC TẾ

Mục 1. GIỚI THIỆU

1. Thế nào là mua bán hàng hoá quốc tế?

Trong hoạt động kinh doanh nói chung và kinh doanh quốc tế nói riêng, mua bán hàng hoá là một giao dịch chủ yếu. Ở quy mô trong nước, mua bán hàng hoá thực hiện chức năng trao đổi hàng hoá trong xã hội; ở quy mô quốc tế, nó làm nhiệm vụ trao đổi hàng hoá giữa các nước thông qua các hoạt động xuất khẩu, nhập khẩu hàng hoá.

Việc mua bán giữa các thương nhân thuộc các nước khác nhau là một tất yếu khách quan, xuất phát từ lợi thế so sánh giữa các nước. Về cơ bản, mỗi nước có những lợi thế tương đối so với nước khác về một số lĩnh vực hàng hoá, vì vậy, nước đó sẽ xuất khẩu những mặt hàng này và sẽ nhập khẩu những mặt hàng khác mà mình ít có lợi thế hơn.

Tuy những loại hình giao dịch kinh doanh quốc tế mới xuất hiện ngày càng nhiều, như cung ứng dịch vụ quốc tế, đầu tư quốc tế, v.v. song mua bán hàng hoá quốc tế - một giao dịch mặc dù được coi là truyền thống và cổ điển - vẫn có giá trị quan trọng bậc nhất trong các giao dịch kinh doanh quốc tế.

Điều 27 Luật thương mại Việt Nam 2005 nêu rõ mua bán hàng hoá quốc tế 'được thực hiện dưới các hình thức xuất khẩu, nhập khẩu, tạm nhập, tái xuất, tạm xuất tái nhập và chuyển khẩu'.

Hoạt động mua bán hàng hoá quốc tế là hoạt động mua bán hàng hoá vượt ra ngoài phạm vi một quốc gia, diễn ra tại nhiều nước khác nhau, với nhiều yếu tố khác biệt về địa lí, lịch sử, khí hậu, cũng như các yếu tố kinh tế, chính trị, luật pháp, văn hoá, tôn giáo... Chính vì vậy, hoạt động này mang tính phức tạp hơn hoạt động mua bán hàng hoá trong nước và có nhiều rủi ro hơn. Những rào cản về văn hoá có thể gây nên những bất đồng và xung đột về quan niệm, về phong cách làm việc, thói quen kinh doanh, thị hiếu tiêu dùng… Yếu tố địa lí, khí hậu của một nước đôi khi cũng là một vấn đề quan trọng cần phải được các nhà kinh doanh quốc tế quan tâm, vì nó có thể ảnh hưởng trực tiếp tới sự chấp nhận sản phẩm mới trên thị trường[1].

[1] Độ cao, độ ẩm, nhiệt độ là những đặc điểm khí hậu ảnh hưởng tới công dụng và chức năng của sản phẩm. Sản phẩm được xem là hoàn hảo ở những nước ôn đới cũng có thể bị hư hỏng

Yếu tố quốc tế trong mua bán hàng hoá cũng sẽ làm phát sinh những vấn đề pháp lí đặc thù so với mua bán hàng hoá trong nước, như vấn đề rủi ro đối với hàng hoá trong quá trình vận tải từ nước này sang nước khác, rủi ro trong thanh toán, chuyển tiền quốc tế, hay sự xuất hiện thường xuyên của hiện tượng xung đột luật, v.v.. Đó cũng là những vấn đề mà pháp luật về mua bán hàng hoá quốc tế phải giải quyết.

2. Pháp luật mua bán hàng hoá quốc tế

Nhiều nguồn luật khác nhau có thể được áp dụng để điều chỉnh giao dịch mua bán hàng hoá quốc tế, trong đó có ba nguồn luật chủ yếu là: luật quốc gia, điều ước quốc tế và tập quán thương mại quốc tế.

A. *Luật quốc gia*

Mua bán hàng hoá là một hoạt động cơ bản của bất kì nền kinh tế nào, vì thế, nước nào cũng có các quy tắc pháp luật điều chỉnh hợp đồng mua bán hàng hoá. Ở một số nước, có những văn bản riêng điều chỉnh hợp đồng mua bán hàng hoá, *ví dụ*, ở Anh Quốc có Luật mua bán hàng hoá 1979. Ở một số nước khác, pháp luật về mua bán hàng hoá được quy định như một phần của luật thương mại (*ví dụ*, pháp luật Việt Nam). Ở Trung Quốc, chế định về hợp đồng mua bán hàng hoá là một chương trong Luật hợp đồng 1999.

Tuy vậy, một hợp đồng mua bán hàng hoá quốc tế có thể được điều chỉnh cùng một lúc bởi pháp luật của nhiều nước. *Ví dụ*, một doanh nghiệp Việt Nam xuất khẩu hàng hoá sang Hoa Kỳ bằng đường biển. Doanh nghiệp kí hợp đồng chuyên chở đường biển với người chuyên chở của Singapore. Không may, trong hành trình, tàu gặp bão và phải vào một cảng lánh nạn ở Malaysia. Người bảo hiểm của lô hàng là một công ty Hong Kong. Một giao dịch như vậy chịu sự tác động không phải của một mà của nhiều hệ thống pháp luật quốc gia khác nhau, và hợp đồng 'có tính quốc tế' này có thể được điều chỉnh bởi pháp luật quốc gia của các chủ thể hợp đồng, pháp luật của nước nơi kí kết hợp đồng, nơi thực hiện hợp đồng, nơi xảy ra tranh chấp, nơi có tài sản là đối tượng của hợp đồng...

Khi pháp luật của các nước này có những quy định khác nhau về cùng một vấn đề đang tranh chấp, thì sẽ làm phát sinh vấn đề xung đột luật. *Ví dụ*, xung đột luật về hình thức hợp đồng, hay xung đột luật về nội dung của hợp đồng.

- *Xung đột luật về hình thức hợp đồng:* Luật của các nước quy định khác nhau về hình thức của hợp đồng mua bán hàng hoá quốc tế. Theo luật của một số nước, như Anh Quốc, Pháp, Hoa Kỳ, Đức, hợp đồng mua bán hàng hoá quốc tế có thể được giao kết bằng văn bản, bằng lời nói hoặc bằng hành vi cụ thể, trừ trường hợp mua bán bất động sản.[2] Trong khi đó, theo luật của một số nước khác, như Việt Nam, Trung Quốc, hợp đồng mua bán hàng hoá quốc tế phải được giao kết bằng văn bản.[3] Như vậy, các hợp đồng được giao kết bằng lời nói, hoặc bằng hành vi[4] sẽ có hiệu lực theo pháp luật của một số nước, song theo pháp luật của một số nước khác sẽ chưa phát sinh hiệu lực pháp luật.

- *Xung đột luật về nội dung hợp đồng:* Nói đến nội dung của hợp đồng thương mại quốc tế là đề cập nhiều vấn đề phức tạp, như quyền và nghĩa vụ của các bên, các điều khoản cần phải được thoả thuận trong hợp đồng (điều khoản chủ yếu của hợp đồng), việc áp dụng các biện pháp khắc phục khi có sự vi phạm hợp đồng, trong trường hợp nào được áp dụng chế tài nghiêm khắc nhất (chế tài hủy hợp đồng), v.v. Về vấn đề này, luật của các nước quy định không giống nhau. *Ví dụ*, theo luật của Pháp, Đức, Nhật Bản, điều khoản chủ yếu của hợp đồng bao gồm đối tượng của hợp đồng và giá cả, trong khi theo luật của Anh Quốc, Hoa Kỳ, Australia, chỉ cần hai bên xác định

nhanh chóng tại những nước nhiệt đới. *Ví dụ*, các nhà sản xuất nhận ra rằng khi các thiết bị xây dựng ở Hoa Kỳ được đem bán tại sa mạc Sahara thì cần phải điều chỉnh nhiều, để có thể chịu đựng được cái nóng và bụi gay gắt của vùng sa mạc này. Khí hậu khác nhau ở châu Âu khiến cho hãng Bosch-Siemens buộc phải sửa đổi những chiếc máy giặt của họ. Bởi vì ở Đức không có nhiều ánh nắng mặt trời, nên những chiếc máy giặt phải có đặc điểm là tốc độ vắt cao khoảng 1000-1600 vòng/phút. Quần áo phải khô hơn khi ra khỏi máy giặt, vì người sử dụng không thể chờ có quần áo khô khi phải phơi thêm ngoài trời cả ngày. Ngược lại, ở Italia và Tây Ban Nha thì lượng ánh sáng mặt trời hàng năm cao hơn rất nhiều, nên tốc độ quay của máy giặt chỉ khoảng 500 vòng/phút.

[2] GS. TS. Nguyễn Thị Mơ, *Giáo trình pháp lí đại cương*, Nxb. Giáo dục, Hà Nội, (2005), tr. 191.

[3] Khoản 2 Điều 27 Luật thương mại Việt Nam năm 2005 quy định: 'Mua bán hàng hoá quốc tế phải được thực hiện trên cơ sở hợp đồng bằng văn bản hoặc bằng hình thức khác có giá trị pháp lí tương đương'. Các hình thức có giá trị tương đương văn bản bao gồm điện báo, telex, fax, thông điệp dữ liệu và các hình thức khác theo quy định của pháp luật (Khoản 15 Điều 3); thông điệp dữ liệu là thông tin được tạo ra, gửi đi, nhận và lưu giữ bằng phương tiện điện tử (Khoản 5 Điều 3).

[4] *Ví dụ*, người được chào hàng chấp nhận đơn chào hàng bằng việc mở L/C, gửi tiền ứng trước cho người chào hàng.

rõ đối tượng hợp đồng là đủ.[5] Về quyền và nghĩa vụ của người mua và người bán trong hợp đồng mua bán, luật của Pháp quy định theo hướng bảo vệ quyền lợi của người mua (người tiêu dùng), trong khi luật của Đức lại bảo vệ cho người bán.[6] Về vấn đề bất khả kháng trong thực hiện hợp đồng, theo pháp luật của một số nước, đình công được coi là trường hợp bất khả kháng, nhưng ở một số nước khác thì không.

Để giải quyết xung đột luật, cách tốt nhất là các bên trong hợp đồng thoả thuận lựa chọn một luật quốc gia nào đó để điều chỉnh hợp đồng của họ. Pháp luật quốc gia cũng như các điều ước quốc tế có liên quan[7] đều khẳng định quyền tự do lựa chọn luật áp dụng của các bên tham gia vào một giao dịch kinh doanh quốc tế. Quyền tự do này được thừa nhận trong nhiều văn bản pháp luật của Việt Nam liên quan đến việc điều chỉnh các loại hợp đồng khác nhau.[8] Nhưng cần lưu ý là quyền tự do này luôn được giới hạn trong khuôn khổ pháp luật và không được trái với các quy phạm được gọi là 'trật tự công cộng quốc tế', 'các nguyên tắc cơ bản của pháp luật', hay các 'quy phạm mệnh lệnh' áp dụng cho một số tình huống nhất định, cho dù luật điều chỉnh hợp đồng là luật nào.

Nếu các bên trong hợp đồng mua bán hàng hoá quốc tế không lựa chọn luật áp dụng, thì theo các nguyên tắc chung của tư pháp quốc tế, luật áp dụng cho hợp đồng sẽ được xác định bằng cách áp dụng các quy phạm xung đột.

Quy phạm xung đột là quy phạm chỉ ra hệ thống pháp luật nào trong số các hệ thống pháp luật đang xung đột được áp dụng cho các giao dịch kinh doanh quốc tế trong từng trường hợp cụ thể.[9] Quy phạm xung đột không trực tiếp quy định quyền và nghĩa vụ của các chủ thể khi tham gia quan hệ pháp luật, mà chỉ mang tính chất 'dẫn chiếu'. Nó thực hiện nhiệm vụ hướng dẫn việc lựa chọn một cách khách quan luật áp dụng, mà luật đó có liên quan nhiều nhất và có hiệu lực áp dụng nhất cho loại quan hệ pháp luật nhất định. Khi quy phạm xung đột dẫn chiếu tới luật nào đó, thì luật được áp dụng có thể là luật của nước nơi có toà án giải quyết tranh chấp ('*lex fori*'), hoặc là luật của một nước khác.

5 GS. TS. Nguyễn Thị Mơ, Sđd, tr. 192.

6 VCCI và Danida, *Cẩm nang hợp đồng thương mại*, Hà Nội, (2007), tr. 93-94.

7 Khoản 1 Điều 3 Công ước Rô-ma năm 1980 về luật áp dụng cho các nghĩa vụ hợp đồng.

8 Đoạn 2 Khoản 3 Điều 759 Bộ luật dân sự 2005; Khoản 2 Điều 5 Luật thương mại 2005; Khoản 2 Điều 4 Bộ luật hàng hải 2005.

9 GS. TS. Nguyễn Thị Mơ (Chủ biên), Sđd, tr. 195; Trường Đại học Luật Hà Nội, *Giáo trình tư pháp quốc tế*, Nxb. Tư pháp, (2006), tr. 39.

Hầu hết các nước đều có các quy phạm xung đột, nhằm giúp toà án nước mình lựa chọn luật áp dụng khi giải quyết các tranh chấp kinh doanh quốc tế nói chung và các tranh chấp về hợp đồng mua bán hàng hoá nói riêng. Pháp luật Việt Nam có các quy phạm xung đột được quy định trong nhiều văn bản pháp luật. như: Bộ luật Dân sự 2015, Luật Đầu tư 2015, Luật Thương mại 2005, v.v. Một số nước ban hành riêng một Bộ luật tư pháp quốc tế. *Ví dụ*: Ba Lan có Bộ luật Tư pháp quốc tế 1965 điều chỉnh các quan hệ dân sự, hôn nhân gia đình, lao động;[10] Bỉ có Luật tư pháp quốc tế 2004.

Như vậy, luật quốc gia áp dụng cho hợp đồng mua bán hàng hoá quốc tế có thể là các quy phạm luật thực chất (trực tiếp quy định quyền và nghĩa vụ của các bên trong hợp đồng), có thể là các quy phạm xung đột (quy phạm 'dẫn chiếu' tới luật của một quốc gia cụ thể và luật đó sẽ được áp dụng để điều chỉnh hợp đồng).

B. *Điều ước quốc tế*

Hiện tượng xung đột luật trong hợp đồng mua bán hàng hoá quốc tế có thể gây ra những tranh chấp, xung đột trong thực tiễn. Vì vậy, để tránh hiện tượng nói trên, các nước thường cùng nhau đàm phán để kí kết các điều ước quốc tế có liên quan, nhằm thống nhất một số quy tắc pháp luật điều chỉnh các quan hệ này. Có hai loại điều ước quốc tế liên quan: điều ước quốc tế thống nhất luật thực chất, và điều ước quốc tế thống nhất luật xung đột. Các điều ước này có thể là song phương hoặc đa phương.

1. Điều ước quốc tế thống nhất luật thực chất

Thống nhất luật thực chất là việc các nước cùng nhau thoả thuận xây dựng các quy phạm thực chất để điều chỉnh các quan hệ mua bán hàng hoá quốc tế. Từ những thập kỉ 20 của thế kỉ XX đã xuất hiện rất nhiều điều ước thương mại quốc tế chứa đựng các quy phạm thực chất thống nhất được kí kết và thực hiện như một xu hướng phát triển kinh tế tất yếu của thế giới.

Trong lĩnh vực mua bán hàng hoá quốc tế, có một số điều ước quốc tế quan trọng như sau:

- Hai Công ước La Hay 1964 về mua bán quốc tế động sản hữu hình

Công ước thứ nhất mang tên 'Luật thống nhất về giao kết hợp

10 GS. TS. Nguyễn Thị Mơ (Chủ biên), Sđd, tr. 174.

đồng mua bán quốc tế các động sản hữu hình' (Convention on Uniform Law on the Formation of Contracts for the International Sales - viết tắt là 'ULF'). Công ước thứ hai là 'Luật thống nhất về mua bán quốc tế các động sản hữu hình) (Convention on Uniform Law on the International Sales of Goods - viết tắt là 'ULIS').[11] Hai công ước này trên thực tế rất ít được áp dụng. Hiện nay, các nước gia nhập Công ước Viên 1980 (viết tắt là 'CISG') đều đã tuyên bố từ bỏ hai công ước nói trên.

- *Công ước Viên 1980 của Liên hợp quốc về hợp đồng mua bán hàng hoá quốc tế* (United Nations Convention on Contracts fo International Sale of Goods, viết tắt là 'CISG')

Công ước này được kí tại Viên (Áo) vào ngày 11/4/1980 và chính thức có hiệu lực từ ngày 01/01/1988. CISG được soạn thảo bởi Ủy ban của Liên hợp quốc về Luật thương mại quốc tế ('UNCITRAL') trong một nỗ lực tạo ra một văn bản thống nhất luật thực chất cho hợp đồng mua bán hàng hoá quốc tế. Công ước này là công ước được áp dụng rộng rãi nhất và có sức ảnh hưởng mạnh nhất trong giao dịch mua bán hàng hoá quốc tế hiện nay. Tính đến cuối tháng 12/2017, đã có 88 nước thành viên của Công ước[12] và ước tính Công ước điều chỉnh các giao dịch chiếm ba phần tư thương mại hàng hoá thế giới. Công ước này góp phần quan trọng vào việc loại bỏ các xung đột luật giữa các quốc gia. Các hợp đồng được kí kết giữa các bên có trụ sở thương mại tại các nước thành viên của Công ước Viên sẽ được điều chỉnh thống nhất bởi Công ước này, mà không còn tranh cãi về luật của nước nào sẽ được áp dụng nữa. Công ước quy định cụ thể về quyền và nghĩa vụ của người bán, người mua, trách nhiệm của mỗi bên khi vi phạm hợp đồng, các trường hợp miễn trách nhiệm… Các quy định của Công ước thường là khách quan, không gắn với hệ thống pháp luật quốc gia nào và có tính đến các vấn đề pháp lí thường phát sinh trong thực tiễn mua bán hàng hoá, vì thế tạo ra các giải pháp an toàn, công bằng cho các bên trong hợp đồng. Nội dung về Công ước này sẽ được trình bày kĩ hơn tại Mục 3 của chương này.

2. Điều ước quốc tế thống nhất luật xung đột

Thực tiễn giải quyết xung đột pháp luật của các quốc gia cho thấy, đối với cùng một quan hệ pháp luật cụ thể, các nước có các quy phạm xung đột không giống nhau. Nếu liên quan đến cùng một vấn đề (cùng một phạm vi) mà các nước có các quy phạm xung đột khác nhau (với các hệ thuộc khác nhau), thì sẽ nảy sinh hiện tượng 'xung đột của quy phạm xung đột'. Điều này khiến cho việc giải quyết xung đột luật bằng quy phạm xung đột trở thành một phương pháp chứa đựng nhiều khó khăn và rủi ro. *Ví dụ*, cùng một tranh chấp về hợp đồng kinh doanh quốc tế, nếu được xét xử tại toà án nước A và áp dụng quy phạm xung đột của nước A, thì luật điều chỉnh hợp đồng có thể sẽ khác với luật điều chỉnh do toà án nước B lựa chọn theo quy phạm xung đột của nước B. Điều này sẽ khiến các bên khó dự đoán về luật áp dụng, vì tranh chấp của họ có thể sẽ được giải quyết ở nhiều toà án khác nhau. Đây là một khó khăn rất lớn khi áp dụng các quy phạm xung đột để giải quyết tranh chấp trong mua bán hàng hoá quốc tế. Chính vì thế, các nước hiện nay có xu hướng đàm phán và kí kết các điều ước quốc tế để thống nhất các quy phạm xung đột.

Các quy phạm xung đột thống nhất có thể được quy định trong các điều ước quốc tế song phương hoặc đa phương.

Các điều ước quốc tế song phương có liên quan đến vấn đề này là các hiệp định tương trợ tư pháp. Trước năm 1992, khi còn tồn tại Liên Xô và các nước xã hội chủ nghĩa cũ ở Đông Âu, Việt Nam đã kí kết 6 hiệp định tương trợ tư pháp song phương với các nước Cộng hoà dân chủ Đức, Liên Xô, Tiệp Khắc, Cuba, Hungary, và Bulgaria.[13] Sau năm 1992, kể từ khi có Hiến pháp mới cho đến nay, Việt Nam đã kí thêm 9 hiệp định tương trợ tư pháp với Ba Lan, Lào, Trung Quốc, Liên bang Nga, Pháp, Ukraine, Mông Cổ, Belarus, và Cộng hoà dân chủ nhân dân Triều Tiên. Trong các hiệp định này (trừ các hiệp định với Pháp và Trung Quốc), đều có các quy phạm xung đột được áp dụng thống nhất với các nước kí kết, *ví dụ*, các quy phạm xác định luật áp dụng cho các quan hệ dân sự theo nghĩa rộng có yếu tố nước ngoài, và quy phạm xác định cơ quan tư pháp có thẩm quyền. Tuy vậy, có một nhận xét chung là các quy phạm này thường chỉ tập trung vào các quan hệ hôn nhân gia đình, quan hệ thừa kế, mà ít có những quy phạm xung đột liên quan đến lĩnh vực thương mại quốc tế.

Các điều ước quốc tế đa phương về thống nhất quy phạm xung đột thường được thông qua trong khuôn khổ một tổ chức quốc tế, trong đó quan trọng nhất là Hội nghị La Hay về tư pháp quốc tế. Hội nghị La Hay là

[11] Hai công ước này đã được 7 quốc gia phê chuẩn: Đức, Bỉ, Gambia, Italia, Hà Lan, Anh Quốc, Saint Martin và Israel.

[12] UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, truy cập ngày 25/12/2017.

[13] Đến nay, Hiệp định với Cộng hoà dân chủ Đức đã hết hiệu lực, Hiệp định với Liên Xô được Liên bang Nga kế thừa (mặc dù giữa Việt Nam và Liên bang Nga đã kí hiệp định mới, nhưng hiệp định mới này hiện chưa có hiệu lực), Hiệp định với Tiệp Khắc được cả Séc và Slovakia kế thừa.

thiết chế thường trực có nhiệm vụ thống nhất tư pháp quốc tế trên phạm vi toàn cầu.[14] Hội nghị này đã xây dựng và thông qua hàng chục điều ước quốc tế, trong đó có một số điều ước quốc tế đã được áp dụng khá rộng rãi và có tầm quan trọng đáng kể trong việc giải quyết xung đột luật trong mua bán hàng hoá quốc tế.

Trong các điều ước quốc tế đa phương thống nhất quy phạm xung đột, các điều ước quốc tế sau đây được áp dụng khá rộng rãi:

- *Công ước La Hay 1955 về luật áp dụng đối với mua bán quốc tế các động sản hữu hình (The Hague Convention 1955 on the Law Applicable to International Sales of Goods)*

Theo Công ước này, hợp đồng mua bán hàng hoá quốc tế phải tuân thủ luật mà các bên lựa chọn. Nếu không có sự thoả thuận thống nhất của các bên về luật áp dụng, thì luật của nước nơi người bán có trụ sở kinh doanh vào lúc nhận được đơn đặt hàng, sẽ được áp dụng, trừ các trường hợp ngoại lệ sau: (i) Khi đơn đặt hàng được giao cho một chi nhánh của người bán thực hiện, thì luật của nước nơi có chi nhánh được áp dụng; (ii) Khi đơn đặt hàng được giao cho người bán hoặc đại lí của người bán ở nước người mua, thì luật của nước nơi người mua thường trú được áp dụng (Điều 3). Công ước này có hiệu lực năm 1964 và hiện nay đã có 8 nước thành viên (Đan Mạch, Phần Lan, Pháp, Italia, Na Uy, Thụy Điển, Thụy Sĩ và Niger).[15]

- *Công ước Rome 1980 về luật áp dụng đối với các nghĩa vụ phát sinh từ hợp đồng (The Rome Convention 1980 on the Law Applicable to Contractual Obligations)*

Công ước này có 9 nước thành viên châu Âu, bao gồm Bỉ, Đan Mạch, Pháp, Đức, Irland, Italia, Luxemburg, Hà Lan và Anh Quốc. Sau đó, Công ước này lần lượt được sự tham gia của 6 nước khác là Hy Lạp, Tây Ban Nha, Bồ Đào Nha, Áo, Phần Lan và Thụy Điển. Đây là một Công ước được áp dụng rất rộng rãi tại các nước châu Âu.

Công ước được áp dụng đối với các nghĩa vụ phát sinh từ hợp đồng. Theo Công ước, một hợp đồng sẽ được điều chỉnh bởi luật do các bên lựa chọn. Sự lựa chọn này phải được thể hiện rõ trong các điều khoản của hợp đồng hoặc theo hoàn cảnh của vụ việc. Các bên có thể lựa chọn luật áp dụng cho toàn bộ hoặc chỉ một phần của hợp đồng.

[14] *Xem*: Danh sách các nước thành viên của Tổ chức này, http://www.hcch.net/index_en.php?act=states.listing

[15] http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=31

Trong trường hợp các bên không lựa chọn luật áp dụng cho hợp đồng, thì hợp đồng sẽ được điều chỉnh theo luật của 'các nước có mối liên hệ mật thiết nhất' với hợp đồng đang tranh chấp. 'Nước có mối liên hệ mật thiết nhất' với hợp đồng đang tranh chấp được xác định theo nguyên tắc tại khoản 2 Điều 4 của Công ước. Theo nguyên tắc này, 'nước có mối liên hệ mật thiết nhất' với hợp đồng là nước có địa bàn kinh doanh chính của bên thực hiện nghĩa vụ chính.

C. *Tập quán thương mại quốc tế*

Tập quán thương mại quốc tế cũng là nguồn luật quan trọng điều chỉnh hợp đồng mua bán hàng hoá quốc tế. Tập quán thương mại quốc tế là những thói quen phổ biến được thừa nhận và áp dụng rộng rãi trong hoạt động kinh doanh ở một khu vực nhất định hoặc trên phạm vi toàn cầu. Những tập quán quốc tế được áp dụng phổ biến trong mua bán hàng hoá quốc tế bao gồm: Các điều kiện cơ sở giao hàng trong mua bán hàng hoá quốc tế (viết tắt là 'INCOTERMS') được Phòng thương mại quốc tế ('ICC') tập hợp và ban hành từ năm 1936 (và đã được sửa đổi vào các năm 1953, 1968, 1976, 1980, 1990, 2000 và 2010) (xem Mục 2 của Chương này); Tập quán và thực hành thống nhất về tín dụng chứng từ (viết tắt là 'UCP') (xem Mục 4 của Chương này).

Các tập quán được hình thành lâu đời trong các quan hệ thương mại quốc tế, thường quy định về những vấn đề đặc thù trong mua bán hàng hoá quốc tế (mà thường luật quốc gia không có quy định), như việc chuyển giao rủi ro từ người bán sang người mua, nghĩa vụ của mỗi bên liên quan đến vận tải hàng hoá, mua bảo hiểm cho hàng hoá, thực hiện các thủ tục hải quan ở nước xuất khẩu và ở nước nhập khẩu. Các tập quán thương mại quốc tế chỉ có tính chất hướng dẫn chứ không có tính chất bắt buộc, tuy vậy, khi một tập quán được các bên thoả thuận ghi nhận hoặc dẫn chiếu vào hợp đồng mua bán hàng hoá quốc tế, thì sẽ có hiệu lực áp dụng bắt buộc đối với các chủ thể.

D. *Các nguồn luật khác*

Ngoài ra, có một số nguồn luật khác cũng đang ngày càng trở nên quan trọng trong việc điều chỉnh các hợp đồng thương mại quốc tế nói chung và hợp đồng mua bán hàng hoá quốc tế nói riêng, và có tính chất pháp lí tương tự như các tập quán thương mại quốc tế - đó là các 'hợp đồng mẫu' và các 'nguyên tắc chung của luật hợp đồng'.[16]

[16] Một số nhà nghiên cứu gọi các nguồn luật này là 'luật mềm' ('soft law'), với ý nghĩa là những quy tắc pháp lí được ban hành bởi các tổ chức tư, hoặc đôi khi của các tổ chức công, nhưng không có giá trị bắt buộc.

Trước hết, về các 'hợp đồng mẫu': cần phân biệt các hợp đồng mẫu do một hiệp hội nghề nghiệp soạn thảo và các hợp đồng mẫu được đưa ra bởi các tổ chức độc lập đối với các bên.

Trong thương mại quốc tế, loại 'hợp đồng mẫu' đầu tiên rất phổ biến. Trong nhiều lĩnh vực, các hiệp hội nghề nghiệp đã soạn thảo các hợp đồng mẫu, *ví dụ*, hợp đồng mẫu mua bán ngũ cốc (hợp đồng GAFTA), mua bán dầu (hợp đồng FOSFA), mua bán cà phê, ca-cao hay bông, v.v.. Các hợp đồng nói trên được soạn thảo với những nội dung phù hợp với đặc điểm của từng lĩnh vực kinh doanh tương ứng. Tuy nhiên, đôi khi các quy định của hợp đồng bị chỉ trích là có lợi hơn về mặt pháp lí cho các thành viên của hiệp hội.

Bên cạnh đó, các hợp đồng mẫu do các tổ chức độc lập soạn thảo thì thường không gặp phải những chỉ trích tương tự. Mục tiêu của các tổ chức này là cung cấp cho các nhà hoạt động thực tiễn các hợp đồng đầy đủ và công bằng cho quyền lợi của các bên. Phổ biến nhất là các hợp đồng mẫu và điều khoản mẫu do Phòng thương mại quốc tế (ICC) soạn thảo. Năm 1985, ICC đã ban hành điều khoản mẫu về bất khả kháng. Từ năm 1991, ICC đã xuất bản một loạt các hợp đồng mẫu trong nhiều lĩnh vực, trong đó có lĩnh vực mua bán hàng hoá. Các hợp đồng này có tính chắc chắn và độ tin cậy về mặt pháp lí, do chúng được soạn thảo bởi các chuyên gia trong lĩnh vực có liên quan. Hơn nữa, các quy định trong hợp đồng thường không liên quan đến một hệ thống pháp luật quốc gia cụ thể nào.

Hợp đồng mẫu sẽ trở thành nguồn luật cho hợp đồng mua bán hàng hoá quốc tế khi các bên dẫn chiếu đến hợp đồng mẫu hoặc đến một/một số điều khoản của hợp đồng mẫu.

Về 'các nguyên tắc chung của luật hợp đồng': đó thông thường là những nguyên tắc được đúc rút từ thực tiễn kinh doanh quốc tế, được các thương nhân thừa nhận và áp dụng cho các quan hệ hợp đồng thương mại quốc tế của mình và trở thành phổ biến: Nguyên tắc tự do hợp đồng, nguyên tắc hợp tác, nguyên tắc thiện chí, nguyên tắc phòng ngừa và hạn chế thiệt hại, … Hầu hết các nguyên tắc này cũng được quy định thống nhất trong luật của các quốc gia, vì vậy dễ dàng được công nhận và trở nên phổ biến trong thương mại quốc tế. Đặc biệt, các tổ chức trọng tài thường dẫn chiếu đến các nguyên tắc này trong việc giải thích hợp đồng và giải quyết các tranh chấp phát sinh.[17]

[17] Những nguyên tắc này được các luật gia nói đến như các quy phạm pháp luật 'siêu quốc gia' hay 'thương nhân luật', hoặc theo thuật ngữ La-tinh là '*lex mercatoria*'.

Hiện nay, xu hướng áp dụng các nguyên tắc chung của pháp luật ngày càng gia tăng trong kinh doanh quốc tế. Lí do là: vì các nguyên tắc này tồn tại một cách độc lập với các hệ thống pháp luật quốc gia, nên sẽ dễ dàng đạt được sự chấp nhận của các bên trong hợp đồng. Hơn nữa, được hình thành từ thực tiễn kinh doanh quốc tế, các nguyên tắc này chứa đựng các quy phạm phù hợp với thực tiễn kinh doanh quốc tế luôn biến đổi, vận động. Xu hướng này được thể hiện ở việc: các nguyên tắc chung của pháp luật đã và đang được tập hợp lại và được ban hành dưới dạng các Bộ nguyên tắc. Có thể kể đến Bộ nguyên tắc về hợp đồng thương mại quốc tế (Principles of International Commercial Contracts - viết tắt là 'PICC') do Viện nghiên cứu quốc tế về thống nhất luật tư (International Institute for Unification of Private Law - viết tắt là 'UNIDROIT') biên soạn.[18] Bên cạnh đó còn có Bộ nguyên tắc về luật hợp đồng châu Âu (Principles of European Contract Law - viết tắt là PECL) do Ủy ban về luật hợp đồng châu Âu (thường được gọi là Ủy ban Lando[19]) soạn thảo và ban hành. Nội dung của các Bộ nguyên tắc này sẽ được trình bày kĩ hơn tại Mục 3 của Chương này.

Về tính chất pháp lí, các Bộ nguyên tắc này chỉ mang tính chất tham khảo, không bắt buộc đối với các bên trong hợp đồng. Nói cách khác, các Bộ nguyên tắc này không được áp dụng tự động hay bắt buộc đối với hợp đồng, mà chỉ được áp dụng khi các bên trong hợp đồng lựa chọn. Như vậy, các Bộ nguyên tắc này có giá trị giống như những tập quán thương mại quốc tế. Tuy vậy, nếu các tập quán thương mại quốc tế như INCOTERMS hay UCP chỉ điều chỉnh một hay một số vấn đề liên quan đến việc giao kết và thực hiện hợp đồng mua bán hàng hoá quốc tế, thì các Bộ nguyên tắc này chứa đựng một hệ thống các quy phạm tương đối hoàn chỉnh, điều chỉnh hầu hết mọi vấn đề pháp lí phát sinh trong việc giao kết và thực hiện hợp đồng thương mại quốc tế.

Các mục dưới đây của Chương này sẽ trình bày kĩ hơn về các nguồn luật quan trọng điều chỉnh hợp đồng mua bán hàng hoá quốc tế.

[18] *Xem* toàn bộ nội dung của PICC từ website http://www.unidroit.org

[19] Uỷ ban này do Giáo sư, luật sư O. Lando chủ trì.

Mục 2. CÁC ĐIỀU KIỆN CƠ SỞ GIAO HÀNG TRONG MUA BÁN HÀNG HÓA QUỐC TẾ - INCOTERMS

1. Tổng quan về INCOTERMS

Các hợp đồng mua bán hàng hoá thường chứa đựng những điều kiện cơ sở giao hàng ở dạng viết tắt, mô tả thời gian và địa điểm người mua sẽ nhận hàng, địa điểm thanh toán, giá cả và thời điểm chuyển giao rủi ro đối với mất mát của hàng hoá dịch chuyển từ người bán sang người mua, và chi phí vận tải. Những điều kiện cơ sở giao hàng này được sử dụng rộng rãi trong thương mại quốc tế và nội dung thay đổi tùy thuộc vào luật điều chỉnh.

Nhóm điều kiện cơ sở giao hàng được sử dụng rộng rãi nhất hiện nay là những điều kiện được ICC tập hợp và xuất bản. Đó là INCOTERMS, được sử dụng tại nhiều nước trên thế giới. Hội đồng thương mại, toà án và các luật sư quốc tế đều khuyến khích sử dụng các điều kiện cơ sở giao hàng này. Phiên bản đầu tiên được ấn hành năm 1936 và phiên bản gần đây nhất là INCOTERMS 2010.

Phiên bản 2000 có một số thay đổi so với phiên bản trước đó, INCOTERMS 1990. Phiên bản 1990 cũng có những thay đổi đáng kể so với các phiên bản trước nữa, nhằm thích ứng với những thay đổi về công nghệ và thực tiễn giao nhận hàng hoá trong thập kỉ 80. Theo ICC, 'lí do cơ bản cho sự ra đời của phiên bản 1990 là mong muốn các điều kiện cơ sở giao hàng thích ứng với sự xuất hiện của dữ liệu điện tử (EDI)'. Theo đó, các điều kiện cơ sở giao hàng cho phép các bên chuyển giao chứng từ ở dạng dữ liệu điện tử, kể cả vận đơn, khi hợp đồng chỉ rõ việc chuyển giao bằng phương thức này. Lí do tiếp theo là phiên bản này bắt nguồn từ 'các kĩ thuật vận tải, đặc biệt là việc vận tải hàng hoá bằng container, vận tải đa phương thức, giao nhận "roll-on roll-off" bằng đường bộ và đường sắt'. Những điều kiện cơ sở giao hàng mà trước đây chỉ áp dụng cho vận tải đường bộ và hàng không như *Free on Rail* (FOR), *Free on Truck* (FOT) và *FOB Airport (FOB sân bay)*, nay đã bị loại bỏ, và thay vào đó là điều kiện *Free Carrier* được mở rộng.[20]

INCOTERMS 2010 bỏ đi 4 điều kiện (DAF, DES, DEQ và DDU) và bổ sung 2 điều kiện (DAP - *Delivered at Place*, và DAT - *Delivered at Terminal*), dẫn đến tổng số điều kiện cơ sở giao hàng là 11. INCOTERMS 2010 chính thức thừa nhận việc áp dụng các điều kiện cơ sở giao hàng trong thương mại nội địa và quốc tế. EXW - *Ex Work* đã chỉ ra rất rõ ràng là điều kiện này chỉ phù hợp với thương mại nội địa.

Phiên bản mới này không loại trừ hiệu lực của những phiên bản cũ. Do đó, các bên khi sử dụng INCOTERMS hay các điều kiện cơ sở giao hàng khác, phải chỉ rõ điều kiện cơ sở giao hàng theo nguồn nào mà họ muốn sử dụng. *Ví dụ,* nếu các bên sử dụng FOB trong hợp đồng mua bán, các bên phải làm rõ là FOB INCOTERMS 2000 hay FOB US UCC, vì cùng là chữ viết tắt FOB, nhưng nghĩa của chúng lại khác nhau. Bộ luật thương mại thống nhất Hoa Kỳ (UCC) quy định tại §2-319 về các điều kiện FOB và FAS, theo đó 'khi sử dụng FOB tên điểm đến, người bán phải chịu mọi rủi ro và chi phí để đưa hàng tới điểm đó và giao chúng theo đúng quy định tại điều này'. Tuy nhiên, FOB INCOTERMS 2000 chuyển giao rủi ro từ người bán sang người mua tại cảng đi.

Nếu các bên không chỉ rõ điều kiện cơ sở giao hàng nào được sử dụng, thì toà án hay trọng tài sẽ áp dụng nội dung của điều kiện cơ sở giao hàng mà luật nước họ sử dụng.[21] Các bên cũng không nên chấp nhận việc sử dụng bất kì một điều kiện cơ sở giao hàng cụ thể nào.

INCOTERMS của ICC được coi là bộ quy tắc hoàn hảo nhất, được nghiên cứu nhiều thời gian và cẩn trọng nhất. Các bên được quyền sửa đổi nội dung của những điều kiện cụ thể mà họ muốn sử dụng, nhưng không được làm sai bản chất của điều kiện đó. *Ví dụ*, FOB đã quy định rủi ro chuyển giao từ người bán sang người mua khi hàng qua lan can tàu tại cảng đi, thì các bên không thể sửa đổi là rủi ro chuyển giao từ người bán sang người mua tại cảng đến. Khi đó, toà án hay trọng tài sẽ bỏ qua phần sửa đổi này hoặc họ sẽ coi điều kiện này là vô hiệu.

2. Khái quát về các điều kiện cụ thể

Phần này tập trung vào các điều kiện của INCOTERMS 2010, vì đây là phiên bản cập nhật nhất cho tới thời điểm hiện nay (năm 2017).

Những điều kiện này chỉ áp dụng cho những phương thức vận tải nhất định. FAS, FOB, CFR, CIF chỉ áp dụng cho vận tải đường biển và đường thủy nội địa. Các điều kiện khác - EXW, FCA, CPT, CIP, DAT, DAP và DDP áp dụng cho bất kì hình thức vận tải nào.

Một số điều kiện bắt đầu bằng chữ '*Free*', đó là *Free Alongside the Ship* (FAS - 'Giao dọc mạn tàu'), *Free on Board* (FOB - 'Giao lên tàu'), *Free Carrier* (FCA - 'Giao cho người chuyên chở đầu tiên'). '*Free*' nghĩa là người

[20] Ray August, *International Business Law: Text, Cases, and Readings*, 4th edn. Pearson Prentice Hall, (2004), [CISG reviewed in Chapter 10: Sales], tr. 535-592.

[21] Ray August, Sđd.

bán có nghĩa vụ giao hàng cho người chuyên chở tới cảng được chỉ định. Điều kiện FAS ('giao dọc mạn tàu') yêu cầu người bán giao hàng tại cảng được chỉ định, và đặt hàng hoá dọc theo mạn tàu do người mua chỉ định theo phương cách truyền thống tại cảng đó. '*Alongside*' thường có nghĩa là hàng hoá phải trong phạm vi tay cẩu. Như vậy, người bán có thể sẽ phải thuê xà lan để chở hàng ra tàu vào vị trí quy định. Về những nội dung khác thì FAS cũng giống như FOB. Người bán có nghĩa vụ giao hàng dọc mạn tàu.

Một số điều kiện bắt đầu bằng 'C' ('*Cost*') (nghĩa là 'chi phí'). Điều kiện 'C' có thể đi kèm hoặc không đi kèm với điều kiện 'I' ('*Insurance*') (nghĩa là 'bảo hiểm') và điều kiện 'F' ('*Freight*') (nghĩa là 'cước phí tàu biển') hoặc điều kiện 'P' ('*Paid to*') (nghĩa là 'trả tới'). Điều kiện 'C' thường được người mua ưa chuộng, vì người mua chỉ có ít nghĩa vụ với hàng hoá, khi hàng hoá tới cảng đích hoặc điểm đích tại nước họ. Các điều kiện 'C' yêu cầu người bán thu xếp việc vận tải bằng đường biển tới cảng đích và chuyển giao chứng từ cần thiết, để người mua nhận hàng từ người chuyên chở, và có thể khiếu nại người bảo hiểm trong trường hợp mất hàng hoặc hàng bị thiệt hại. Tuy nhiên, các điều kiện 'C' và điều kiện '*Free*' là các điều kiện theo đó rủi ro được chuyển giao từ người bán sang người mua tại cảng đi. Nghĩa là, rủi ro chuyển giao từ người bán sang người mua khi hàng lên tàu theo CIF, FOB INCOTERMS 2010. Đây là một ưu điểm của INCOTERMS 2010 so với INCOTERMS 2000, vì INCOTERMS 2000 tạo ra ranh giới chuyển giao rủi ro trong tưởng tượng là lan can tàu.

Các điều kiện 'D' yêu cầu người bán giao hàng cho người mua tại địa điểm theo thoả thuận. Điều kiện 'C' khác với điều kiện 'D', mặc dù nghĩa vụ của người bán trong hai nhóm điều kiện này là tương tự nhau. Người bán, theo nhóm điều kiện 'D', phải chịu mọi rủi ro về hàng hoá cho đến khi giao hàng cho người mua.

Mục 3. PHÁP LUẬT VỀ HỢP ĐỒNG MUA BÁN HÀNG HÓA QUỐC TẾ

1. Công ước Viên 1980 về hợp đồng mua bán hàng hoá quốc tế ('CISG')

Công ước Viên về hợp đồng mua bán hàng hoá quốc tế (sau đây gọi là 'CISG') do Ủy ban Liên hợp quốc về Luật thương mại quốc tế ('UNCITRAL') soạn thảo và được thông qua tại Viên năm 1980. CISG được soạn thảo trên cơ sở nỗ lực xây dựng luật thống nhất về mua bán hàng hoá quốc tế, dựa trên hai công ước đã có trước đó - Công ước liên quan đến Luật thống nhất về giao kết hợp đồng mua bán hàng hoá quốc tế (Uniform Law on the Formation of Contracts for the International Sales 'ULF'), và Công ước liên quan đến Luật thống nhất về mua bán hàng hoá quốc tế (Uniform Law on the International Sales of Goods - 'ULIS') đều được thông qua ở La Hay năm 1964. Tuy nhiên, hai công ước này không được sử dụng rộng rãi. Ngày nay, CISG đã được chấp nhận trên phạm vi toàn cầu[22] và được xem là công ước thành công nhất góp phần thúc đẩy thương mại quốc tế. Kể từ khi CISG có hiệu lực vào ngày 1/1/1988, đến thời điểm cuối tháng 12/2017, số lượng thành viên của CISG đã tăng lên 88 nước.[23]

CISG bao gồm 101 điều khoản và được chia thành 4 phần:

- Phần I (từ Điều 1 đến Điều 13) quy định về phạm vi áp dụng Công ước và các điều khoản chung;
- Phần II (từ Điều 14 đến Điều 24) quy định về giao kết hợp đồng;
- Phần III (từ Điều 25 đến Điều 88) bao gồm các quy định thực chất điều chỉnh hợp đồng mua bán, trong đó quy định quyền và nghĩa vụ của các bên, và các biện pháp khắc phục vi phạm hợp đồng;
- Phần IV (từ Điều 89 đến Điều 101) quy định việc phê chuẩn và hiệu lực của Công ước, bao gồm cả quy định về bảo lưu Công ước.

Quy định bảo lưu Công ước rất quan trọng, vì một nước, khi quyết định có thông qua CISG hay không, luôn xem xét các quy định về bảo lưu. Các nước phê chuẩn Công ước có thể lựa chọn 3 cách sau để bảo lưu việc áp dụng Công ước: *Thứ nhất*, việc bảo lưu áp dụng Công ước có thể *ngăn cấm* việc áp dụng CISG, *ví dụ*, CISG có thể không được áp dụng trên toàn lãnh thổ của một nhà nước liên bang (Điều 93); CISG có thể không áp dụng giữa các nước đã có sự thoả thuận có đi có lại về việc này;[24] CISG không thể áp dụng khoản 1(b) Điều 1[25] mà chỉ áp dụng khoản 1(a) Điều

[22] Peter Schlechtriem và Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, 2nd edn., (2005), tr. 1.

[23] UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, truy cập ngày 25/12/2017.

[24] Bảo lưu bởi các nước Scandinavi.

[25] Bảo lưu bởi Hoa Kỳ, Trung Quốc, Slovakia, Singapore và Cộng hoà Séc.

1. *Thứ hai,* việc bảo lưu nhằm *hạn chế* áp dụng CISG như quy định tại Điều 92, theo đó Phần II hoặc Phần III của Công ước được loại trừ.[26] Điều này chứng tỏ CISG là một 'công ước kép', bao gồm cả ULF (điều chỉnh việc giao kết hợp đồng) và ULIS (quy phạm thực chất). *Thứ ba,* việc bảo lưu làm *thay đổi* nội dung của CISG. *Ví dụ*, bảo lưu việc áp dụng Điều 11, theo đó hợp đồng phải được giao kết bằng hình thức viết.[27]

CISG thể hiện một số nội dung chính như sau: (A) Tiêu chí xác định một hợp đồng mua bán hàng hoá quốc tế theo quy định của CISG; (B) Phạm vi áp dụng CISG; (C) Giao kết hợp đồng mua bán hàng hoá quốc tế; (D) Nghĩa vụ của bên bán và bên mua; và (E) Các biện pháp khắc phục vi phạm hợp đồng mua bán hàng hoá quốc tế.

A. *Tiêu chí xác định một hợp đồng mua bán hàng hoá quốc tế theo quy định của CISG*

Điều 1 của CISG quy định về 'trụ sở kinh doanh của các bên tham gia hợp đồng' như là tiêu chí để xác định một hợp đồng là hợp đồng mua bán hàng hoá quốc tế, theo đó một hợp đồng được xem là hợp đồng mua bán hàng hoá quốc tế, nếu các bên tham gia kí kết hợp đồng có trụ sở kinh doanh tại các nước khác nhau, khi mà các nước này là thành viên của CISG, hoặc khi mà quy phạm tư pháp quốc tế dẫn chiếu đến việc áp dụng luật của một nước thành viên của CISG. Như vậy, yếu tố quốc tịch hay tính chất thương mại hay dân sự của các bên trong hợp đồng không ảnh hưởng đến việc xác định 'tính quốc tế' của hợp đồng mua bán hàng hoá theo quy định của CISG.

B. *Phạm vi áp dụng CISG*

1. CISG được áp dụng cho hợp đồng mua bán hàng hoá quốc tế trong hai trường hợp sau:

Thứ nhất, nếu có điều khoản chọn luật áp dụng dẫn chiếu tới CISG, thì CISG sẽ được áp dụng. Nếu cơ quan tài phán tôn trọng quyền tự do hợp đồng của các bên, thì các bên trong hợp đồng mua bán hàng hoá quốc tế có thể tự do lựa chọn CISG là luật điều chỉnh hợp đồng mua bán của họ.[28]

Thứ hai, nếu các bên tham gia hợp đồng không thoả thuận rõ ràng hoặc thoả thuận ngầm về việc coi luật áp dụng cho hợp đồng là CISG, thì lúc đó CISG sẽ được áp dụng theo khoản 1 Điều 1.

Theo khoản 1(a) Điều 1, nếu không có quy phạm tư pháp quốc tế nào được áp dụng, thì CISG sẽ được áp dụng. Theo khoản 1(b) Điều 1, nếu các quy phạm tư pháp quốc tế dẫn chiếu đến luật của một nước kí kết, thì luật áp dụng sẽ là CISG.

2. CISG không được áp dụng trong ba trường hợp sau đây:

Thứ nhất, không được áp dụng CISG để điều chỉnh một số giao dịch nhất định theo quy định của Điều 2, từ (a) đến (d) - mua bán hàng tiêu dùng, hàng bán đấu giá, hoặc nhằm thực thi pháp luật hoặc quyền lực khác theo luật, và mua bán chứng khoán.

Thứ hai, không được áp dụng CISG để điều chỉnh một số giao dịch liên quan đến một số hàng hoá nhất định theo quy định tại Điều 2 từ (e) đến (f) và Điều 3 - tàu thuỷ, máy bay, điện, bất động sản; và các hợp đồng trong đó phần lớn nghĩa vụ của bên cung ứng hàng hoá là cung ứng lao động hoặc thực hiện các dịch vụ khác.

Thứ ba, không áp dụng CISG để điều chỉnh một số vấn đề quy định tại Điều 4 và Điều 5 - tính hiệu lực của hợp đồng, sự tác động có thể phát sinh từ hợp đồng đối với quyền sở hữu hàng hoá đối tượng của hợp đồng mua bán, trách nhiệm của người bán đối với thiệt hại mà hàng hoá gây ra cho bất kì người nào.

C. *Giao kết hợp đồng mua bán hàng hoá quốc tế*

Theo CISG, hợp đồng mua bán quốc tế được giao kết 'khi chấp nhận chào hàng có hiệu lực phù hợp với các quy định của Công ước.'[29] Điều này có nghĩa là CISG chấp nhận mô hình cổ điển về trao đổi chào hàng và chấp nhận chào hàng, và không đòi hỏi thêm các yếu tố khác như hình thức hợp đồng,[30] hay sự 'cân nhắc lợi ích' ('consideration').

[26] Bảo lưu bởi Đan Mạch, nhằm loại trừ áp dụng Phần II CISG. Do đó, tư pháp quốc tế sẽ được áp dụng để xác định luật điều chỉnh việc giao kết hợp đồng.

[27] Bảo lưu này là kết quả của các yêu cầu của Liên Xô và các nước Đông Âu tại các hội nghị ngoại giao, theo đó đòi hỏi phải quy định chặt chẽ về việc điều chỉnh hợp đồng mua bán hàng hoá quốc tế.

[28] Lưu ý rằng một số cơ quan tài phán có thể không tôn trọng sự lựa chọn luật áp dụng, nếu giao dịch mua bán hàng hoá không có yếu tố xuyên quốc gia.

[29] Điều 23 CISG.

[30] Điều 11 CISG, theo đó một hợp đồng không cần phải ở dạng văn bản, trừ khi bảo lưu ở Điều [96] cho phép Điều 12 có hiệu lực tại nước kí kết CISG.

1. Chào hàng

Một chào hàng là sự thể hiện rõ ràng ý chí của người chào hàng (muốn tự ràng buộc mình), được gửi đến cho một hay nhiều người xác định. Một lời đề nghị không được gửi đến cho một hay nhiều người xác định, chỉ có thể được coi là chào hàng, nếu điều này đã được biểu thị rõ ràng bởi người đưa ra chào hàng.[31] CISG không yêu cầu nhất thiết phải ấn định giá cả thì hợp đồng mới có hiệu lực. Một chào hàng được coi là đủ chính xác, khi bao gồm các điều khoản ấn định giá cả một cách trực tiếp hoặc gián tiếp.[32] Việc gửi bảng giá, ca-ta-lô và đặt quảng cáo, cũng như các việc tương tự khác, về nguyên tắc, không phải là chào hàng.[33] Chào hàng có hiệu lực khi nó tới nơi người được chào hàng.[34] Chào hàng, dù là loại chào hàng không thể bị huỷ ('irrevocable'), sẽ mất hiệu lực khi người chào hàng nhận được thông báo về việc từ chối chào hàng.[35]

Theo khoản 2 Điều 15, người chào hàng vẫn có thể thu hồi chào hàng, nếu thông báo thu hồi chào hàng đến được[36] người được chào hàng trước hoặc cùng lúc với chào hàng. Điều này được áp dụng đối với cả chào hàng không thể bị huỷ. Hơn nữa, người chào hàng vẫn có thể huỷ chào hàng sau khi chào hàng đã đến người được chào hàng, nhưng trước khi bên được chào hàng chấp nhận lời chào hàng. Quy định về việc *huỷ chào hàng*[37] xuất hiện như một sự thoả hiệp sau các cuộc thảo luận dai dẳng giữa đại diện của các hệ thống common law và civil law. Việc huỷ chào hàng, về cơ bản, không có gì khác so với quy định vốn có của hệ thống common law. Không thể huỷ chào hàng, nếu đó là chào hàng không thể bị huỷ (được thể hiện một cách rõ ràng hay ẩn ý), hoặc nếu bên được chào hàng đã tiến hành hoạt động theo chào hàng.

2. Chấp nhận chào hàng

Bằng việc chấp nhận chào hàng, người được chào hàng thể hiện sự đồng ý của mình đối với chào hàng.[38] Ngay khi người chào hàng nhận

[31] Khoản 1 Điều 14 CISG.

[32] Khoản 1 Điều 14 CISG.

[33] Toà án tối cao Hungary, ngày 25/9/1992 (1993) ZEuP 79.

[34] Khoản 1 Điều 15 CISG.

[35] Điều 17 CISG.

[36] Theo Điều 24 CISG, 'đến được' nghĩa là lời chào hàng, tuyên bố chấp nhận chào hàng, hoặc bất kì sự biểu lộ nào khác được nói ra hoặc được thể hiện bởi bất kì phương thức nào khác, đến được người chào hàng, trụ sở kinh doanh hoặc địa chỉ email hoặc nơi thường trú của người chào hàng.

[37] Điều 16 CISG.

[38] Khoản 1 Điều 18 CISG.

được sự đồng ý đối với chào hàng, thì chấp nhận chào hàng sẽ có hiệu lực và hợp đồng được giao kết. Các hành vi của người chấp nhận chào hàng, ví dụ như giao hàng hay thanh toán tiền, có thể biểu lộ sự chấp nhận chào hàng gián tiếp. Điều này có thể xảy ra khi chào hàng đã thể hiện rõ là cho phép việc chấp nhận chào hàng như vậy, hoặc việc chấp nhận chào hàng gián tiếp đã trở thành tập quán, hoặc điều đó phù hợp với tập quán thương mại.[39] Hợp đồng sau đó sẽ có hiệu lực tại thời điểm chấp nhận chào hàng gián tiếp. Tuy nhiên, sự im lặng hoặc không hành động tự nó không được coi là chấp nhận chào hàng. Một chấp nhận chào hàng thông thường sẽ không có hiệu lực, nếu chấp nhận chào hàng đó không đến được người chào hàng trong một khoảng thời gian hợp lí, hoặc trong một khoảng thời gian nhất định.[40] Chấp nhận chào hàng có thể được rút lại, nếu việc rút lại chấp nhận chào hàng đến người chào hàng cùng lúc, hoặc trước khi chấp nhận chào hàng có hiệu lực.[41]

Nếu chấp nhận chào hàng đến muộn, người chào hàng có thể chấp nhận điều này, nhưng phải thông báo cho người được chào hàng trong thời gian sớm nhất có thể. Ngược lại, nếu chấp nhận chào hàng đến muộn (*ví dụ* điển hình như các vấn đề về giao hàng, bưu chính đình công…), nhưng lẽ ra là đến kịp trong điều kiện bình thường, thì người chào hàng ngay lập tức phải thông báo cho người được chào hàng, nếu người chào hàng không chấp nhận điều này.[42]

Một chấp nhận chào hàng làm thay đổi chào hàng ban đầu, thông thường sẽ là 'chào hàng ngược', 'chào hàng đối', 'chào hàng mới' hay 'hoàn giá chào' ('counter-offer'), nếu những thay đổi/sửa đổi đó là cơ bản.[43] Sau đó, 'chào hàng mới' này phải được người chào hàng ban đầu chấp nhận.

D. *Nghĩa vụ của bên mua và bên bán*

Về nguyên tắc, nghĩa vụ của bên mua và bên bán được xác định theo hợp đồng và theo CISG, với tư cách luật áp dụng cho hợp đồng. Tuy nhiên, theo quy định tại Điều 9, các bên bị ràng buộc bởi bất kì tập quán nào mà họ đã thoả thuận, hoặc bởi bất kì thói quen nào mà họ đã thiết lập. Do đó, bên mua và bên bán phải thực hiện các nghĩa vụ theo hợp đồng, theo CISG, và

[39] Khoản 3 Điều 18 CISG.

[40] Điều 18 và Điều 20 CISG.

[41] Điều 22 CISG.

[42] Điều 21 CISG.

[43] Về thay đổi cơ bản, xem chi tiết hơn ở khoản 2 Điều 19 CISG.

các thói quen và tập quán. Theo CISG, bên mua và bên bán phải tuân theo các nghĩa vụ sau:

1. Nghĩa vụ của bên bán

(a) Bên bán phải giao hàng phù hợp và không phụ thuộc vào bên thứ ba

Giao hàng là sự bàn giao thực tế hàng hoá cho bên mua. Nếu không có thoả thuận nào về nơi giao hàng, thì bên bán, về nguyên tắc, phải giao hàng tại nơi bên bán có địa điểm/trụ sở kinh doanh tại thời điểm giao kết hợp đồng. Bên bán phải giao hàng vào ngày đã được thoả thuận trong hợp đồng hoặc được hiểu ngầm trong hợp đồng. Nếu ngày giao hàng không được ấn định, thì nguyên tắc về sự hợp lí sẽ được áp dụng.

Hàng hoá được giao phải phù hợp. Tính phù hợp của hàng hoá[44] được hiểu là hàng hoá phải đúng chất lượng, số lượng và mô tả ghi trong hợp đồng và được đóng gói theo cách thức đã được yêu cầu rõ ràng trong hợp đồng,[45] hoặc như khi bán hàng mẫu.[46]

Thêm vào đó, bên bán phải giao những hàng hoá không bị phụ thuộc vào bất cứ quyền hạn hay khiếu nại nào của bên thứ ba, trừ trường hợp người mua đồng ý nhận loại hàng bị phụ thuộc vào quyền hạn và khiếu nại như vậy.[47] Bên bán phải bảo vệ bên mua không chỉ để chống lại những khiếu nại đủ căn cứ, mà còn cả những khiếu nại thiếu căn cứ. Bên mua phải thông báo[48] cho bên bán trong một khoảng thời gian hợp lí về sự tồn tại của bất kì quyền hạn hay khiếu nại nào, trừ khi bên bán đã biết về điều đó. CISG có quy định riêng đối với hàng hoá là đối tượng khiếu nại liên quan đến IPRs.[49]

(b) Bên bán phải giao các tài liệu, chứng từ liên quan đến hàng hoá được giao.

2. Nghĩa vụ của bên mua

(a) Bên mua phải nhận hàng

Việc nhận hàng[50] có quan hệ chặt chẽ với việc chuyển giao rủi ro. Bên mua phải làm tất cả mọi việc để việc giao hàng có thể diễn ra.[51] Do đó, bên mua, nếu cần thiết, phải thông báo cho bên bán địa điểm giao hàng cụ thể. Bên mua phải thật sự sở hữu hàng hoá.[52] Về nguyên tắc, rủi ro được chuyển giao tại nơi giao nhận hàng. Nếu bên mua không nhận hàng, thì sẽ bị coi là vi phạm hợp đồng. Điều này có thể sẽ khiến bên mua phải chịu trách nhiệm về bất kì thiệt hại nào xảy ra đối với hàng hoá. Vấn đề chuyển giao rủi ro được quy định tại các điều từ Điều 66 đến Điều 70.[53] Chuyển giao rủi ro liên quan đến hợp đồng, bao gồm vận tải, được quy định tại Điều 67; nếu liên quan đến hàng hoá quá cảnh, thì xem quy định tại Điều 68.

(b) Bên mua phải thanh toán tiền hàng

Thanh toán tiền hàng là nghĩa vụ chính của bên mua.[54] Nghĩa vụ thanh toán bao gồm 4 yếu tố chính: Xác định giá hàng; Nơi thanh toán; Thời điểm thanh toán; và Phương thức thanh toán. Các yếu tố này thông thường đã được thoả thuận trong hợp đồng. Tuy nhiên, trong hợp đồng, các yếu tố này có thể vẫn có những sự mơ hồ, khó hiểu. Trong trường hợp đó, các quy định bổ sung của CISG sẽ được áp dụng. Vì vậy, trừ khi hợp đồng quy định khác đi, bên mua phải thanh toán tại trụ sở kinh doanh của bên bán hoặc tại nơi giao hàng,[55] mà không cần phải thông báo[56] khi nào hàng hoá hoặc tài liệu, chứng từ thuộc quyền kiểm soát của bên mua.[57] Thủ tục thanh toán cũng là trách nhiệm của bên mua.

E. *Các biện pháp khắc phục vi phạm hợp đồng*

Trong quá trình thực hiện hợp đồng mua bán hàng hoá quốc tế, nếu một bên vi phạm hợp đồng, bên kia có thể áp dụng các biện pháp khắc phục đã được thống nhất trong hợp đồng, hoặc đã được quy định trong CISG. Cần phải ghi nhớ rằng việc áp dụng các biện pháp khắc phục trong CISG phụ thuộc vào việc liệu đã xảy ra vi phạm hợp đồng hay chưa. Tiếc rằng, CISG lại không định nghĩa thế nào là vi phạm hợp đồng. Tuy nhiên,

44 Điều 35 CISG.

45 Khoản 1 Điều 35 CISG.

46 Khoản 2 Điều 35 CISG.

47 Điều 41 CISG.

48 Thông báo về trách nhiệm của người mua, *xem:* Điều 43 và Điều 44 CISG.

49 Điều 42 CISG.

50 Điều 53 và Điều 60 CISG.

51 Điều 60(a) CISG.

52 Điều 60(b) CISG.

53 Neil Gary Oberman, 'Transfer of Risk from Seller to Buyer in International Commercial Contracts: A Comparative Analysis of Risk Allocation under the CISG, UCC and INCOTERMS', Luận văn Thạc sĩ, xem toàn văn tại, http://www.cisg.law.pace.edu/cisg/thesis/Oberman.html.

54 Từ Điều 54 đến Điều 59 CISG.

55 Điều 57 CISG.

56 Điều 59 CISG.

57 Điều 58 CISG.

vi phạm hợp đồng có thể được hiểu thông qua hệ thống các biện pháp khắc phục vi phạm hợp đồng theo quy định của CISG[58] và khoản 1 Điều 79,[59] theo đó 'vi phạm hợp đồng' bao gồm tất cả các hình thức thực hiện không đúng, cũng như hoàn toàn không thực hiện hợp đồng. Nghĩa vụ theo hợp đồng có thể hoặc là được xác định rõ ràng trong CISG (*ví dụ*: Giao hàng đúng thời gian,[60] đúng địa điểm[61] và giao đúng hàng,[62] v.v..), hoặc là được thiết lập và xác định bởi các bên.

Bên cạnh đó, để lựa chọn biện pháp khắc phục vi phạm hợp đồng, việc biết được liệu một vi phạm có được coi là 'vi phạm hợp đồng cơ bản'[63] hay không, rất quan trọng. Một vi phạm hợp đồng cơ bản bao gồm hai yếu tố: (i) Phải có sự thiệt hại đáng kể, làm cho bên chịu thiệt hại mất đi những gì anh ta có quyền chờ đợi trên cơ sở hợp đồng; (ii) Có thể tiên liệu được hậu quả của vi phạm. Do đó, việc của bên vi phạm là phải chứng minh được rằng anh ta, hay bất kì người nào có lí trí bình thường, không thể tiên liệu được hậu quả, khi ở vào địa vị và hoàn cảnh tương tự.[64]

1. Các biện pháp khắc phục vi phạm hợp đồng được áp dụng bởi bên mua

Nếu bên bán không thực hiện bất kì nghĩa vụ nào của mình, bên mua có thể, tùy hoàn cảnh cụ thể, áp dụng một số biện pháp khắc phục như sau:

[58] Điều 45 CISG liệt kê các biện pháp khắc phục vi phạm hợp đồng mà bên mua có thể áp dụng:

(1) Nếu người bán không thực hiện bất kì một nghĩa vụ nào đó của họ theo hợp đồng hay theo Công ước này, bên mua có thể:

(a) Thực hiện các quyền của mình theo quy định tại các điều từ Điều 46 đến Điều 52 CISG;

(b) Đòi bồi thường thiệt hại theo quy định tại các điều từ Điều 74 đến Điều 77.

Theo Điều 61,

(1) Nếu người mua không thực hiện một nghĩa vụ nào đó theo hợp đồng mua bán hoặc theo Công ước này, người bán có thể:

(a) Thực hiện các quyền theo quy định tại các điều từ Điều 62 đến Điều 65;

(b) Đòi bồi thường thiệt hại theo quy định tại các điều từ Điều 74 đến Điều 77 CISG.

[59] 'Một bên không phải chịu trách nhiệm về việc không thực hiện bất kì nghĩa vụ nào, nếu chứng minh được rằng việc không thực hiện nghĩa vụ là do trở ngại vượt ngoài khả năng kiểm soát của mình, và do vậy cũng hợp lí khi không thể hi vọng rằng anh ta lường trước được trở ngại đó tại thời điểm kí kết hợp đồng'.

[60] Điều 33 CISG (thời gian giao hàng).

[61] Điều 31 CISG (địa điểm giao hàng).

[62] Điều 35 CISG (tính phù hợp của hàng hoá).

[63] Điều 25 CISG; và A. Lorenz, *Fundamental Breach under CISG*, nguồn: http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html

[64] Điều 25 CISG.

- Buộc thực hiện đúng hợp đồng[65];
- Gia hạn thời gian thực hiện nghĩa vụ[66];
- Tuyên bố huỷ hợp đồng,[67] yêu cầu được thông báo theo Điều 26;[68]
- Giảm giá;69
- Áp dụng các biện pháp khắc phục đối với việc chỉ giao hàng từng phần, hoặc giao hàng không phù hợp;70
- Bồi thường thiệt hại.71

Trước khi áp dụng các biện pháp khắc phục nêu trên, bên mua cũng có thể gia hạn cho bên bán để bên bán thực hiện nghĩa vụ của mình. Khi nhận thấy rõ ràng rằng bên bán sẽ không hoàn thành các nghĩa vụ của mình, bên mua có thể tạm ngừng hoặc huỷ hợp đồng, kể cả đó là vi phạm cơ bản ban đầu. Số tiền bồi thường thiệt hại được xác định trên cơ sở mức độ thiệt hại, bao gồm cả lợi nhuận bị mất.[72]

Cần phải lưu ý rằng trong trường hợp liên quan đến giao hàng không phù hợp/giao hàng sai, bên mua phải kiểm tra hàng hoá và

[65] Điều 46 và Điều 28 CISG.

[66] Điều 47 và Điều 48 CISG.

[67] Điều 49 CISG.

[68] Điều 49 CISG.

[69] Điều 50 CISG.

[70] Điều 51 CISG.

[71] Từ Điều 74 đến Điều 77 CISG.

[72] Một vấn đề quan trọng khác nữa là việc lượng hoá tiền bồi thường thiệt hại. *Xem*: các điều từ Điều 74 đến Điều 78 CISG. Điều 74 CISG quy định có lợi cho trường hợp bồi thường thiệt hại trên cơ sở doanh thu bị mất và chi phí cho việc thiết kế một phần mềm mới. Để xác định các vấn đề pháp lí liên quan đến các điều khoản CISG, *xem* http://www.cisg.law.pace.edu/cisg/text/ cisgthes.html (UNCITRAL CISG Thesaurus - Outline of Legal Issues). Về thiệt hại và lượng hóa thiệt hại, *cf*. Joanne Darkey, 'A U.S. Court's Interpretation of Damage Provisions under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step towards an International Jurisprudence of CISG or A Missed Opportunity?', 15 *Journal of Law & Commerce (J. Int'l L. & Com.)*, tr. 139-152 (1995), http://www.cisg.law.pace.edu/cisg/biblio/ darkey2.html; Arthur Murphey, 'Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley', 23 *George Washington Journal of International Law & Economics.* (1989), tr. 415-474, http://www.cisg.law.pace.edu/cisg/biblio/murhey.html; Eric Schneider, 'Consequential Damages in the International Sale of Goods: Analysis of Two Decisions' [*Delchi Carrier S.p.A. v. Rotorex Corp.* (CISG decision: U.S. Dist. Ct. 1994) and Bundesgerichtshof, 24 November 1980 (ULIS decision: BGH)] 16 *Journal of International Business Law* (1996), tr. 615-688; Jeffrey Sutton, 'Measuring Damages under the United Nations Convention on the International Sale of Goods', 50 Ohio St. L.J. (1989), tr. 737-752, http://www.cisg.law.pace.edu/cisg/biblio/sutton.html

thông báo về việc hàng không phù hợp trong một khoảng thời gian hợp lí. Nếu bên mua không thực hiện điều này, thì bên mua sẽ bị mất hoàn toàn quyền áp dụng các biện pháp khắc phục vi phạm hợp đồng.

2. Biện pháp khắc phục vi phạm hợp đồng được áp dụng bởi bên bán

Các biện pháp khắc phục vi phạm hợp đồng được áp dụng bởi bên bán cũng giống như bởi bên mua:[73] Bên bán cũng có thể yêu cầu buộc thực hiện đúng hợp đồng, tuyên bố huỷ hợp đồng và đòi bồi thường thiệt hại. Bên bán cũng có thể cho bên mua thêm thời gian thực hiện nghĩa vụ của mình. Cũng giống như bên mua, bên bán có thể ngừng thực hiện các nghĩa vụ của mình hoặc huỷ hợp đồng, nếu nhận thấy rõ ràng rằng bên mua sẽ không thực hiện các nghĩa vụ của mình.

CISG quy định các biện pháp khắc phục vi phạm hợp đồng tương đương cho cả bên mua và bên bán. Hơn nữa, sự miễn trừ cũng áp dụng đối với cả hai bên. Điều này có nghĩa là bên mua hoặc bên bán không phải chịu trách nhiệm khi không thực hiện nghĩa vụ của mình, nếu việc đó là do có sự cản trở nằm ngoài khả năng kiểm soát của bên mua hoặc bên bán, làm cho họ không thể thực hiện được nghĩa vụ của mình. Sự cản trở này được hiểu là bất khả kháng,[74] và không thực hiện được nghĩa vụ do hành động thiếu sót của bên kia.[75] Hơn nữa, cả bên mua và bên bán đều phải cố gắng hạn chế thiệt hại cho đối tác kinh doanh của mình.[76]

Nhìn chung, qua các điều khoản của CISG, có thể thấy rằng CISG dường như là một trong những minh chứng thành công nhất về việc thống nhất luật điều chỉnh hợp đồng mua bán hàng hoá quốc tế.

2. Bộ nguyên tắc của UNIDROIT về hợp đồng thương mại quốc tế năm 2010 - PICC

Bộ nguyên tắc của UNIDROIT về hợp đồng thương mại quốc tế (viết tắt là 'PICC') là một công cụ quan trọng khác của luật thương mại quốc tế, có liên quan đến hoạt động mua bán hàng hoá quốc tế.

Mục A dưới đây sẽ làm rõ hơn các nguyên tắc trên là gì và sự ảnh hưởng ngày càng lớn của chúng đối với luật hợp đồng quốc tế nói chung. Mục B sẽ nghiên cứu phạm vi áp dụng của các nguyên tắc này đối với hợp đồng mua bán hàng hoá quốc tế.

73 Các điều từ Điều 61 đến Điều 65 CISG.

74 Điều 79 CISG.

75 Điều 80 CISG.

76 Điều 77 CISG.

A. *Khái quát về PICC*

UNIDROIT là tổ chức liên chính phủ, trụ sở tại Rome (Italia), hoạt động như tên gọi của nó - hài hoà hoá pháp luật. Cùng với các sáng kiến khác, UNIDROIT giữ vai trò quan trọng trong việc tạo ra những cố gắng ban đầu nhằm hài hoà hoá pháp luật về hợp đồng mua bán hàng hoá quốc tế. Trong thời gian gần đây, PICC là một trong những thành quả nổi bật của UNIDROIT. Đề án được bắt đầu vào năm 1971. Bản dự thảo đầu tiên được soạn thảo công phu bởi ba luật sư danh tiếng trong lĩnh vực luật so sánh - Giáo sư R. David (thuộc hệ thống civil law), Giáo sư C. Schmithoff (thuộc hệ thống common law), và Giáo sư T. Popescu (thuộc hệ thống luật XHCN). Năm 1980, một Nhóm công tác đã tiếp tục công việc một cách hiệu quả và thành thạo dưới sự chủ trì của Giáo sư J. Bonell (Italia). Qua nhiều năm, các thành viên của Nhóm cũng thay đổi, tuy nhiên mối quan tâm hàng đầu luôn được đặt ra là cố gắng đảm bảo tính đại diện của các hệ thống luật pháp cơ bản trên toàn thế giới.[77] Từ giai đoạn thứ hai của đề án, các quan sát viên đã được mời tham dự các cuộc họp, nhằm hướng đến lợi ích từ hoạt động phản biện của các tổ chức như Hội nghị La Haye, UNCTAD, Hiệp hội luật sư quốc tế ('IBA'), ICC và các tổ chức trọng tài khác.

PICC là sự pháp điển hoá luật hợp đồng nói chung, mà chính các quy định này (còn được gọi là 'black letter rules' - 'quy định cơ bản') sẽ được bình luận và minh họa. Điểm cơ bản là Bộ nguyên tắc này không phải là dự thảo cho một công ước quốc tế trong tương lai, như CISG (*xem* nội dung ở trên). Bộ nguyên tắc này được coi như một công cụ 'luật mềm', không mang bất kì giá trị quy phạm nào - tương tự như INCOTERMS được soạn thảo bởi ICC. PICC được xuất bản đơn giản như một cuốn sách[78] và bất kì ai quan tâm cũng có thể sử dụng các nội dung trong cuốn sách đó.

Những trường hợp có thể áp dụng và bản chất của PICC được đề cập trong *Lời nói đầu*:

> Bộ nguyên tắc đưa ra các quy tắc chung dưới đây cho hợp đồng thương mại quốc tế.

77 Châu Á có đại diện là các chuyên gia đến từ Nhật Bản và Trung Quốc.

78 *UNIDROIT Principles of International Commercial Contracts 2010*, UNIDROIT, Rome.

Bộ nguyên tắc này được áp dụng khi các bên thoả thuận rằng hợp đồng của họ sẽ được điều chỉnh bằng Bộ nguyên tắc này.

Bộ nguyên tắc này có thể được áp dụng khi các bên thoả thuận rằng hợp đồng của họ sẽ được điều chỉnh bởi các nguyên tắc chung của pháp luật, '*lex mercatoria*' hoặc cách diễn đạt tương tự như vậy.

Bộ nguyên tắc này có thể được áp dụng khi các bên không chọn luật điều chỉnh hợp đồng của họ.

Bộ nguyên tắc này có thể được sử dụng để bổ sung hoặc giải thích các văn bản luật quốc tế thống nhất.

Bộ nguyên tắc này có thể được sử dụng để bổ sung hoặc giải thích cho luật trong nước.

Bộ nguyên tắc này có thể được sử dụng làm mẫu cho các nhà làm luật quốc gia và quốc tế.

Sau khi xuất bản bản lần đầu tiên vào năm 1994, PICC đã nhanh chóng trở thành nguồn tham khảo chính. Trong giới hàn lâm, PICC cũng không hề bị thờ ơ mà ngày càng được quan tâm. Phải thừa nhận ở nhiều góc độ rằng, hầu hết các mục đích được đề cập trong Lời nói đầu đều đã đạt được.

Mặc dù việc thu thập dữ liệu chính xác về vấn đề này không phải dễ dàng, nhưng thực tế đã diễn ra việc các bên trong hợp đồng quốc tế lựa chọn PICC như là luật điều chỉnh quan hệ hợp đồng của họ.[79] Tuy nhiên, còn nhiều tranh cãi về việc các bên có nên hay không nên lựa chọn các quy phạm 'luật mềm' để thay thế cho việc áp dụng các quy phạm của hệ thống pháp luật quốc gia, khi sử dụng chúng với tư cách là luật áp dụng cho hợp đồng của họ.

Trong bất kì trường hợp nào, PICC cũng giữ vai trò quan trọng khi mà các bên quyết định rằng hợp đồng của họ sẽ chịu sự điều chỉnh của *lex mercatoria* hay tập quán thương mại quốc tế. Nhiều phán quyết, cơ bản là của tổ chức trọng tài chứ không phải các toà trong nước, đều nhắc đến PICC nhằm chứng minh cho nội dung của công thức chung này. Thực tiễn cũng cho thấy sự dẫn chiếu thường xuyên đến PICC còn

[79] PICC cũng khuyến nghị các bên phải đưa vào hợp đồng thoả thuận sau: 'Hợp đồng này sẽ được điều chỉnh bởi Bộ nguyên tắc của UNIDROIT (2010) [ngoại trừ Điều…]'. Nếu các bên muốn bổ sung việc áp dụng luật của cơ quan xét xử nào đó, thì nên diễn đạt: 'Hợp đồng này sẽ được điều chỉnh bởi Bộ nguyên tắc của UNIDROIT (2010) [ngoại trừ Điều…], khi cần thiết sẽ được bổ sung bằng các quy định của [cơ quan xét xử X]'.

nhằm để hỗ trợ cho phán quyết được đưa ra trên cơ sở luật quốc gia hoặc luật quốc tế.[80]

Mặt khác, hiện nay PICC còn giữ vị trí hàng đầu trong số các động cơ thúc đẩy quá trình cải cách lập pháp đã và sẽ diễn ra ở một số nước, như Pháp, Đức, Nga, Litva, Estonia, Hungary, Thổ Nhĩ Kỳ và Trung Quốc. Trong tổ chức OHADA của 16 nước châu Phi, theo đề nghị của Hội đồng bộ trưởng, bản dự thảo Đạo luật thống nhất về luật hợp đồng đã lấy PICC làm mẫu.[81]

Hiện nay, một số hợp đồng mẫu được ICC cũng như Trung tâm thương mại quốc tế của WTO xây dựng cũng đưa ra lời khuyên cho các bên nên dẫn chiếu đến PICC để điều chỉnh những vấn đề chưa được đề cập trong hợp đồng mẫu.[82]

Bản đầu tiên của PICC được xuất bản vào năm 1994. Bản thứ hai được xuất bản vào năm 2004 và đã bổ sung một số chương mới về quyền đại diện, quyền của bên thứ ba (set-off), nhượng quyền, chuyển giao nghĩa vụ, chuyển giao hợp đồng và thời hiệu. Bản thứ ba xuất bản vào năm 2010 đã mang đến sự đổi mới cơ bản trong các vấn đề về hiệu lực, bồi thường, điều kiện và hợp đồng nhiều bên.[83]

PICC 2010 bao gồm 211 điều (trong khi đó chỉ có 120 điều ở bản năm 1994 và 185 điều ở bản năm 2004). Sau Lời nói đầu là 11 chương, bao gồm: (i) Điều khoản chung; (ii) Giao kết hợp đồng và quyền đại diện; (iii) Hiệu lực; (iv) Giải thích hợp đồng; (v) Nội dung, quyền của bên thứ ba và các điều kiện của hợp đồng; (vi) Thực hiện hợp đồng; (vii) Không thực hiện hợp đồng; (viii) Thực hiện bù nghĩa vụ (Set-off); (ix) Nhượng quyền, chuyển giao nghĩa vụ và chuyển giao hợp đồng; (x) Thời hiệu; (xi) Hợp

[80] Về vấn đề áp dụng PICC bởi các tổ chức trọng tài và toà án trong nước, *xem*: M. J. BONELL, *An International Restatement of Contract Law*, *The UNIDROIT Principles of International Commercial Contract*, Transnational Publishers, Ardsley, New York, 3rd edn., (2005), tr. 277-300, cũng như ngân hàng dữ liệu UNILEX (http://www.unilex.info). Toà phá án của Bỉ (*Cour de Cassation*) đã tham gia vào đội ngũ các toà án quốc gia có tham chiếu đến PICC (Cass., 19 June 2009, *D.A.O.R.* (2010), at 149, obs. PHILIPPE, *R.D.C.* (2010) at 879 , obs. MALFLIET).

[81] Về sự ảnh hưởng của PICC đối với cải cách lập pháp, *xem* M. J. BONELL, Sđd, tr. 268-271. Cụ thể hơn về dự thảo Đạo luật thống nhất của OHADA, *xem* 'The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts', *Unif. Law Rev,* (2004), tr. 573-584. PICC cũng được tham khảo trong các dự án hiện hành khác về hài hoà hoá luật hợp đồng ở các nước châu Phi nói tiếng Anh.

[82] *Ví dụ*: hợp đồng mẫu của ICC về nhượng quyền thương mại (Điều 32) và về đại diện (Điều 24); hợp đồng mẫu về liên doanh của Trung tâm thương mại quốc tế của WTO (Điều 31 về hợp đồng ba bên, Điều 23 về hợp đồng hai bên).

[83] Những điểm mới của bản PICC 2010 sẽ được phân tích trong số tạp chí sắp tới của *Uniform Law Review*, do UNIDROIT xuất bản.

đồng nhiều bên.[84]

Những giá trị tương ứng của common law và civil law đối với việc thúc đẩy hiệu quả kinh tế và phát triển là đối tượng của nhiều tranh cãi nảy lửa, được khơi mào trong các báo cáo *Doing Business* của Ngân hàng thế giới.[85] Về khía cạnh này, PICC là một 'sản phẩm' độc đáo, ra đời từ sự hội tụ của nhiều nguồn cảm hứng đa dạng - phản ánh thành phần mang tính đại diện toàn cầu của Nhóm công tác. CISG, bản thân nó là sản phẩm của những cuộc tranh luận giữa đại diện của các hệ thống luật pháp khác nhau, cũng trở thành hình mẫu cho một số điều khoản trong PICC (*xem* nội dung dưới đây).[86]

Điểm cuối cùng trong phần giới thiệu ngắn gọn này về PICC: Nhóm công tác thường xuyên quan tâm đến các nhu cầu và kì vọng của những nhà thực hành luật trong lĩnh vực hợp đồng quốc tế. PICC dành sự chú ý đặc biệt dành cho các điều khoản bị từ chối trong hoạt động pháp điển hoá quốc gia nói chung, nhưng lại xuất hiện vô cùng thường xuyên trong các hợp đồng thực tế.[87] *Ví dụ*: các điều từ Điều 2.1.2 đến Điều 2.1.22 của phần Giao kết hợp đồng,[88] cũng như các điều khoản về

[84] Sự sắp xếp theo trình tự những vấn đề khác nhau này không phải lúc nào cũng như ý, bởi vì đây là mối quan tâm lớn, khi các chương mới được bổ sung vào bản xuất bản đầu tiên, để làm sao việc đánh số các điều khoản chỉ phải chỉnh sửa một cách ít nhất có thể.

[85] Những báo cáo hàng năm này cố gắng xếp hạng những hệ thống pháp luật quốc gia khác nhau theo khả năng tạo thuận lợi cho kinh doanh của chúng; các báo cáo nhìn chung chỉ trích hệ thống civil law, trong khi đó lại vạch ra nhiều điểm tốt của hệ thống common law một cách không có căn cứ. Về quan điểm chỉ trích các báo cáo này, xem bài phân tích mở rộng của Association Henri Capitant, 'Les droits de la tradition civiliste en question. A propos des rapports *Doing Business* de la Banque Mondiale', Paris, S.L.C, (2006).

[86] Một cách tổng thể, PICC xuất hiện như một công cụ civil law, vì chúng có hình thức của một công trình pháp điển hoá có hệ thống. Nhưng sự đóng góp của common law là không thể phủ nhận, ví dụ, như điều khoản về ngăn ngừa vi phạm hợp đồng (Điều 7.3.3). *Restatement Second on Contracts* và *UCC* (*Bộ luật thương mại thống nhất Hoa Kỳ*) đã luôn luôn được đưa ra thảo luận. Một điều khoản như Điều 6.1.4, quy định về thực hiện hợp đồng song phương, đã chịu ảnh hưởng trực tiếp từ các quy định tương ứng của *Restatement* (§ 234). Mặt khác, các luật sư civil law sẽ cảm thấy thoải mái với các điều khoản chịu sự ảnh hưởng từ các quy định thuộc hệ thống pháp luật của họ, *ví dụ*, luật Đức (*Nachfrist* trong Điều 7.1.5), luật Ý (sự đồng ý trước của bên kia trong Điều 9.2.4 và Điều 9.3.4), hay luật Pháp (thừa nhận sự phân biệt giữa 'nghĩa vụ phải thực hiện các biện pháp theo quy định của pháp luật' - 'obligations de moyens', và 'nghĩa vụ đạt kết quả theo quy định của pháp luật' - 'obligations de résultat' trong Điều 5.1.4 và Điều 5.1.5). Điều quan trọng nhất là việc đưa các quy định pháp luật quốc gia vào PICC luôn luôn là kết quả của sự đồng thuận giữa các thành viên của Nhóm công tác, sau những cuộc thảo luận so sánh kĩ lưỡng.

[87] Về các điều khoản này trong thực tiễn, *xem* M. Fontaine và F. De Ly, *Drafting International Contracts. An Analysis of Contract Clauses*, (2006).

[88] *Xem:* các điều khoản về xác nhận bằng văn bản (Điều 2.1.12); giao kết hợp đồng phụ thuộc vào sự thoả thuận về hình thức và nội dung (Điều 2.1.13); hợp đồng với các điều khoản sẽ được quy định sau (Điều 2.1.14); nghĩa vụ bảo mật (Điều 2.1.16), các điều khoản về sáp nhập (Điều 2.1.17); và sửa đổi bằng hình thức đặc biệt (Điều 2.1.18).

trở ngại (từ Điều 6.2.1. đến 6.2.3) và sự kiện bất khả kháng (Điều 7.1.7). Sự quan tâm rõ ràng đó đã góp phần giúp PICC trở thành nguồn tham khảo hấp dẫn đối với các bên tham gia hoạt động thương mại quốc tế.

B. *PICC và hợp đồng mua bán hàng hoá quốc tế*

PICC có thể giữ vai trò gì liên quan đến hợp đồng mua bán hàng hoá quốc tế? Cụ thể, các nguyên tắc này có mối quan hệ thế nào tới các công cụ chuyên sâu hơn, như INCOTERMS và CISG, mà cả hai đều liên quan đến hợp đồng mua bán hàng hoá quốc tế?

Không giống như hai văn bản trên, PICC không được soạn thảo để điều chỉnh chuyên về hợp đồng mua bán hàng hoá quốc tế. PICC là các quy phạm có thể áp dụng cho hợp đồng thương mại nói chung; chúng được xây dựng để điều chỉnh bất kì loại hợp đồng nào, không dành riêng cho hợp đồng mua bán hàng hoá quốc tế, mà áp dụng cho các loại hợp đồng đa dạng như hợp đồng cho thuê, hợp đồng xây dựng, hợp đồng phân phối, hợp đồng chuyển giao công nghệ hay hợp đồng cung ứng. PICC nêu rõ các quy phạm chung liên quan chủ yếu đến giao kết hợp đồng, thực hiện hợp đồng và không thực hiện hợp đồng.

Điểm khác nhau cơ bản này đã đưa ra câu trả lời cho câu hỏi nêu trên. PICC, một mặt, giống với INCOTERMS và CISG, mặt khác cũng chứa đựng nhiều bổ sung. Trên thực tế, cả ba văn bản trên đều bổ sung cho nhau, mỗi văn bản thể hiện ở một mức độ khác nhau về tính khái quát và tính cụ thể.

CISG xây dựng các quy phạm để điều chỉnh nhiều khía cạnh quan trọng nhất của một hợp đồng mua bán hàng hoá quốc tế, như: Giao kết hợp đồng; Nghĩa vụ của bên bán (giao hàng, sự phù hợp của hàng hoá, quyền của bên thứ ba) và các biện pháp khắc phục vi phạm hợp đồng tương ứng cho người mua; Nghĩa vụ của người mua (thanh toán tiền hàng, nhận hàng) và các biện pháp khắc phục vi phạm hợp đồng tương ứng cho người bán; chuyển rủi ro; cũng như một số điều khoản áp dụng chung cho nghĩa vụ của cả hai bên.

INCOTERMS cũng điều chỉnh cụ thể về hợp đồng mua bán hàng hoá quốc tế, nhưng các quy định trong INCOTERMS chỉ điều chỉnh một vài vấn đề cụ thể, cơ bản là giao hàng và chuyển rủi ro, mỗi điều kiện cơ sở giao hàng đưa ra sự lựa chọn giữa những sắp xếp khác nhau, phù hợp với nhu cầu của các bên, và phụ thuộc vào bối cảnh kinh doanh của chính các bên. Một điều có thể thấy ngay rằng vấn đề chủ đạo của

INCOTERMS đã được một số điều khoản của CISG điều chỉnh, đó là các vấn đề về giao hàng và chuyển rủi ro. Tuy nhiên, các quy phạm này của CISG là các quy định chung, áp dụng cho bất kì hợp đồng mua bán hàng hoá quốc tế nào, trong khi đối với giao dịch mua bán cụ thể, các bên thường ưa chuộng các quy phạm cụ thể và tinh tế như INCOTERMS hơn là các quy định chung. Trong hoàn cảnh đó, việc lựa chọn một quy định theo INCOTERMS là hoàn toàn tương thích với việc áp dụng CISG, điều này đơn giản là INCOTERMS sẽ thay thế các điều khoản tương ứng của CISG (điều này được cho phép bởi Điều 6 CISG). Mặc khác, có thể thấy rằng, với tất cả các điều khoản khác giải quyết các vấn đề không được INCOTERMS điều chỉnh (giao kết hợp đồng, thanh toán tiền hàng, khắc phục vi phạm hợp đồng, v.v.), CISG vẫn có phạm vi áp dụng rộng trong quan hệ hợp đồng mua bán hàng hoá quốc tế.

Tương tự INCOTERMS nhưng ở mức độ khái quát cao hơn, PICC có thể áp dụng cho các hợp đồng mua bán kết hợp với CISG (cũng như kết hợp với INCOTERMS). CISG bao trùm nhiều lĩnh vực của quan hệ hợp đồng giữa bên mua và bên bán, tuy nhiên không phải là tất cả. *Ví dụ*, CISG đã tuyên bố rõ rằng nó không điều chỉnh vấn đề hiệu lực của hợp đồng (Điều 4), một vấn đề được PICC quy định chi tiết (từ Điều 3.1.1 đến Điều 3.3.2)[89]. Có nhiều vấn đề khác CISG không điều chỉnh, vì các vấn đề đó không phải vấn đề riêng của hợp đồng mua bán hàng hoá quốc tế, như quyền đại diện, giải thích hợp đồng, các quy phạm chung về nội dung và thực hiện hợp đồng, thực hiện bù nghĩa vụ ('set-off'), nhượng quyền, chuyển giao nghĩa vụ và chuyển giao hợp đồng, thời hiệu và hợp đồng nhiều bên. Nếu các bên muốn hưởng lợi ích từ việc được áp dụng một bộ các quy tắc điều chỉnh hợp đồng mua bán của mình, họ có thể thoả thuận rằng, ngoài CISG và INCOTERMS, hợp đồng của họ sẽ chịu sự điều chỉnh của PICC.[90]

Theo nguyên tắc 'luật riêng' ('*lex specialis*') được ưu tiên áp dụng so với luật chung, INCOTERMS sẽ chiếm ưu thế hơn so với các quy định của CISG về giao nhận hàng hoá và chuyển rủi ro; đồng thời chính bản thân CISG sẽ chiếm ưu thế hơn so với PICC khi điều chỉnh các vấn đề như nghĩa vụ của các bên và biện pháp khắc phục vi phạm hợp đồng tương ứng. Tất nhiên, không có gì ngăn cản các bên làm giảm hiệu lực của điều khoản nào đó của CISG bằng việc ủng hộ các quy định của PICC (*ví dụ*, về vấn đề giao kết hợp đồng, hoặc về biện pháp khắc phục vi phạm hợp đồng nào đó).

Sự kết hợp các công cụ nói trên có thể diễn ra một cách trôi chảy, vì chính PICC cũng chịu ảnh hưởng của CISG, mà cơ bản là liên quan đến một vài điều khoản về giao kết hợp đồng (so sánh các điều từ Điều 14 đến Điều 24 của CISG, với các điều từ Điều 2.1.1 đến Điều 2.1.11 của PICC), và các biện pháp khắc phục áp dụng đối với việc không thực hiện hợp đồng (so sánh các điều từ Điều 45 đến Điều 52 và các điều từ Điều 61 đến Điều 65 của CISG, với các điều từ Điều 7.1.1 đến Điều 7.4.13 của PICC). Hai công cụ trên đạt được tính tương thích ở mức độ cao và dường như không có vấn đề gì khi kết hợp chúng với nhau.

Kết luận

Với tư cách là một Bộ nguyên tắc được xây dựng để điều chỉnh chung về hợp đồng, PICC đã đưa ra sự bổ trợ đáng quý cho các quy định điều chỉnh hợp đồng mua bán hàng hoá quốc tế của CISG. Giống như CISG, PICC được soạn thảo công phu với hi vọng thoả mãn nhu cầu của các bên tham gia thương mại quốc tế, và cố gắng duy trì những giải pháp có thể chấp nhận được ở cả hai hệ thống common law và civil law. Vì PICC là công cụ 'luật mềm', nên các bên thường lựa chọn áp dụng. Tuy nhiên, trọng tài (đôi khi là cả trọng tài trong nước) ngày càng có xu hướng dẫn chiếu đến PICC, khi các bên trong hợp đồng lựa chọn các nguyên tắc chung về thương mại quốc tế để điều chỉnh quan hệ hợp đồng của họ.

3. Bộ nguyên tắc của luật hợp đồng châu Âu (PECL)

Bộ nguyên tắc của luật hợp đồng châu Âu (sau đây gọi là 'PECL') là kết quả công việc của Ủy ban Luật hợp đồng châu Âu, một tổ chức của các luật sư đến từ các quốc gia thành viên của Cộng đồng châu Âu, do Giáo sư O. Lando đứng đầu. PECL đáp ứng yêu cầu của Cộng đồng châu Âu - đó là cần có nền tảng cho luật hợp đồng, nhằm tăng cường sự phát triển nhanh chóng số lượng các văn bản pháp luật của Cộng đồng châu Âu điều chỉnh các loại hợp đồng cụ thể.[91]

PECL gồm có Phần I, Phần II và Phần III, bao gồm các quy định nền tảng về hợp đồng, giao kết hợp đồng, quyền đại diện, hiệu lực hợp đồng, giải thích hợp đồng, nội dung hợp đồng, thực hiện hợp đồng,

[89] Cũng trong Điều 4 nêu rõ rằng CISG không điều chỉnh vấn đề hậu quả của hợp đồng mua bán có thể xảy ra đối với việc sở hữu hàng hoá đã bán; về vấn đề này, PICC không đưa ra bất kì giải pháp nào.

[90] Như trên.

[91] Chi tiết về Ủy ban về Luật hợp đồng châu Âu, xem tại : http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/members.htm. Xem đầy đủ văn bản PECL tại http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/

không thực hiện hợp đồng (vi phạm) và các biện pháp khắc phục vi phạm hợp đồng. Phần I và Phần II của PECL (từ Chương 1 đến Chương 9) được thông qua vào năm 1999, Phần III (từ Chương 10 đến Chương 17), được xem xét lại vào năm 2002, bao gồm các quy định điều chỉnh hợp đồng có nhiều bên tham gia, nhượng quyền khiếu nại, thay thế nợ mới, chuyển giao hợp đồng, thực hiện bù nghĩa vụ ('set-off'), thời hiệu, tính bất hợp pháp, các điều kiện hợp đồng, và tư bản hoá lợi tức.

Có thể nói rằng ngày nay, PECL được xem là quy định hữu ích điều chỉnh hợp đồng mua bán quốc tế, nhưng chỉ trong mối liên hệ với các quốc gia châu Âu. Việc áp dụng PECL, nguyên tắc tự do hợp đồng, giao kết hợp đồng và các biện pháp khắc phục khi không thực hiện hợp đồng theo PECL sẽ được đề cập dưới đây.

A. *Áp dụng PECL*

Cũng giống như CISG, PECL đưa ra giải pháp cho vấn đề phát sinh mà hệ thống luật hoặc các quy định của luật áp dụng không giải quyết vấn đề đó. Tuy nhiên, PECL có thể chỉ được áp dụng cho các hợp đồng mua bán hàng hoá quốc tế có liên quan đến châu Âu.

Theo Điều 1:101, PECL sẽ được áp dụng cho những trường hợp sau:

- Các bên thoả thuận đưa PECL vào hợp đồng, hoặc hợp đồng sẽ được điều chỉnh bởi các nguyên tắc PECL.
- Các bên thoả thuận rằng hợp đồng của họ sẽ được điều chỉnh bởi 'các nguyên tắc chung của pháp luật', *lex mercatoria*, hoặc những quy định tương tự;
- Các bên không chọn bất kì hệ thống luật hay quy định pháp luật nào để điều chỉnh hợp đồng. Đồng thời, mặc dù không có điều khoản lựa chọn luật nào được quy định trong hợp đồng, nhưng phải liên quan tới châu Âu.

B. *Nguyên tắc tự do hợp đồng*

Nguyên tắc tự do hợp đồng là một nguyên tắc cơ bản. Phần lớn các quy định trong PECL là những áp dụng cụ thể của nguyên tắc tự do hợp đồng.

Việc áp dụng trực tiếp nguyên tắc tự do hợp đồng được quy định tại Điều 1:102 PECL. Các bên được tự do giao kết hợp đồng và quyết định nội dung của hợp đồng, tùy thuộc vào sự thiện chí, tính công bằng và các quy định bắt buộc của PECL. Tuy nhiên, các bên có thể không áp dụng bất kì quy định nào của PECL, hoặc làm giảm hoặc thay đổi hiệu lực của các quy định đó, trừ khi PECL có quy định khác.[92]

Về yêu cầu thiện chí, PECL quy định rằng, trước khi bảo lưu trách nhiệm của bên đàm phán thiếu thiện chí, PECL ghi nhận quyền tự do đàm phán của các bên, mà không có gì khác, ngoài việc thể hiện sự tự do hợp đồng ở giai đoạn trước khi kí kết hợp đồng. [93]

Điều 1:103 của PECL quy định chi tiết giới hạn của tự do hợp đồng bằng các quy định bắt buộc. Trong trường hợp luật áp dụng đã được xác định bởi quy tắc chọn luật của toà án trước khi diễn ra tranh chấp, thì điều khoản này vẫn cho phép các bên 'lựa chọn PECL làm luật điều chỉnh hợp đồng của họ, theo đó sẽ không phải áp dụng các quy định bắt buộc của luật quốc gia',[94] trừ những quy định luôn luôn được áp dụng, bất kể luật điều chỉnh là luật nào.[95]

Do đó, việc các bên có quyền tự do áp dụng PECL cho hợp đồng có thể cho phép họ trốn tránh áp dụng một số quy phạm mệnh lệnh của luật quốc gia, những quy phạm được gọi là luật bắt buộc 'thông thường', sẽ đối lập với cái gọi là 'luật áp dụng trực tiếp' - luật được áp dụng mà không cần quan tâm đến luật nào điều chỉnh hợp đồng.[96] Những quy định áp dụng trực tiếp là những quy định 'mang ý nghĩa của một chính sách công cơ bản của quốc gia ban hành quy định đó, và nó phải có hiệu lực điều chỉnh hợp đồng, khi hợp đồng có mối quan hệ mật thiết với quốc gia này'.[97] Do đó, trong bất kì trường hợp nào, quyền tự do áp dụng PECL cho hợp đồng của các bên không có nghĩa là cho phép các bên trốn tránh việc áp dụng các quy phạm mệnh lệnh của luật quốc gia, luật siêu quốc gia hay luật quốc tế, mà những quy phạm mệnh lệnh này luôn được áp dụng cho hợp đồng, bất kể luật điều chỉnh hợp đồng là luật nào. Quyền tự do hợp đồng của các bên bị giới hạn một cách có hệ thống bởi các quy phạm mệnh lệnh cơ bản.

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92 Điều 6 CISG.

93 Điều 2:301 PECL:
(1) Một bên được tự do đàm phán và không phải chịu trách nhiệm khi không đạt được thoả thuận.
(2) Tuy nhiên, nếu một bên đàm phán hoặc phá hủy đàm phán trái với thiện chí và công bằng, thì phải chịu trách nhiệm về những thiệt hại gây ra cho bên kia. (…).

94 Khoản 1 Điều 1:103 PECL.

95 Khoản 2 Điều 1:103 PECL.

96 *Principles of European Contract Law, Parts I and II*, được chuẩn bị bởi Ủy ban châu Âu về luật hợp đồng, Phần I và Phần II được chỉnh sửa bởi O. Lando và Hugh BEALE, (2000), tr. 102. *Principles of European Contract Law*, *Part III* được chỉnh sửa bởi O. Lando, Eric Cliver, André Prum và Reinhard Zimmermann.

97 Sđd tr. 101.

Tự do quyết định nội dung của hợp đồng nghĩa là tự do quy định các nghĩa vụ, nơi thực hiện nghĩa vụ,[98] ngày thực hiện hợp đồng,[99] hoặc đồng tiền được sử dụng để thanh toán.[100]

PECL giữ lại nhiều khái niệm về các nguyên tắc cơ bản và bỏ đi những khái niệm không nhất quán của pháp luật các nước, về 'trái đạo đức', 'tính bất hợp pháp', 'chính sách công' và 'đạo đức'.[101] Bình luận về Điều 15:102 chỉ ra rằng mặc dù PECL tạo ra một hệ thống các quy định độc lập, áp dụng cho các hợp đồng được điều chỉnh bởi PECL, song vẫn không thể bỏ qua tất cả các điều khoản của luật quốc gia hay các quy định khác của luật áp dụng cho những hợp đồng đó, cụ thể là những quy định hoặc lệnh cấm công khai hoặc hiểu ngầm, làm cho hợp đồng trở nên vô hiệu, không có hiệu lực (không có giá trị), có thể bị huỷ hoặc không thể thực hiện được trong một số hoàn cảnh nhất định. Do đó, việc tiếp tục phân biệt các quy phạm mệnh lệnh tại Điều 1:103 của PECL là cần thiết.[102]

C. *Giao kết hợp đồng*

Nên lưu ý rằng các điều kiện giao kết hợp đồng cũng được quy định trong PECL. Mặc dù không đặt tên nguyên tắc, nhưng PECL đã quy định về nguyên tắc đồng thuận, khi trước tiên nêu rõ rằng hợp đồng được giao kết nếu có sự thoả thuận của các bên, đó là ý định chịu sự ràng buộc về mặt pháp luật và đạt được thoả thuận đầy đủ mà 'không cần phải có thêm bất kì yêu cầu nào'.[103] Thêm vào đó, có thể nhận thấy rõ ràng rằng: 'Một hợp đồng không cần phải giao kết hoặc chứng minh bằng văn bản, cũng không cần phải phụ thuộc vào bất kì yêu cầu nào về hình thức (…)'.[104]

98 Khoản 1 Điều 7:101 PECL.

99 Điều 7:102 PECL.

100 Điều 7:108 PECL.

101 *Principles of European Contract Law*, *Part III* được chỉnh sửa bởi O. Lando, Eric Cliver, André Prum và Reinhard Zimmermann, tr. 211.

102 Điều 1:103:
(1) Nếu luật áp dụng quy định khác, các bên có thể chọn Bộ nguyên tắc để điều chỉnh hợp đồng của họ, theo đó các quy phạm mệnh lệnh của luật quốc gia không được áp dụng.
(2) Tuy nhiên, nếu các quy định của luật quốc gia, luật xuyên quốc gia và luật quốc tế đó có hiệu lực, phù hợp với tư pháp quốc tế, thì chúng sẽ được áp dụng mà không xét đến luật nào điều chỉnh hợp đồng.

103 Khoản 1 Điều 2:101 PECL.

104 Khoản 2 Điều 2:101 PECL. So sánh sự giống nhau với Điều 11:104 PECL, theo đó quy định rằng 'chuyển nhượng không cần thiết phải ở dạng văn bản, và không phụ thuộc vào bất kì yêu cầu nào về hình thức. Nó có thể được chứng minh bằng bất kì phương thức nào, bao gồm cả nhân chứng'.

Như đã đề cập ở trên, theo PECL, một hợp đồng được giao kết trên cơ sở thoả thuận giữa các bên,[105] việc giao kết hợp đồng được thực hiện chủ yếu thông qua trao đổi chào hàng và chấp nhận chào hàng. Một chào hàng có thể bị huỷ cho đến lúc được chấp nhận chào hàng, trừ khi chào hàng đó được xem là chào hàng cố định.[106] Chấp nhận chào hàng không phù hợp với chào hàng được xem là 'chào hàng mới' ('counter-offer'), trừ khi những thay đổi đó là không cơ bản.[107] Đàm phán phải được tiến hành và tiếp tục trên cơ sở thiện chí.[108]

Mặc dù rõ ràng là PECL điều chỉnh việc giao kết hợp đồng thông qua trao đổi chào hàng và chấp nhận chào hàng, PECL cũng làm rõ rằng: các quy định về giao kết hợp đồng sẽ được xem là luật áp dụng, kể cả trong trường hợp hợp đồng được giao kết theo một cách khác. Điều này gián tiếp thừa nhận rằng hợp đồng được phép giao kết theo nhiều cách khác nữa.

D. *Các biện pháp khắc phục khi không thực hiện hợp đồng*

PECL quy định các biện pháp khắc phục vi phạm hợp đồng như sau:

- Buộc thực hiện đúng hợp đồng;
- Giảm giá;
- Chấm dứt hợp đồng.

Biện pháp buộc thực hiện đúng hợp đồng được giới hạn bởi một vài điều khoản.[109] Theo PECL, biện pháp buộc thực hiện đúng hợp đồng không được thừa nhận, nếu việc đó là bất hợp pháp hoặc bất khả thi, hoặc việc đó sẽ gây phiền toái bất hợp lí, hoặc việc đó có thể đạt được bằng các cách khác. Ngoài ra, PECL cũng mở rộng các hạn chế này để đối với biện pháp khắc phục áp dụng đối với hành vi thực hiện không đúng hợp đồng ('defective performance').[110]

PECL cũng quy định biện pháp giảm giá.[111] Biện pháp chấm dứt hợp đồng phụ thuộc vào việc vi phạm đó có phải là vi phạm cơ bản hay không,

105 Khoản 1 Điều 2:101 PECL.

106 Điều 2:202 PECL.

107 Điều 2:208 PECL.

108 Điều 2:301 PECL.

109 Điều 9:102 PECL.

110 Khoản 1 Điều 9:102 PECL.

111 Điều 9:401 PECL.

hoặc bên không thực hiện hợp đồng đã được thông báo gia hạn hợp đồng hay chưa.[112]

Bên cạnh những biện pháp khắc phục vi phạm nêu trên, biện pháp bồi thường thiệt hại cũng được đưa ra.[113] PECL giả định rằng thiệt hại có thể được bồi thường trên cơ sở trách nhiệm nghiêm ngặt, do đó không đòi hỏi phải chứng minh sự sơ suất/bất cẩn của bên không thực hiện hợp đồng. Tuy nhiên, PECL cũng tạo ra ngoại lệ cho tình huống theo đó việc thực hiện hợp đồng bị ngăn cản, do xuất hiện một sự kiện vượt quá khả năng kiểm soát của bên vi phạm.[114]

Về vấn đề tính toán bồi thường thiệt hại, PECL quy định rằng tổng số tiền trả cho bên không vi phạm sẽ bằng số tiền mà đáng lẽ ra hợp đồng được thực hiện đúng, và phải bao gồm các chi phí phát sinh cũng như lợi nhuận bị mất.[115]

Về mức độ của thiệt hại, PECL áp dụng tiêu chí 'khả năng có thể tiên liệu được thiệt hại'[116] như là hậu quả tiềm tàng của vi phạm. Tuy nhiên, cần lưu ý rằng về vấn đề này, PECL quy định tiêu chí 'cẩu thả hiển nhiên' ('gross negligence') hoặc 'cố ý làm sai' ('intentional misconduct'). Nếu hành vi của bên vi phạm là 'cẩu thả hiển nhiên' ('gross negligence') hoặc 'cố ý làm sai' ('intentional misconduct'), thì việc bồi thường thiệt hại sẽ không giới hạn ở những thiệt hại có thể tiên liệu được.

Về miễn trừ trách nhiệm do có trở ngại nằm ngoài khả năng kiểm soát của bên vi phạm, các biện pháp khắc phục như bồi thường thiệt hại và buộc thực hiện đúng hợp đồng sẽ không được thừa nhận.[117] Sự miễn trừ trách nhiệm sẽ được duy trì, khi mà tác động của những trở ngại đó vẫn còn tồn tại.[118] Tác động của những trở ngại nêu trên sẽ là điều kiện cho phép bên chịu thiệt hại được đàm phán lại, hoặc yêu cầu toà án phán quyết chấm dứt hợp đồng.[119]

Mặc dù có một vài điều khoản trong PECL giới hạn phạm vi áp dụng của PECL chỉ ở phạm vi Âu, nhưng PECL vẫn đóng vai trò hết sức quan trọng trong việc thống nhất các quy định điều chỉnh hợp đồng mua bán hàng hoá quốc tế trên thế giới.

[112] Điều 9:301 PECL.

[113] Điều 8:101 và 8:102 PECL.

[114] Điều 8:108 PECL.

[115] Điều 9:502 PECL.

[116] Điều 9:503 PECL.

[117] Khoản 2 Điều 8:101 PECL.

[118] Khoản 2 Điều 8:108 PECL.

[119] Điều 6:111 PECL.

4. Pháp luật Việt Nam điều chỉnh hoạt động mua bán hàng hoá quốc tế

A. *Nguồn luật điều chỉnh*

Trước năm 2005, pháp luật Việt Nam điều chỉnh hoạt động mua bán hàng hoá quốc tế nằm rải rác ở nhiều văn bản quy phạm pháp luật khác nhau như Bộ luật dân sự 1995, Luật thương mại 1997, Pháp lệnh hợp đồng kinh tế 1989 và vô số các văn bản dưới luật khác có liên quan. Không chỉ nằm tản mát ở các văn bản, các quy định pháp luật này còn thường xuyên chồng chéo. Năm 2005 được coi là năm bản lề cho hoạt động lập pháp của Việt Nam, với việc ban hành nhiều văn bản luật nhằm làm cho hệ thống pháp luật của Việt Nam tương thích với các quy định của WTO. Trong số các văn bản luật này phải kể đến Bộ luật Dân sự 2005 (nay là Bộ luật Dân sự 2015) và Luật Thương mại 2005. Hiện nay, các quy định pháp luật cơ bản cho hoạt động mua bán hàng hoá quốc tế của Việt Nam được thể hiện trong Bộ luật Dân sự 2015 (sau đây gọi tắt là Bộ luật Dân sự) và Luật Thương mại 2005 (sau đây gọi tắt là Luật Thương mại).

Điều 1 Bộ luật Dân sự quy định:

> 'Bộ luật dân sự quy định địa vị pháp lí, chuẩn mực pháp lí cho cách ứng xử của cá nhân, pháp nhân; quyền, nghĩa vụ về nhân thân và tài sản của cá nhân, pháp nhân trong các quan hệ được hình thành trên cơ sở bình đẳng, tự do ý chí, độc lập về tài sản và tự chịu trách nhiệm (sau đây gọi chung là quan hệ dân sự).'

Như vậy, giao dịch mua bán hàng hoá quốc tế sẽ được điều chỉnh bởi Bộ luật Dân sự. Bộ luật Dân sự đề ra những quy tắc chung nhất về hợp đồng như hình thức hợp đồng, các biện pháp khắc phục vi phạm hợp đồng, v.v.. Để tránh tình trạng chồng chéo như thời kì trước năm 2005, Điều 4 Luật Thương mại đã xác định rõ ràng thứ tự áp dụng luật điều chỉnh cho hợp đồng mua bán hàng hoá quốc tế trong trường hợp luật điều chỉnh hợp đồng là luật Việt Nam như sau:

1. Hoạt động thương mại phải tuân theo Luật Thương mại và pháp luật có liên quan.
2. Hoạt động thương mại đặc thù được quy định trong luật khác thì áp dụng quy định của luật đó.
3. Hoạt động thương mại không được quy định trong Luật Thương mại và trong các luật khác thì áp dụng quy định của Bộ luật Dân sự.

Như vậy, thứ tự áp dụng luật điều chỉnh giao dịch mua bán hàng hóa quốc tế lần lượt sẽ là luật chuyên ngành, Luật Thương mại và Bộ luật Dân sự. Trong trường hợp pháp luật không có quy định gì hoặc quy định không đầy đủ thì nguồn luật nào điều chỉnh giao dịch nói trên?

Điều 12 Luật Thương mại quy định:

> Trừ trường hợp có thoả thuận khác, các bên được coi là mặc nhiên áp dụng thói quen trong hoạt động thương mại đã được thiết lập giữa các bên đó mà các bên đã biết hoặc phải biết nhưng không được trái với quy định của pháp luật.

Điều 13 Luật Thương mại quy định:

> Trường hợp pháp luật không có quy định, các bên không có thoả thuận và không có thói quen đã được thiết lập giữa các bên thì áp dụng tập quán thương mại nhưng không được trái với những nguyên tắc quy định trong Luật này và trong Bộ luật Dân sự.

Từ hai Điều trên có thể thấy ngoài các quy phạm pháp luật thì giao dịch mua bán hàng hóa quốc tế còn được điều chỉnh bởi những thói quen được hình thành giữa các bên, và những tập quán thương mại mà các bên đã biết hoặc phải biết, đối với loại hợp đồng trong hoạt động thương mại cụ thể. Điều 13 cũng chỉ ra thứ tự áp dụng hai nguồn luật này, theo đó thói quen hình thành giữa các bên sẽ được ưu tiên áp dụng so với tập quán thương mại.

B. *Khái niệm hợp đồng mua bán hàng hoá quốc tế*

Luật Thương mại không trực tiếp định nghĩa hoạt động mua bán hàng hoá quốc tế. Thay vào đó, Luật này liệt kê những hoạt động được coi là hoạt động mua bán hàng hoá quốc tế tại Điều 27, đó là xuất khẩu, nhập khẩu, tạm xuất tái nhập, tạm nhập tái xuất, chuyển khẩu.

'Xuất khẩu' hàng hoá là việc hàng hoá được đưa ra khỏi lãnh thổ Việt Nam hoặc đưa vào khu vực đặc biệt nằm trên lãnh thổ Việt Nam - được coi là khu vực hải quan riêng theo quy định của pháp luật (Khoản 1 Điều 28 Luật thương mại).

'Nhập khẩu' hàng hoá là việc hàng hoá được đưa vào lãnh thổ Việt Nam từ nước ngoài hoặc từ khu vực đặc biệt nằm trên lãnh thổ Việt Nam - được coi là khu vực hải quan riêng theo quy định của pháp luật (Khoản 2 Điều 28 Luật thương mại).

'Tạm nhập, tái xuất' hàng hoá là việc hàng hoá được đưa từ nước ngoài hoặc từ các khu vực đặc biệt nằm trên lãnh thổ Việt Nam - được coi là khu vực hải quan riêng theo quy định của pháp luật, vào Việt Nam, có làm thủ tục nhập khẩu vào Việt Nam và làm thủ tục xuất khẩu chính hàng hoá đó ra khỏi Việt Nam (Khoản 1 Điều 29 Luật thương mại).

'Tạm xuất, tái nhập' hàng hoá là việc hàng hoá được đưa ra nước ngoài hoặc đưa vào các khu vực đặc biệt nằm trên lãnh thổ Việt Nam - được coi là khu vực hải quan riêng theo quy định của pháp luật, có làm thủ tục xuất khẩu ra khỏi Việt Nam và làm thủ tục nhập khẩu lại chính hàng hoá đó vào Việt Nam (Khoản 2 Điều 29 Luật thương mại).

'Chuyển khẩu' hàng hoá là việc mua hàng từ một nước, vùng lãnh thổ để bán sang một nước, vùng lãnh thổ ngoài lãnh thổ Việt Nam mà không làm thủ tục nhập khẩu vào Việt Nam và không làm thủ tục xuất khẩu ra khỏi Việt Nam (Khoản 1 Điều 30 Luật thương mại).

Từ những khái niệm trên, có thể thấy rằng hàng hoá phải là (i) động sản; và (ii) có thể dịch chuyển qua biên giới. Mua bán bất động sản với người nước ngoài không thuộc nhóm hoạt động mua bán hàng hoá quốc tế.

C. *Hình thức của hợp đồng*

Hợp đồng mua bán hàng hoá quốc tế phải được thực hiện trên cơ sở hợp đồng bằng văn bản hoặc bằng hình thức khác có giá trị pháp lí tương đương. Điều 15 Luật thương mại quy định theo đó các thông điệp dữ liệu đáp ứng các điều kiện, tiêu chuẩn kĩ thuật theo quy định của pháp luật thì được thừa nhận là có giá trị pháp lí tương đương văn bản.

D. *Giao kết hợp đồng*

Luật Thương mại không quy định về giao kết hợp đồng, vì những nội dung này đã được điều chỉnh bởi Bộ luật dân sự. Hợp đồng được giao kết và các bên sẽ bị ràng buộc khi chào hàng được chấp nhận. Các quy tắc về chào hàng và chấp nhận chào hàng này khá tương tự với các quy định của CISG. Nội dung dưới đây chỉ làm rõ những điểm khác biệt.

Người bán gửi chào hàng cho người mua. Người mua có thể gửi chấp nhận chào hàng với sự sửa đổi một số nội dung của chào hàng. Theo CISG, nếu những sửa đổi/bổ sung này là cơ bản, thì sẽ trở thành một 'chào hàng mới' như quy định tại khoản 3 Điều 19 CISG. Tuy nhiên,

pháp luật Việt Nam đòi hỏi rằng chấp nhận chào hàng phải vô điều kiện. Nói cách khác, chấp nhận chào hàng phải phản ánh chính xác nội dung của chào hàng. Điều 395 Bộ luật Dân sự quy định rằng mọi sửa đổi/bổ sung đối với đề nghị giao kết hợp đồng (chào hàng) hình thành nên một 'chào hàng mới'.

Thông thường, im lặng không được coi là chấp nhận. Tuy nhiên, khoản 2 Điều 404 Bộ luật Dân sự công nhận im lặng là chấp nhận, nếu các bên thoả thuận với nhau im lặng là chấp nhận giao kết hợp đồng.

Đối với những nước theo hệ thống common law, thời điểm chấp nhận chào hàng có hiệu lực phụ thuộc vào việc áp dụng học thuyết nào, học thuyết 'tống phát' hay học thuyết 'tiếp thu'. Pháp luật Việt Nam không thừa nhận học thuyết 'tống phát'. Khoản 1 Điều 400 Bộ luật Dân sự quy định thời điểm hợp đồng được giao kết là thời điểm bên đề nghị nhận được chấp nhận giao kết.

E. *Nội dung của hợp đồng*

Trước năm 2005, pháp luật Việt Nam quy định hợp đồng phải có các điều khoản chủ yếu. Tuy nhiên, từ năm 2005, hợp đồng nói chung và hợp đồng mua bán hàng hoá quốc tế nói riêng không nhất thiết phải có những điều khoản này. Các bên có thể thoả thuận các điều khoản về (i) Hàng hoá; (ii) Số lượng và chất lượng; (iii) Giá cả và phương thức thanh toán; (iv) Thời hạn, địa điểm thực hiện; (v) Nghĩa vụ của các bên; (vi) Trách nhiệm của các bên; (vii) Phạt vi phạm và các điều khoản khác. Đồng thời, pháp luật Việt Nam cũng đưa ra các phương pháp giải quyết trong một số trường hợp nhất định, khi hợp đồng thiếu những điều khoản cụ thể.

Trong trường hợp hợp đồng không quy định giá cả, mặc dù thực tế ít khi xảy ra, Điều 52 Luật Thương mại quy định giá của hàng hoá sẽ được xác định theo giá của loại hàng hoá đó trong các điều kiện tương tự về phương thức giao hàng, thời điểm mua bán hàng hoá, thị trường địa lí, phương thức thanh toán và các điều kiện khác có ảnh hưởng đến giá cả.

Trong trường hợp không có thoả thuận về địa điểm thanh toán, Điều 54 Luật Thương mại yêu cầu người mua sẽ phải thanh toán tại một trong những địa điểm sau: (i) Địa điểm kinh doanh của bên bán được xác định vào thời điểm giao kết hợp đồng, nếu không có địa điểm kinh doanh thì tại nơi cư trú của bên bán; hoặc (ii) Địa điểm giao hàng hoặc giao chứng từ, nếu việc thanh toán được tiến hành đồng thời với việc giao hàng hoặc giao chứng từ.

Trong trường hợp không có thoả thuận về thời gian giao hàng, người bán phải giao hàng trong một khoảng thời gian hợp lí sau khi hợp đồng được giao kết. Tuy nhiên, pháp luật Việt Nam không đưa ra các tiêu chí xác định thế nào là 'thời gian hợp lí'.

F. *Chuyển giao rủi ro*

Mất mát hàng hoá có thể xảy ra bất kì lúc nào và trong phần lớn các trường hợp, bảo hiểm sẽ chi trả cho thiệt hại này. Vấn đề là phải xác định người bán hay người mua có nghĩa vụ đòi bảo hiểm? Không giống như luật quốc gia của một số nước, pháp luật Việt Nam cho phép các bên phân bổ rủi ro giữa hai bên và tự xác định thời điểm chuyển giao rủi ro. Trong trường hợp không có thoả thuận cụ thể, Luật thương mại quy định chuyển giao rủi ro từ người bán sang người mua khi người mua nhận hàng tại địa điểm giao hàng. Nếu không có thoả thuận cụ thể về địa điểm nhận hàng, thì rủi ro sẽ chuyển sang cho người mua khi người mua nhận được giấy tờ sở hữu hoặc giấy tờ xác nhận việc chiếm hữu hàng hoá của mình. Nếu người mua không phải là người nhận hàng từ người bán, thì rủi ro sẽ chuyển cho người mua khi hàng hoá được giao cho người vận chuyển đầu tiên. Trong các trường hợp khác, chuyển giao rủi ro theo quy định của pháp luật Việt Nam khá giống với CISG.

G. *Thực hiện hợp đồng*

Tương tự như CISG, pháp luật Việt Nam quy định nghĩa vụ cơ bản của người bán và người mua trong việc thực hiện hợp đồng. Nhìn chung, các bên có quyền được nhận từ hợp đồng những gì mà họ mong muốn. Một bên không thực hiện nghĩa vụ của mình sẽ bị coi là vi phạm hợp đồng, và bên vi phạm sẽ phải chịu chế tài nặng nhất như huỷ hợp đồng hoặc chấm dứt hợp đồng, nếu vi phạm đó là vi phạm cơ bản. Pháp luật Việt Nam định nghĩa vi phạm cơ bản hơi khác so với CISG. Khoản 13 Điều 3 Luật Thương mại quy định vi phạm cơ bản là sự vi phạm hợp đồng của một bên gây thiệt hại cho bên kia đến mức làm cho bên kia không đạt được mục đích của việc giao kết hợp đồng. Mục đích giao kết hợp đồng đôi khi không tương đồng với những gì mà bên bị vi phạm có quyền được nhận như quy định tại Điều 25 CISG.

H. *Các biện pháp khắc phục vi phạm hợp đồng*

Khi một bên vi phạm hợp đồng, bên kia có quyền yêu cầu áp dụng các biện pháp khắc phục vi phạm. Các biện pháp này được liệt kê tại Điều 292 Luật Thương mại là: Buộc thực hiện đúng hợp đồng; Phạt vi phạm, Bồi thường thiệt hại; Tạm ngừng thực hiện hợp đồng; Đình chỉ thực hiện hợp đồng; Huỷ hợp đồng; và các biện pháp khác theo thoả thuận giữa các bên.

Pháp luật Việt Nam cho phép bên bị vi phạm đòi thực hiện biện pháp buộc thực hiện đúng hợp đồng, nếu một bên không thực hiện nghĩa vụ. *Ví dụ,* khi bên bán giao hàng thiếu thì bên mua sẽ yêu cầu bên bán giao hàng đủ; hoặc khi bên bán giao hàng có khuyết tật thì bên mua có quyền yêu cầu khắc phục những khuyết tật này hoặc giao hàng khác thay thế. Bên vi phạm không thể dùng tiền hoặc hàng khác loại để thay thế, trừ trường hợp có sự đồng ý của bên kia.

Pháp luật Việt Nam sử dụng biện pháp phạt vi phạm nhằm phạt bên vi phạm. Biện pháp này thường sẽ không có hiệu lực theo quy định của common law, nếu mục đích của biện pháp là phạt chứ không phải là bù đắp cho bên bị vi phạm. Để bảo đảm tính công bằng của hợp đồng, pháp luật Việt Nam yêu cầu các bên phải đưa vào hợp đồng điều khoản phạt với mức phạt không quá 8% giá trị hợp đồng bị vi phạm (Điều 301 Luật Thương mại).

Đối với biện pháp bồi thường thiệt hại, pháp luật Việt Nam không yêu cầu mức bồi thường thiệt hại phải không vượt quá thiệt hại mà bên vi phạm lường trước, hoặc phải lường trước, vào thời điểm giao kết hợp đồng, trên cơ sở những dữ liệu mà anh ta đã biết hoặc phải biết, như quy định tại Điều 74 CISG. Pháp luật Việt Nam cho phép bên bị vi phạm đòi bồi thường tất cả các thiệt hại, bao gồm giá trị hàng hoá bị thiệt hại, thiệt hại trực tiếp và lợi ích trực tiếp mà bên bị vi phạm lẽ ra được hưởng nếu vi phạm không xảy ra. Điều đó có nghĩa là yêu cầu 'lường trước được' là yêu cầu không bắt buộc. Bên đòi bồi thường thiệt hại có nghĩa vụ thực hiện tất cả những biện pháp cần thiết để giảm tối đa thiệt hại. Nếu bên khiếu nại không thực hiện nghĩa vụ này, bên kia có quyền yêu cầu giảm một phần giá trị bồi thường. Nếu người mua chậm thanh toán, người bán có quyền đòi lãi chậm trả. Mức lãi suất là mức trung bình đối với nợ quá hạn trên thị trường vào thời điểm thanh toán, trừ trường hợp các bên có thoả thuận khác hoặc pháp luật có quy định khác.

Pháp luật Việt Nam cho phép bên bị vi phạm yêu cầu tạm dừng thực hiện hợp đồng, chấm dứt hợp đồng hoặc huỷ hợp đồng khi xảy ra những điều kiện tạm dừng thực hiện hợp đồng, chấm dứt hợp đồng hoặc huỷ hợp đồng theo thoả thuận của các bên, hoặc khi một bên vi phạm cơ bản hợp đồng. Như vậy, các biện pháp khắc phục vi phạm hợp đồng theo quy định của pháp luật Việt Nam không áp dụng với những vi phạm dự kiến như CISG. Nếu có căn cứ rõ ràng là một bên sẽ không thực hiện nghĩa vụ của mình theo hợp đồng, thì bên kia cũng không thể đòi áp dụng các biện pháp khắc phục vi phạm ngay, mà phải chờ đến khi vi phạm thực sự xảy ra. *Ví dụ,* người bán có thể biết người mua không thể trả được tiền hàng, nhưng không thể khiếu nại, mà phải chờ đến khi hết hạn thanh toán và người mua chưa thanh toán. Bên bị vi phạm phải thông báo cho bên vi phạm biết biện pháp khắc phục mà mình lựa chọn.

Khi sử dụng chế tài huỷ hợp đồng, bên bị vi phạm có quyền yêu cầu huỷ một phần hoặc toàn bộ hợp đồng. Việc huỷ một phần hợp đồng không làm ảnh hưởng tới hiệu lực của những nội dung còn lại của hợp đồng.

Bên bị vi phạm chỉ có quyền đòi áp dụng chế tài buộc thực hiện đúng hợp đồng cùng với chế tài phạt và bồi thường thiệt hại. Việc đòi bồi thường thiệt hại không cản trở bên bị vi phạm yêu cầu áp dụng các biện pháp khắc phục khác.

I. *Các trường hợp miễn trách nhiệm do vi phạm hợp đồng*

Điều 294 Luật Thương mại đưa ra bốn trường hợp miễn trách cho hành vi vi phạm hợp đồng. Đó là: (i) Xảy ra trường hợp miễn trách nhiệm mà các bên đã thoả thuận; (ii) Xảy ra sự kiện bất khả kháng; (iii) Hành vi vi phạm của một bên hoàn toàn do lỗi của bên kia; (iv) Hành vi vi phạm của một bên do thực hiện quyết định của cơ quan quản lí nhà nước có thẩm quyền mà các bên không thể biết được vào thời điểm giao kết hợp đồng. Bên vi phạm hợp đồng phải thông báo ngay bằng văn bản cho bên kia về trường hợp được miễn trách nhiệm và những hậu quả có thể xảy ra. Khi những cản trở không còn nữa, bên vi phạm hợp đồng phải thông báo ngay cho bên kia biết.

Khoản 1 Điều 156 Bộ luật Dân sự quy định sự kiện bất khả kháng là sự kiện xảy ra một cách khách quan không thể lường trước được và không thể khắc phục được, mặc dù đã áp dụng mọi biện pháp cần thiết với khả năng cho phép. Trong trường hợp bất khả kháng, các bên có thể

thoả thuận kéo dài thời hạn thực hiện nghĩa vụ hợp đồng; nếu các bên không có thoả thuận hoặc không thoả thuận được, thì thời hạn thực hiện nghĩa vụ hợp đồng được tính thêm một thời gian bằng thời gian xảy ra sự kiện bất khả kháng cộng với thời gian hợp lí để khắc phục hậu quả. Tuy nhiên, thời gian kéo dài không được quá 5 tháng đối với hàng hoá, dịch vụ mà thời hạn giao hàng, cung ứng dịch vụ được thoả thuận không quá 12 tháng, kể từ khi giao kết hợp đồng; hoặc 8 tháng đối với hàng hoá, dịch vụ mà thời hạn giao hàng, cung ứng dịch vụ được thoả thuận trên 12 tháng, kể từ khi giao kết hợp đồng.

5. Chọn luật áp dụng cho hợp đồng mua bán hàng hoá quốc tế

Hợp đồng mua bán hàng hoá quốc tế, dù được kí kết hoàn chỉnh đến đâu, thì bản thân nó cũng không thể dự kiến và điều chỉnh được mọi vấn đề và tình huống có thể phát sinh trong thực tế. Do đó, cần quy định điều khoản chọn luật điều chỉnh trong hợp đồng, nhằm tạo một cơ sở pháp lí cụ thể, giúp các bên dựa vào đó để xác định quyền và nghĩa vụ của mình.

Bằng việc sử dụng điều khoản chọn luật, các bên có thể thoả thuận luật áp dụng. *Ví dụ*, các bên có thể đưa vào hợp đồng điều khoản với nội dung sau: 'Hợp đồng được lập giữa các bên sẽ được điều chỉnh và giải thích theo luật của Canada…', hoặc có thể là 'Luật áp dụng hiệu lực và việc thực hiện hợp đồng này sẽ được điều chỉnh bởi luật của nước người mua ghi trên đơn đặt hàng này'. Sau khi các bên thoả thuận chọn luật áp dụng, mặc dù các bên có thể không có bất kì một mối liên hệ nào với hệ thống luật điều chỉnh mà họ đã lựa chọn, thì sự lựa chọn của họ vẫn có hiệu lực. Luật áp dụng có thể là luật quốc gia, điều ước quốc tế hoặc các tập quán thương mại quốc tế.

A. *Luật quốc gia*

Luật quốc gia trở thành luật điều chỉnh hợp đồng mua bán hàng hoá quốc tế khi:

- Các bên thoả thuận trong hợp đồng, nghĩa là ngay từ lúc đàm phán, kí kết hợp đồng, các bên có thể thoả thuận điều này;
- Các bên thoả thuận lựa chọn luật áp dụng cho hợp đồng sau khi hợp đồng được kí kết. Có thể vào lúc giao kết hợp đồng, vì lí do chủ quan hoặc khách quan, các bên đã không thoả thuận luật áp dụng cho hợp đồng, khi có tranh chấp xảy ra hoặc sau khi kí hợp đồng, các bên vẫn có thể đàm phán với nhau để thoả thuận chọn luật áp dụng.
- Nếu điều ước quốc tế dẫn chiếu tới luật quốc gia, thì luật quốc gia sẽ trở thành luật điều chỉnh hợp đồng. *Ví dụ*, Công ước La Haye 1955 về luật áp dụng cho hợp đồng mua bán hàng hoá quốc tế dẫn chiếu đến luật nước người bán tại Điều 3 như sau:

> Trong trường hợp các bên không thoả thuận luật áp dụng cho hợp đồng, thì hợp đồng sẽ được điều chỉnh bởi luật quốc gia của nước mà người bán cư trú tại thời điểm người bán nhận được đơn đặt hàng. Nếu đơn đặt hàng gửi tới trụ sở của người bán, thì hợp đồng sẽ được điều chỉnh bởi luật quốc gia nơi thành lập trụ sở của người bán.

- Cơ quan giải quyết tranh chấp chọn luật điều chỉnh. Lúc này, nếu cơ quan giải quyết tranh chấp chọn luật quốc gia, căn cứ vào các học thuyết khác nhau, thì luật quốc gia sẽ trở thành luật điều chỉnh hợp đồng.

Theo học thuyết 'trao quyền' ('vested right' doctrine), toà án hoặc trọng tài sẽ áp dụng luật của nước nơi có quyền của các bên trong tranh chấp. Đó có thể là luật của nơi giao kết hợp đồng nếu tranh chấp liên quan đến hiệu lực của hợp đồng, và có thể là luật của nơi thực hiện hợp đồng nếu tranh chấp liên quan đến việc thực hiện hợp đồng.

Học thuyết 'trao quyền' này là căn cứ truyền thống để toà án hoặc trọng tài xác định luật áp dụng. Tuy nhiên, đây không phải là căn cứ duy nhất. Những năm gần đây, nhiều nước theo hệ thống civil law thay đổi nguyên tắc chọn luật áp dụng, vì họ cho rằng học thuyết 'trao quyền' quá cứng nhắc và không phản ánh chính xác lợi ích thực sự của các nước mà luật của các nước này có thể hoặc không thể được áp dụng. Phần lớn các nước chọn luật áp dụng dựa trên học thuyết 'nước có quan hệ mật thiết nhất' ('most significant relationship' doctrine). Một số nước lại chọn học thuyết 'lợi ích nhà nước' ('governmental interests' doctrine).[120]

Học thuyết 'nước có quan hệ mật thiết nhất' chỉ ra rằng toà án hoặc trọng tài sẽ áp dụng luật của nước có mối liên hệ mật thiết nhất với các bên và với giao dịch của họ. Thực chất, toà án sẽ xem xét những yếu tố sau trong mọi trường hợp: (i) Luật nước nào thúc đẩy tốt nhất các nhu cầu của hệ thống quốc tế? (ii) Luật nước nào sẽ được thúc đẩy,

[120] Ray August, *Sđd*

thông qua việc áp dụng vào vụ việc cụ thể? và (iii) Luật nước nào sẽ thúc đẩy tốt nhất những chính sách, pháp luật có liên quan? Ngoài ra, toà án sẽ xem xét 'các yếu tố cụ thể', căn cứ vào từng loại tranh chấp mà toà án phải giải quyết. Và những yếu tố cụ thể trong các tranh chấp hợp đồng thường là: (i) Nơi giao kết hợp đồng; (ii) Nơi đàm phán hợp đồng; (iii) Nơi thực hiện hợp đồng; (iv) Nơi có đối tượng tranh chấp; và (v) Quốc tịch, nơi cư trú, nơi thường trú, nơi có trụ sở doanh nghiệp của các bên.[121]

Nếu toà án áp dụng học thuyết 'lợi ích nhà nước', trước hết, sẽ không chọn luật áp dụng, trừ trường hợp các bên yêu cầu. Nếu các bên không yêu cầu, toà án sẽ chọn luật nước họ để giải quyết. Nếu các bên yêu cầu, toà án sẽ nghiên cứu xem nước nào có lợi ích chính đáng trong việc xác định kết quả của tranh chấp. Nếu chỉ có nước có toà án có lợi ích (trường hợp xung đột giả), tất nhiên, toà án sẽ chọn luật nước mình. Nếu cả nước có toà án và nước khác cùng có lợi ích chính đáng (trường hợp xung đột thật), thì toà án sẽ áp dụng luật của nước có toà án, vì đương nhiên là toà án sẽ hiểu các lợi ích này rõ hơn. Nếu hai nước, đều không phải là nước có toà án, và đều có lợi ích chính đáng (cũng là trường hợp xung đột thật), thì toà án sẽ bỏ vụ kiện, nếu nước, nơi có toà án, muốn áp dụng học thuyết 'toà án không thích hợp' ('forum non conveniens') (*xem* Mục 2 - Chương 7 của Giáo trình). Nếu không, toà án sẽ chọn luật của bất kì nước nào mà toà án cho là thích hợp nhất, và thông thường sẽ là luật của nước nơi có toà án[122].

Pháp luật Việt Nam đã có những bước tiến nhất định trong sự thừa nhận và bảo đảm quyền tự do của các bên trong việc lựa chọn luật áp dụng. Các quy định hạn chế về vấn đề này trong Bộ luật dân sự 2005 đã được gỡ bỏ. *Ví dụ*: Điều 769 Bộ luật dân sự 2005 quy định như sau: 'Hợp đồng được giao kết tại Việt Nam và thực hiện hoàn toàn tại Việt Nam thì phải tuân theo pháp luật nước Cộng hoà xã hội chủ nghĩa Việt Nam'. Như vậy, nếu hợp đồng được giao kết và thực hiện hoàn toàn tại Việt Nam, thì toà án Việt Nam, khi thụ lí, sẽ luôn áp dụng pháp luật Việt Nam, kể cả khi các bên lựa chọn luật áp dụng là luật của nước khác. Tương tự, Điều 770 Bộ luật Dân sự cũng từ chối chọn luật điều chỉnh hình thức của hợp đồng. Bộ luật Dân sự 2015 đã hoàn toàn cho phép các bên trong quan hệ hợp đồng được thỏa thuận lựa chọn pháp luật áp dụng đối với hợp đồng tại Khoản 1 Điều 683. Nguyên tắc áp dụng pháp luật nơi có mối liên hệ gắn bó nhất với hợp đồng được thể hiện xuyên suốt trong Điều 683.

121 Ray August, *Sđd*

122 Ray August, Sđd.

Luật do các bên lựa chọn sẽ không được thừa nhận, nếu luật đó hoặc hậu quả của việc áp dụng luật đó trái với các nguyên tắc cơ bản của pháp luật Việt Nam.[123] Các nguyên tắc chung của pháp luật Việt Nam được ghi nhận từ Điều 10 đến Điều 15 Luật Thương mại, và 5 nguyên tắc cơ bản của pháp luật dân sự được nêu rõ trong các điều từ Điều 3 Bộ luật Dân sự. [124]

B. *Điều ước quốc tế*

Điều ước quốc tế là sự thoả thuận bằng văn bản có giá trị ràng buộc về pháp luật giữa hai hay nhiều nước hay chủ thể khác của pháp luật quốc tế. Khoản 1 Điều 2 Luật Điều ước quốc tế 2016 quy định:

> Điều ước quốc tế là thoả thuận bằng văn bản được kí kết nhân danh Nhà nước hoặc Chính phủ nước Cộng hòa xã hội chủ nghĩa Việt Nam với bên ký kết nước ngoài, làm phát sinh, thay đổi, hoặc chấm dứt quyền, nghĩa vụ của nước Cộng hòa xã hội chủ nghĩa Việt Nam theo pháp luật quốc tế, không phụ thuộc vào tên gọi là hiệp ước, công ước, hiệp định, định ước, thoả thuận, nghị định thư, bản ghi nhớ, công hàm trao đổi hoặc văn kiện có tên gọi khác.

Điều ước quốc tế sẽ điều chỉnh hợp đồng mua bán hàng hoá quốc tế khi: (i) Các bên mang quốc tịch của các nước là thành viên của điều ước; hoặc (ii) Quy phạm tư pháp quốc tế dẫn chiếu đến việc áp dụng luật của nước thành viên của điều ước. *Ví dụ*, CISG vẫn có thể điều chỉnh hợp đồng, trong trường hợp trụ sở kinh doanh của người bán và người mua không phải là ở các nước thành viên của CISG. Giả sử người bán có trụ sở kinh doanh ở nước A (không phải là nước thành viên), và người mua có trụ sở kinh doanh ở nước B (cũng không phải là nước thành viên). Người bán và người mua giao kết hợp đồng tại nước C (là nước thành viên của CISG). Và người bán vi phạm nghĩa vụ thực hiện hợp đồng tại nước C. Người mua khiếu kiện tại nước B, và quy tắc chọn luật của nước B dẫn chiếu đến luật áp dụng là luật của nước C. Vì nước C là thành viên của CISG và đây là hợp đồng mua bán hàng hoá quốc tế, nên nó sẽ được điều chỉnh bởi CISG.[125]

123 Điểm a Khoản 1 Điều 670 Bộ luật Dân sự; và Khoản 2 Điều 5 Luật Thương mại.

124 Đó là 5 nguyên tắc: bình đẳng, công bằng, tôn trọng đạo đức xã hội, thiện chí trung thực, tôn trọng lợi ích công cộng và chịu trách nhiệm dân sự.

125 Ray August, Sđd.

Trong trường hợp điều ước quốc tế quy định việc áp dụng luật nước ngoài, tập quán thương mại quốc tế hoặc những điều khoản khác với luật quốc gia, thì quy định của điều ước quốc tế sẽ được ưu tiên áp dụng. Nguyên tắc này được thừa nhận ở nhiều nước, trong đó có Việt Nam.[126]

C. *Tập quán thương mại quốc tế*

Để một thói quen trở thành tập quán thương mại quốc tế, cần phải thoả mãn hai điều kiện. *Thứ nhất*, đó phải là thói quen, thuật ngữ La-tinh là '*usus*', đòi hỏi sự lặp đi lặp lại và nhất quán ở các nước. Bằng chứng của sự lặp đi lặp lại này thể hiện trong các tuyên bố chính thức của chính phủ, bao gồm thư từ ngoại giao, chính sách, thông cáo báo chí, quan điểm của các luật gia, văn bản dưới luật. Tính nhất quán và lặp đi lặp lại không căn cứ theo thời gian, mà thể hiện ở việc nước đó coi đó là quy tắc ứng xử, và cũng như không có nghĩa là tất cả các nước đều phải tuân theo quy tắc này. Ngoài ra, quy tắc này phải được nhiều nước áp dụng, trong một thời gian đủ dài, để toà án thừa nhận như một tập quán duy nhất và nhất quán.

Thứ hai, về mặt tâm lí, thói quen đó phải được thừa nhận là 'luật'. Các nước thường sử dụng tiêu chí 'thừa nhận' trong việc xác định một tập quán có tính ràng buộc về mặt pháp luật hay không? Điều này được thể hiện bằng thuật ngữ La-tinh '*opinio juris sive necessitatis*'.[127]

Tập quán thương mại quốc tế sẽ là luật áp dụng cho hợp đồng, khi các bên thoả thuận trong hợp đồng hoặc khi chúng được dẫn chiếu đến. Khi luật áp dụng không giải quyết được tranh chấp thì tập quán thương mại quốc tế cũng thường được dẫn chiếu để giải quyết.

Mục 4. THANH TOÁN HỢP ĐỒNG MUA BÁN HÀNG HÓA QUỐC TẾ

1. Giới thiệu

Mục này tập trung nghiên cứu về thanh toán trong thương mại quốc tế, đặc biệt là thanh toán hợp đồng mua bán hàng hoá quốc tế. Theo Điều 1 CISG, hợp đồng mua bán hàng hoá phải được kí kết giữa các bên có trụ sở kinh doanh đặt tại các nước khác nhau.

126 Khoản 1 Điều 5 Luật Thương mại.

127 Ray August, Sđd.

Do người mua và người bán ở những nước khác nhau, nên vấn đề quan trọng đặt ra là làm thế nào để thực hiện hoạt động thanh toán. Người bán sau khi giao hàng, nhận vận đơn vận tải luôn muốn được thanh toán ngay lập tức, tuy nhiên, người mua khi chưa nhận được hàng sẽ chưa muốn thanh toán. Người mua có thể chỉ muốn thanh toán sau khi nhận hàng và chắc chắn là hàng đã đủ số lượng cũng như đạt yêu cầu về chất lượng. Cơ chế thanh toán trong trường hợp này cần sự tham gia của bên thứ ba, thường là ngân hàng - giữ vai trò như bên trung gian, để đảm bảo rằng người bán sẽ được thanh toán đúng thời hạn.

Thông thường, sau khi gửi hàng hoá đi, người bán sẽ kí phát một hối phiếu ghi giá trị hàng được gửi, kèm theo vận đơn và các chứng từ cụ thể khác, trình hối phiếu cho ngân hàng - thường là ở nước người bán cư trú, để thanh toán hoặc chuyển nhượng. Người mua, thông qua ngân hàng ở nước người mua, sẽ trả tiền khi họ nhận được các chứng từ theo yêu cầu.

Mục này đề cập đến hai loại thủ tục thanh toán trong thương mại quốc tế. *Thứ nhất*, hối phiếu kèm chứng từ và tín dụng chứng từ, có chức năng chủ yếu là đảm bảo an toàn thanh toán cho hàng hoá và dịch vụ khi chứng từ được xuất trình; và *thứ hai*, tín dụng dự phòng, thư bảo đảm và bảo lãnh với chức năng chủ yếu là đảm bảo sự an toàn trước trường hợp mất khả năng thanh toán hợp đồng cơ sở.

2. Hối phiếu kèm chứng từ

Trong hoạt động mua bán hàng hoá quốc tế, thuật ngữ 'hối phiếu kèm chứng từ có nghĩa là một loại hối phiếu đi kèm chứng từ vận tải và sẽ được chấp nhận hoặc thanh toán khi chuyển giao chứng từ, ngược lại với một dạng hối phiếu là hối phiếu 'trơn'.[128] Theo một khái niệm tương tự, 'hối phiếu kèm chứng từ là loại hối phiếu có đính kèm vận đơn (hay chứng từ sở hữu).[129]

Do đó, hối phiếu kèm chứng từ có thể được cấu trúc một bộ gồm: (A) Hối phiếu; và (B) Chứng từ vận tải - một chứng từ sở hữu, mà hình thức thông dụng nhất trong mua bán hàng hoá quốc tế chính là vận đơn. Để hiểu hối phiếu kèm chứng từ là gì, cần giải thích khái niệm về hối phiếu và chứng từ vận tải với chức năng là chứng từ sở hữu. Phần tiếp theo bắt đầu với khái niệm và chức năng của hối phiếu, sau đó đưa

128 R. Goode, Sđd, tr. 1054.

129 L. S. Sealy và R. J. A. Hooley, Sđd, tr. 847.

ra giới thiệu ngắn gọn về chức năng của chứng từ sở hữu, và cuối cùng sẽ phân tích hoạt động của hối phiếu kèm chứng từ.

A. *Hối phiếu*

Trên bình diện quốc tế, Công ước Liên hợp quốc về hối phiếu và trái phiếu quốc tế đã được thông qua vào năm 1988 với mục đích, như nhiều công ước quốc tế khác, hướng tới sự hài hoà hóa các quy định liên quan đến hối phiếu. Công ước này trước tiên hướng tới hối phiếu quốc tế với định nghĩa tại khoản 1 Điều 2.

Theo luật Anh, mục 3(1) Đạo luật hối phiếu năm 1882 định nghĩa hối phiếu là 'Một văn bản yêu cầu vô điều kiện do một người kí phát cho một người khác, đòi hỏi người này, theo yêu cầu, tại một thời điểm ấn định hay có thể ấn định trong tương lai, phải thanh toán một khoản tiền nhất định cho người cầm hối phiếu hay một người cụ thể hoặc theo yêu cầu của người này.'

Hối phiếu (hay còn gọi là 'draft'), cùng với những phương tiện thanh toán khác (*ví dụ*, séc), thuộc về nhóm chứng từ gọi là giấy tờ có giá. Một giấy tờ có giá, chứng minh nghĩa vụ trả tiền của người này cho người khác, có hai đặc điểm nổi bật. *Thứ nhất,* nó có thể được chuyển nhượng và với sự chuyển nhượng, các quyền đi kèm cũng được chuyển nhượng, theo đó người được chuyển nhượng có thể nhân danh chính mình sử dụng giấy tờ có giá và dĩ nhiên không cần báo trước cho người mang nghĩa vụ về sự chuyển nhượng. *Thứ hai,* khi người được chuyển nhượng có thiện chí, họ sẽ nhận hối phiếu mà không đưa ra yêu sách đối với người chuyển nhượng. Hối phiếu là hợp đồng độc lập và không bị tác động do những vi phạm hợp đồng cơ sở mà dựa vào đó đã tạo ra hối phiếu. Do những đặc trưng nêu trên, hối phiếu được coi như tiền mặt.[130]

Trong trường hợp hối phiếu được chuyển nhượng có quyền truy đòi, người chuyển nhượng hối phiếu có thể phải chịu trách nhiệm trước người giữ hối phiếu tiếp theo, nếu người có trách nhiệm thanh toán hối phiếu không thực hiện nghĩa vụ thanh toán, trong trường hợp người giữ hối phiếu tiếp theo đã thông báo về việc không thực hiện đó. Trong trường hợp hối phiếu được chuyển nhượng không có quyền truy đòi, người chuyển nhượng không chịu trách nhiệm, và vì vậy, người giữ hối phiếu tiếp theo phải chịu thiệt hại. Vấn đề khác là hối phiếu có thể là hối phiếu trả ngay hoặc hối phiếu kì hạn. Hối phiếu trả ngay phải được thanh toán ngay khi xuất trình. Hối phiếu kì hạn phải được thanh toán dựa vào việc xuất trình hối phiếu, khi hối phiếu đến kì thanh toán (*ví dụ*, 90 ngày) sau khi kí. Hối phiếu kì hạn có thể được bán lấy tiền mặt, tuy nhiên, chắc chắn rằng giá trị của chúng (hối suất trả ngay) có thể thấp hơn mệnh giá của hối phiếu (do tiền hoa hồng hoặc tiền lãi).

[130] Indira. Carr, Sđd, tr. 466.

B. *Chức năng của chứng từ vận tải*

Sau khi giao hàng, người bán sẽ nhận được chứng từ vận tải, thông thường bao gồm vận đơn hoặc các chứng từ sở hữu khác. Một chứng từ sở hữu sẽ có giá trị chuyển quyền chiếm hữu hợp pháp đối với hàng hoá. *Ví dụ,* theo tập quán của các thương nhân, vận đơn được thừa nhận như một chứng từ sở hữu. Chỉ người giữ chứng từ sở hữu mới có thể nhận hàng hoá vận tải ở nơi đến. Vì vậy, vận đơn có thể được chuyển nhượng để người giữ vận đơn bán lại hàng hoá hoặc dùng hàng hoá thế chấp với ngân hàng nhằm mục đích tăng tiền bảo đảm. Tóm lại, chứng từ vận tải trao cho người mua quyền nhận hàng hoá tại cảng đến.

C. *Hoạt động của hối phiếu kèm chứng từ*

Các bên của hợp đồng mua bán hàng hoá quốc tế có thể thoả thuận thực hiện thanh toán qua hối phiếu kèm chứng từ. Người bán sẽ gửi một hối phiếu kèm chứng từ cho người mua để bảo đảm rằng người mua không nhận vận đơn, chứng từ cho phép người mua có quyền chuyển nhượng hàng hoá mà không chấp nhận hay thanh toán hối phiếu như thoả thuận trước đó giữa các bên. Nếu người mua không chấp nhận hoặc không thanh toán hối phiếu (phụ thuộc vào việc hối phiếu trả ngay hay hối phiếu kì hạn), thì người mua chắc chắn sẽ hoàn trả hối phiếu cho người bán, và nếu người mua chiếm giữ vận đơn bất hợp pháp, thì quyền sở hữu hàng hoá sẽ không chuyển sang cho người mua.[131]

Thuận lợi của người bán là khi hối phiếu được người mua chấp nhận, người bán có thể nhận được tiền trước khi đến kì hạn của hối phiếu, bằng việc bán cho một ngân hàng với giá thấp hơn. Đối với người mua, người mua được hoãn việc thanh toán cho đến khi hối phiếu hết kì hạn. Tuy nhiên, với hối phiếu kèm chứng từ, khó khăn chính đối với người bán là người mua có thể không thực hiện nghĩa vụ thanh toán hối phiếu. Trong trường hợp đó, bên được người bán giảm giá hối phiếu có thể truy đòi người bán.[132]

[131] L. S. Sealy và R. J. A. Hooley, Sđd, tr. 847.

[132] Indira. Carr, Sđd, tr. 470.

Trong trường hợp người mua không thực hiện nghĩa vụ thanh toán, có thể phát sinh vấn đề là người mua có thể tiến hành bán hàng hoá mà người mua có vận đơn - một chứng từ sở hữu. Đây là hành vi bất hợp pháp hay còn gọi là hành vi gian lận của người mua khi quyền sở hữu hàng hoá chưa thực sự chuyển giao cho người mua, bởi vì họ chưa chấp nhận hay thanh toán hối phiếu. Để tránh rủi ro do sự gian lận của người mua mà không thực hiện nghĩa vụ thanh toán hối phiếu, người bán sẽ nghĩ đến việc nhờ thu qua ngân hàng. Ngân hàng của người bán (ngân hàng nhờ thu) có thể gửi đi hối phiếu và chứng từ vận tải cho ngân hàng đại lí của mình (ngân hàng thu hộ) tại nước người mua với mệnh lệnh không tách rời các chứng từ, trừ khi người mua chấp nhận hoặc thanh toán hối phiếu. Ngân hàng thu hộ sẽ xuất trình bộ chứng từ cho người mua, yêu cầu họ chấp nhận hoặc thanh toán hối phiếu. Mối quan hệ giữa người bán và ngân hàng trả tiền, người trả tiền và ngân hàng nhờ thu thường được điều chỉnh bởi Bộ quy tắc nhờ thu của ICC (bản mới nhất là URC 522 xuất bản năm 1995),[133] thường được biết dưới tên gọi Bộ quy tắc thống nhất về nhờ thu hoặc URC. Thực tế, trong trường hợp này, đã có sự kết hợp của hai phương thức thanh toán trong thương mại quốc tế, đó là hối phiếu kèm chứng từ và nhờ thu; nói cách khác, đó là phương thức nhờ thu với sự hỗ trợ của chứng từ (nhờ thu kèm chứng từ).

D. *Nhờ thu kèm chứng từ*[134]

Các quy tắc trên đưa ra thủ tục mà các bên liên quan phải tuân thủ, bao gồm nghĩa vụ và trách nhiệm pháp lí của ngân hàng và khách hàng liên quan đến giao dịch nhờ thu. Với nỗ lực vượt qua những trở ngại (do sự khác biệt trong thủ tục và cách viết) ở các nước khác nhau, các thông lệ tiêu chuẩn mà các ngân hàng có thể áp dụng đã được đưa ra.

Người bán có thể thay đổi bất kì thủ tục chuẩn nào cho phù hợp với đòi hỏi của chính họ, bằng cách gửi các mệnh lệnh cụ thể bằng văn bản đến ngân hàng của họ, đối với hối phiếu cá nhân và tùy thuộc vào thoả thuận của ngân hàng. Các quy tắc trong URC thừa nhận những quy tắc địa phương là các quy tắc ràng buộc tất cả các bên '…[n]ếu không trái với các quy định hoặc luật lệ không thể tách rời của một nước, một bang hay một địa phương'.

[133] R. Goode, Sđd, tr. 1054.

[134] Technical Officers, Global International Trade and Business Finance, National Australia Bank Limited, *Finance of International Trade,* (2000).

Ví dụ, ở một vài nước, việc thanh toán được thực hiện bằng nội tệ mà không chú ý đến tiền tệ dưới dạng hối phiếu và sau đó thành lập các quỹ công trái, ủy thác, rủi ro hối đoái của người bán cho tới khi có thể có được dự trữ ngoại tệ.

1. Các bên trong phương thức nhờ thu kèm chứng từ

Khi việc thanh toán được thực hiện bằng phương thức nhờ thu kèm chứng từ, các bên tham gia giao dịch bao gồm:

- *Người ủy thác* (thường là người kí phát hối phiếu) - người bán chuẩn bị các chứng từ nhờ thu và giao chúng cho ngân hàng của người bán với mệnh lệnh nhờ thu.
- *Ngân hàng nhờ thu* - thường là ngân hàng của người bán, sẽ chuyển các chứng từ cùng với mệnh lệnh của người bán tới ngân hàng thu hộ.
- *Ngân hàng thu hộ* - là bất kì ngân hàng nào (khác với ngân hàng nhờ thu) liên quan đến quá trình nhờ thu, và thông thường là đại lí của ngân hàng nhờ thu tại nước của người mua.
- *Ngân hàng xuất trình*, thông thường là ngân hàng của người mua, trình ra cho người chịu trách nhiệm thanh toán hối phiếu (người mua) các chứng từ nhờ thu và tiếp nhận việc thanh toán hoặc đạt được sự chấp thuận thanh toán từ người này. Ngân hàng thu hộ hay ngân hàng xuất trình thường là một ngân hàng.
- *Người chịu trách nhiệm thanh toán* - người mua sẽ thanh toán hoặc chấp nhận thanh toán cho người xuất trình chứng từ.

Ngân hàng thường yêu cầu người bán phải điền đầy đủ vào một mẫu mệnh lệnh cho mỗi hối phiếu kèm chứng từ được ủy thác nhờ thu hoặc được thu mua. Các mệnh lệnh phải chính xác và đầy đủ, vì mệnh lệnh sẽ được chuyển cho ngân hàng thu hộ ở nước ngoài để thực hiện việc nhờ thu đáp ứng yêu cầu của người bán.

2. Phương pháp hối phiếu nhờ thu

Ngay khi hàng hoá được vận chuyển, người bán kí phát một hối phiếu trả ngay hoặc hối phiếu kì hạn cho người mua ở nước ngoài, kèm theo các chứng từ vận tải (thường là bản sao) và chuyển các chứng từ đó

cho ngân hàng của mình (ngân hàng nhờ thu) cùng với những mệnh lệnh mà theo đó ngân hàng sẽ thực hiện việc nhờ thu. Ngân hàng của người bán chuyển hối phiếu và chứng từ cho ngân hàng thu hộ (mệnh lệnh của người bán sẽ được chuyển cho ngân hàng này). Nếu người bán kí phát một hối phiếu 'trả ngay' hoặc một hối phiếu 'theo yêu cầu', thì mệnh lệnh sẽ cho phép các chứng từ có thể được chuyển nhượng, chỉ khi hối phiếu đã được thanh toán (D/P). Trong trường hợp hối phiếu có kì hạn, mệnh lệnh thường cho phép các chứng từ được chuyển nhượng, khi hối phiếu được chấp nhận thanh toán (D/A) với việc xuất trình tiếp theo để thanh toán khi đến hạn.

Ngân hàng thu hộ nên thường xuyên cho ngân hàng nhờ thu biết về tình trạng của hối phiếu. Tuy nhiên, ngân hàng thu hộ ở một số nước có thể khá lỏng lẻo trong việc cập nhật tin tức, và thường khi ngân hàng nhờ thu yêu cầu thì việc này mới được thực hiện.

Khi hối phiếu đã được thanh toán, ngân hàng thu hộ sẽ báo cho ngân hàng nhờ thu - ngân hàng sẽ sử dụng số tiền thu được theo mệnh lệnh của người bán.

3. Xuất trình khi hàng tới nơi đến (PAG)

Một người bán có thể nhận ra rằng người mua không sẵn sàng cho việc thanh toán hoặc chấp nhận hối phiếu mình kí phát trước khi hàng hoá tới nơi đến. Ở một số nước, có thông lệ tạm hoãn việc thanh toán hoặc chấp nhận hối phiếu trước khi hàng tới nơi đến. Thuật ngữ dùng cho tiêu đề của nội dung này, 'PAG', được dùng để diễn đạt thông lệ này. Nó cũng được mô tả là 'thanh toán khi tàu vận tải đến nơi'.

Ngân hàng gửi đi hối phiếu kèm chứng từ xuất khẩu bằng đường hàng không hoặc chuyển phát nhanh như đã mô tả, nhưng việc chuyển mệnh lệnh của người bán cho ngân hàng tại nước nhập khẩu - ngân hàng xuất trình hối phiếu cho người chịu trách nhiệm thanh toán hối phiếu, sẽ bị hoãn cho đến khi hàng tới nơi, hoặc có thể yêu cầu hoãn xuất trình hối phiếu, nếu người chịu trách nhiệm thanh toán hối phiếu mong muốn điều đó.

Trong hầu hết các trường hợp, ngân hàng nhờ thu sẽ bán hạ giá hối phiếu trước khi nó được người mua chấp nhận hay thanh toán. Hối phiếu bị giảm giá khi ngân hàng tin rằng tài khoản của người bán có lượng hối phiếu đã đạt đến giới hạn tối đa (ít hơn phí ngân hàng), hoặc khi ngân hàng thoả thuận trả trước cho bên bán một tỉ lệ mệnh giá của hối phiếu, nhưng từ chối không quyết toán cho đến khi người mua thanh toán hối phiếu. Điều này mang lại thuận lợi về việc chuyển giao vốn cho người bán ở thời điểm sớm hơn, nếu người bán phải đợi hối phiếu đến kì thanh toán. Tuy nhiên, ngân hàng nhờ thu sẽ thường duy trì quyền truy đòi đối với người bán.

Nếu người mua không thực hiện nghĩa vụ với hối phiếu bằng việc không chấp nhận hoặc không thanh toán, thì ngân hàng có thể kiện người bán. Điều này nêu bật lên một bất lợi thực sự, từ góc độ người bán, về việc thanh toán theo phương thức hối phiếu kèm chứng từ nhờ ngân hàng thu hoặc bán hạ giá cho ngân hàng. Người mua có thể chấp nhận hối phiếu, vì vậy vận đơn sẽ được chuyển nhượng cho họ. Tuy nhiên, người bán không chắc chắn rằng người mua sẽ thanh toán khi hối phiếu đến hạn.[135] Vấn đề này sẽ được khắc phục khi sử dụng phương thức tín dụng chứng từ - được trình bày dưới đây. Đó cũng chính là nguyên nhân vì sao tín dụng chứng từ hoặc thư tín dụng được ưa thích hơn khi so sánh với phương thức hối phiếu kèm chứng từ.

3. Tín dụng chứng từ

Tín dụng chứng từ (còn được biết tới như tín dụng thương mại hay thư tín dụng) có nhiều ưu điểm có thể lựa chọn thay cho hối phiếu kèm chứng từ. Loại tín dụng này được sử dụng rộng rãi trên thế giới. Sự phổ biến của chúng trong thương mại quốc tế đã khiến cho nhiều chuyên gia mô tả tín dụng chứng từ như 'nhân tố quyết định của thương mại quốc tế', và người ta nói rằng các thương nhân trên khắp thế giới đã gắn bó và tiếp tục gắn bó hết lòng với phương thức này, và nhiều luật điều chỉnh thư tín dụng đều dựa vào tập quán và thực tiễn thương mại.[136]

Quy tắc thực hành thống nhất về tín dụng chứng từ (viết tắt là 'UCP'), Phụ lục của UCP về xuất trình chứng từ điện tử ('e-UCP'), và tập quán ngân hàng theo tiêu chuẩn quốc tế được áp dụng cho việc kiểm tra chứng từ trong phương thức tín dụng chứng từ (viết tắt là 'ISBP').

Mặc dù tín dụng chứng từ được sử dụng rộng rãi, nhưng việc cố gắng hài hoà các quy định điều chỉnh tín dụng chứng từ thông qua đàm phán và kí kết các điều ước quốc tế đều chưa thành công. Tuy nhiên, sự thống nhất trên phạm vi gần như toàn cầu đã đạt được bằng nỗ lực lớn của ICC - tổ chức soạn thảo và chịu trách nhiệm về Quy tắc thực hành thống nhất về tín dụng chứng từ UCP. Một học giả xuất sắc về luật thương

135 L. S. Sealy và R. J. A Hooley, Sđd, tr. 848.

136 Indira Carr , Sđd, tr. 471.

mại ở Anh Quốc, Giáo sư R. M. Goode, đã mô tả UCP như là 'biện pháp hài hoà thành công nhất trong lịch sử thương mại quốc tế'. Sự thống nhất các quy tắc, theo Giáo sư E. P. Ellinger, chuyên gia hàng đầu về thư tín dụng, là kết quả của sự thông dụng và cần thiết của ngân hàng, với tư cách là các tác nhân trong thương mại quốc tế.[137]

UCP được xem như bộ luật chuẩn hoá (i) các điều kiện mà theo đó các ngân hàng được chuẩn bị để phát hành tín dụng chứng từ theo yêu cầu của thương nhân - người tự nguyện thu xếp việc thanh toán cho hàng hoá giao dịch của mình thông qua tín dụng chứng từ; và (ii) việc giải thích thực tiễn tín dụng chứng từ.[138] UCP cũng được coi như một bộ quy tắc điều chỉnh việc sử dụng tín dụng chứng từ. Phần lớn thương nhân và ngân hàng ở hầu hết các nước trên thế giới đều chào đón và chấp thuận sử dụng UCP cho việc thanh toán hàng hoá.

UCP được ICC xuất bản lần đầu tiên vào năm 1993 và được sửa đổi 6 lần cho đến nay. Bản mới nhất là UCP 600, có hiệu lực từ ngày 01/7/2007. UCP 600 thay thế cho bản năm 1993 (UCP 500).[139] Bổ sung cho UCP 600, một phụ lục của UCP (gọi là 'e-UCP') cũng được ban hành để giải quyết việc xuất trình chứng từ điện tử.

A. *Áp dụng UCP*

Điều 1 của UCP quy định:

> Quy tắc thực hành thống nhất về tín dụng chứng từ, bản 2007, xuất bản phẩm số 600 của ICC (UCP) là các quy tắc áp dụng cho bất kì tín dụng chứng từ ('credit') nào (bao gồm cả thư tín dụng dự phòng, trong chừng mực mà các quy tắc này có thể áp dụng), khi nội dung của tín dụng chỉ rõ nó là đối tượng của các quy tắc này. Các quy tắc này ràng buộc tất cả các bên, trừ khi điều này bị thay đổi hay loại bỏ một cách rõ ràng.
>
> Từ phạm vi áp dụng trên, có ba vấn đề pháp lí cần xem xét:

[137] Indira Carr, Sđd, tr. 471-472.

[138] National Australia Bank Limited, Sđd, tr. 5.

[139] Điều này không có nghĩa là UCP 500 không được áp dụng nữa. Các bên có thể lựa chọn áp dụng UCP 500 hay thậm chí là các bản UCP trước đó của UCP, bằng việc đưa chúng vào hợp đồng của mình kèm theo hoặc không kèm theo những sửa đổi. Thực sự, UCP chỉ là luật mẫu đưa ra chỉ dẫn, còn việc nó có được áp dụng hay không là do các bên lựa chọn.

1. Các quy tắc UCP áp dụng đối với thư tín dụng

Việc áp dụng UCP có liên quan nhiều đến việc xác định thư tín dụng là gì. Khái niệm và các loại thư tín dụng sẽ được trình bày ở phần sau. UCP cũng áp dụng đối với thư tín dụng dự phòng, nhưng thực tiễn thương mại quốc tế đã chỉ ra rằng nó không phù hợp đối với loại thư tín dụng này, và các thương nhân cũng không sẵn sàng áp dụng UCP đối với thư tín dụng dự phòng. Điều đó giải thích tại sao Điều 1 của UCP quy định rằng nó chỉ áp dụng đối với thư tín dụng dự phòng 'trong chừng mực mà các quy tắc này có thể áp dụng'.

2. Áp dụng khi nội dung của tín dụng chỉ rõ nó là đối tượng của các quy tắc này

Tuy nhiên, vì là luật mẫu, UCP không tự động phát sinh giá trị pháp lí. Các thương nhân, hay chính xác hơn, các bên trong hợp đồng thương mại có quyền tự do đưa vào hợp đồng của mình tất cả hoặc bất kì quy tắc nào của UCP, và nếu đã đưa vào hợp đồng, thì UCP sẽ điều chỉnh tất cả các vấn đề của thoả thuận thư tín dụng chứng từ, trừ vấn đề liên quan đến mối quan hệ giữa người thụ hưởng và người mở thư tín dụng theo hợp đồng cơ sở, nghĩa là giữa người bán và người mua theo hợp đồng mua bán hàng hoá, vì hợp đồng này thường không đưa các quy tắc của UCP vào.

3. UCP ràng buộc tất cả các bên, trừ khi điều này bị thay đổi hoặc loại bỏ một cách rõ ràng

Khi được đưa vào hợp đồng cơ sở, *ví dụ*, hợp đồng mua bán hàng hoá quốc tế, UCP sẽ tự động trở thành một phần tham khảo không thể thiếu của hợp đồng, và tất cả các thuật ngữ và điều kiện được dùng trong thư tín dụng chứng từ, cũng như các điều khoản khác của UCP, sẽ trở thành thoả thuận do các bên xây dựng nên. Các thoả thuận trên 'ràng buộc tất cả các bên', vì thực chất chúng là một phần của hợp đồng và thoả thuận giữa người bán và người mua. Tuy nhiên, vì là các thoả thuận, nên các bên được tự do thay đổi, chỉnh sửa, bổ sung hay thậm chí cả loại bỏ việc áp dụng UCP trong thoả thuận tín dụng của mình. Nhưng thực tiễn đã cho thấy, trừ trường hợp ngoại lệ, các thương nhân không cần chỉnh sửa hay thay đổi nhiều quy tắc của UCP, vì chúng luôn trợ giúp cho sự phát triển lâu dài và bền vững cũng như sự lưu thông mạnh mẽ hàng hoá và dịch vụ trong thương mại quốc tế.

B. Định nghĩa tín dụng chứng từ

Các nhà nghiên cứu trên toàn thế giới đã đưa ra một số định nghĩa về tín dụng chứng từ. *Ví dụ,* một trong những định nghĩa ngắn gọn và chính xác nhất là: thư tín dụng, về bản chất, là sự bảo đảm thanh toán của ngân hàng khi có sự xuất trình một số chứng từ nhất định.[140] Thư tín dụng còn có thể được hiểu là thông báo của ngân hàng nhằm thanh toán cho một bên xác định hoặc người thụ hưởng, với điều kiện người thụ hưởng xuất trình các chứng từ xác định (thường đi kèm với hối phiếu ghi rõ số tiền phải trả) nhằm chứng minh rằng nghĩa vụ giao hàng đã hoàn thành. Thông báo này đề ra các điều khoản và điều kiện nghiêm ngặt cần được thực hiện.[141]

Điều 2 UCP quy định: 'Thư tín dụng là bất cứ thoả thuận có tên gọi hoặc mô tả như thế nào, có giá trị không thể bị huỷ, từ đó xác định rõ nghĩa vụ của ngân hàng phát hành nhằm bảo đảm thanh toán khi có sự xuất trình hồ sơ phù hợp.'

Do vậy, thư tín dụng có thể được hiểu là loại tín dụng (theo định nghĩa tại Điều 2 UCP) nhằm dàn xếp việc bên mua ('người yêu cầu' hoặc 'người xin mở thư tín dụng') trả tiền cho bên bán ('người thụ hưởng') khi có sự xuất trình một số chứng từ xác định (đây là lí do tại sao loại tín dụng này còn được gọi là tín dụng 'chứng từ').

Để hiểu rõ hơn khái niệm của thư tín dụng theo quy định tại Điều 2 UCP, cần làm rõ các thuật ngữ liên quan tại Điều này theo quy định của UCP như sau:

- 'Ngân hàng phát hành' ['Issuing bank'] là ngân hàng cung cấp thư tín dụng theo đề nghị của người yêu cầu (người mở thư tín dụng), hoặc với danh nghĩa của chính ngân hàng.
- 'Thanh toán' ['Honour'] nghĩa là:
  + Việc trả tiền ngay, nếu thư tín dụng có giá trị trả ngay.
  + Cam kết trả chậm và trả khi đáo hạn, nếu thư tín dụng có giá trị trả chậm.
  + Sự chấp nhận hối phiếu ['draft'] do người thụ hưởng kí phát và trả khi đáo hạn, nếu thư tín dụng có giá trị chấp nhận.
- 'Xuất trình hợp lệ' ['Complying presentation'] là sự xuất trình [chứng từ] phù hợp với các điều kiện và điều khoản nêu tại thư tín dụng, với các điều khoản có thể áp dụng của Quy tắc này [UCP] và với thực tiễn hoạt động ngân hàng tiêu chuẩn quốc tế.

Tóm lại, thư tín dụng là thoả thuận không thể bị huỷ, và xác định rõ nghĩa vụ của 'ngân hàng phát hành' phải 'thanh toán', thực chất là việc trả tiền cho giá trị hàng hoá, khi bộ chứng từ xuất trình tại ngân hàng được coi là 'xuất trình hợp lệ'.

C. Các loại tín dụng chứng từ (thư tín dụng)

1. Thư tín dụng không huỷ ngang và thư tín dụng huỷ ngang

(a) Thư tín dụng không huỷ ngang (không thể bị hủy) (Irrevocable credit)

Điều 3 UCP quy định rằng một thư tín dụng không thể bị huỷ ngay cả khi không có chỉ dẫn về điều này. Thư tín dụng không huỷ ngang thiết lập sự cam kết rõ ràng của ngân hàng phát hành rằng ngân hàng sẽ thanh toán cho thư tín dụng, với điều kiện các chứng từ, xác định rõ trong thư tín dụng, được xuất trình hợp lệ (Điều 2 và Điều 7(a) UCP). Trừ các trường hợp được quy định tại Điều 38 UCP (thư tín dụng chuyển nhượng), thư tín dụng không huỷ ngang không thể được sửa đổi hoặc huỷ bỏ sau khi đã được truyền đạt tới bên bán với tư cách người thụ hưởng, không cần phải có sự đồng ý của bên bán, ngân hàng phát hành và ngân hàng xác nhận, nếu có (Điều 10(a) UCP 600).

Khi thư tín dụng không huỷ ngang được phát hành dưới dạng thông báo, người thụ hưởng được bảo đảm rằng thư tín dụng đó chứa đựng cam kết rõ ràng từ phía ngân hàng phát hành, hay nói khác đi, hàm ý từ việc sử dụng thuật ngữ 'không huỷ ngang' có nghĩa là các hoạt động kí phát sẽ được thực hiện chi trả đúng hẹn, với điều kiện các điều khoản và điều kiện nêu trong thư tín dụng đã được thực hiện đúng. Đây là lí do tại sao những thư tín dụng này có giá trị cao trong giới thương mại, khi được phát hành bởi các ngân hàng có uy tín và là loại thư tín dụng thường được yêu cầu trong các giao dịch thương mại.[142]

(b) Thư tín dụng huỷ ngang (có thể bị hủy) (Revocable Credit)

Thư tín dụng huỷ ngang là thư tín dụng có thể bị huỷ, hoặc các điều

[140] Được định nghĩa bởi R. M. Goode, chuyên gia hàng đầu trong lĩnh vực luật thương mại ở Anh và trên thế giới. *Xem*: R. Goode, Sđd, tr. 1059.

[141] National Australia Bank Limited, Sđd, tr. 5.

[142] National Australia Bank Limited, Sđd, tr. 51.

khoản của nó có thể được sửa đổi bất kì lúc nào mà không cần có sự đồng ý từ người thụ hưởng. Thư tín dụng huỷ ngang, do đó, không đem lại, hoặc đem lại với mức rất thấp, sự bảo vệ an toàn cho người thụ hưởng. Thư tín dụng huỷ ngang rất hiếm gặp và có xu hướng được sử dụng chỉ trong trường hợp các bên không quan tâm tới an toàn tín dụng (*ví dụ,* mức độ tin tưởng giữa họ là rất cao). Tuy nhiên, dễ nhận thấy rằng UCP 600 chỉ áp dụng cho thư tín dụng không huỷ ngang mà không áp dụng cho thư tín dụng huỷ ngang. Vì vậy, nếu các bên trong hợp đồng muốn sử dụng hình thức thư tín dụng huỷ ngang, họ cần chỉ rõ rằng thư tín dụng áp dụng trong giao dịch là thư tín dụng được điều chỉnh bởi UCP 500, phiên bản trước của UCP 600, có điều chỉnh thư tín dụng huỷ ngang.

2. Thư tín dụng chưa xác nhận (Unconfirmed Credit) và thư tín dụng xác nhận (Confirm Credit)

Ý nghĩa của sự 'xác nhận' thư tín dụng không huỷ ngang được nêu rõ, cùng với những vấn đề khác, tại Điều 2 UCP như sau: 'Xác nhận là sự cam kết rõ ràng của ngân hàng xác nhận, ngoài cam kết của ngân hàng phát hành, nhằm thanh toán hoặc thương lượng thanh toán trên cơ sở việc xuất trình [chứng từ] hợp lệ.'

Vì vậy, trong loại thư tín dụng chưa xác nhận, chỉ có ngân hàng phát hành cam kết trả tiền cho người thụ hưởng, mặc dù thư tín dụng sẽ được phát hành dưới dạng thông báo bởi ngân hàng (làm nhiệm vụ) thông báo thư tín dụng tới bên bán, nhưng ngân hàng thông báo sẽ không có nghĩa vụ trả tiền. Tuy nhiên, trong loại thư tín dụng xác nhận, sẽ có thêm cam kết từ một ngân hàng không phải ngân hàng phát hành (thường là ngân hàng thông báo). Do đó, người thụ hưởng được bảo đảm rằng anh ta sẽ được hưởng thêm một cam kết thanh toán rõ ràng nữa bên cạnh cam kết của ngân hàng phát hành. Hơn nữa, điều này sẽ tạo thuận lợi cho người thụ hưởng, vì ngân hàng xác nhận (ngân hàng thông báo) thường có trụ sở tại nước sở tại, do đó làm tăng tâm lí thoải mái, tin tưởng cho người thụ hưởng.

Cam kết 'được xác nhận' có thể được trình bày cụ thể trong thông báo tín dụng, phát hành bởi ngân hàng xác nhận. Nếu không, việc sử dụng cụm từ 'Thư tín dụng này được chúng tôi bảo đảm' hoặc các cụm từ tương tự, là đủ để thể hiện hàm ý cam kết từ phía ngân hàng xác nhận.

(a) Thư tín dụng 'xác nhận' kèm theo 'không huỷ ngang'

Thư tín dụng không huỷ ngang và được xác nhận bởi một ngân hàng uy tín có trụ sở tại nước sở tại là điều lí tưởng cho bên bán, bảo đảm rằng anh ta sẽ được trả tiền, vì thư tín dụng loại này là sự xác lập cam kết trả tiền của hai ngân hàng. Hình thức này có vị trí cao hơn thư tín dụng không huỷ ngang nhưng tốn kém hơn, do ngân hàng xác nhận sẽ tính phí xác nhận mà về bản chất là nhận rủi ro về phía mình thông qua việc cam kết trả tiền, để đổi lại phí xác nhận đó.

(b) Khi nào thư tín dụng cần được 'xác nhận'?

Trong trường hợp ngân hàng phát hành là ngân hàng nổi tiếng, hạng nhất hoặc có thứ hạng cao, đặt trụ sở tại nước có môi trường kinh tế và chính trị ổn định, việc xác nhận có rất ít giá trị thực tiễn. Tuy nhiên, nếu ngân hàng phát hành ít được biết đến và là ngân hàng nhỏ, hoặc nếu nước - nơi thư tín dụng được phát hành gặp vấn đề về chính trị hoặc kinh tế, thì dễ hiểu rằng người thụ hưởng có thể tìm cách để thư tín dụng được xác nhận bởi một ngân hàng ở nước của mình, theo đó uy tín và vị trí của ngân hàng này cũng có thể được anh ta đánh giá một cách dễ dàng hơn.[143]

(c) Quy trình xác nhận thư tín dụng

Việc yêu cầu ngân hàng thông báo xác nhận thư tín dụng phải được ngân hàng phát hành thực hiện. Ngân hàng phát hành sẽ chịu trách nhiệm trả phí xác nhận, trừ khi chính ngân hàng đó yêu cầu rằng người thụ hưởng sẽ phải trả khoản phí đó. Trường hợp người thụ hưởng yêu cầu xác nhận, khi nhận được một thư tín dụng không có điều khoản xác nhận, ngân hàng thông báo có trách nhiệm chuyển yêu cầu tới ngân hàng phát hành để được cấp phép xác nhận. Mặc dù ngân hàng thông báo hiếm khi từ chối yêu cầu xác nhận thư tín dụng từ ngân hàng phát hành, nhưng họ có thể từ chối xác nhận trong trường hợp không thể thoả thuận được với ngân hàng phát hành về phạm vi trách nhiệm mà ngân hàng xác nhận phải gánh chịu khi thực hiện xác nhận thư tín dụng.[144]

(d) Xác nhận ngầm

Xác nhận ngầm không thuộc phạm vi điều chỉnh của UCP. Xác nhận ngầm là cam kết của một ngân hàng (theo yêu cầu của người thụ hưởng, không phải theo yêu cầu của ngân hàng phát hành hoặc được ngân hàng phát hành cấp phép xác nhận) nhằm bổ sung nghĩa vụ trả tiền của mình vào thư tín dụng căn cứ theo các điều khoản của thư tín dụng, với

143 National Australia Bank Limited, Sđd, tr. 53.

144 Như trên.

điều kiện các chứng từ được xuất trình theo thứ tự. Do vậy, những giao dịch này chỉ được dành riêng cho một số khách hàng nhất định, đáp ứng được các tiêu chuẩn ngặt nghèo từ phía ngân hàng. Việc cung cấp xác nhận ngầm được đánh giá và quyết định thuần túy dựa trên sự suy xét cẩn trọng của ngân hàng được yêu cầu bổ sung xác nhận ngầm.[145]

3. Thư tín dụng trả ngay, chấp nhận và trả chậm

Căn cứ vào thời điểm bên bán có quyền nhận thanh toán, thư tín dụng có thể được phân loại như sau[146]:

- 'Trả ngay' ('payment at sight'): Ngân hàng cam kết thanh toán cho bên bán (người thụ hưởng theo thư tín dụng) ngay khi chứng từ được xuất trình hợp lệ. Thông thường, ngân hàng sẽ yêu cầu bên bán kí phát một hối phiếu thanh toán ngay và xuất trình cùng với các chứng từ khác để được nhận thanh toán;

- 'Trả chậm' ('deferred payment'): Ngân hàng cam kết thanh toán cho bên bán tại một ngày trong tương lai được xác định căn cứ theo các điều khoản của thư tín dụng, *ví dụ,* 90 ngày, kể từ ngày chuyển hàng. Bất kể khi nào việc trả tiền trong tương lai của ngân hàng không phải cho một hối phiếu đã được chấp nhận (thư tín dụng theo hình thức chấp nhận), thì tín dụng đó được gọi là tín dụng trả chậm. Tín dụng này có thể được chiết khấu trước khi đến hạn thanh toán bởi một ngân hàng chiết khấu tham gia chuyển nhượng quyền của người thụ hưởng căn cứ theo thư tín dụng;

- 'Thư tín dụng chấp nhận' ('acceptance credit'): Ngân hàng cam kết chấp nhận hối phiếu kí phát bởi bên bán. Hối phiếu thường ở dạng thanh toán trong tương lai. Do vậy, bằng việc chấp nhận hối phiếu, ngân hàng đồng ý trả tiền trên mệnh giá của hối phiếu khi đến hạn thanh toán cho bên xuất trình hối phiếu. Giữa thời điểm chấp nhận và hạn thanh toán của hối phiếu, bên bán có thể chiết khấu cho ngân hàng của anh ta để nhận tiền mặt.

[145] Các tiêu chí sau đây có thể là những yếu tố quyết định trong việc đánh giá một yêu cầu xác nhận ngầm từ người thụ hưởng: (i) Thương nhân giàu kinh nghiệm; (ii) Đánh giá tín dụng của ngân hàng phát hành; (iii) Mối quan hệ giữa khách hàng với ngân hàng; (iv) Kiểm soát hàng hoá thông qua vận đơn; (v) Khả năng từ chối thực hiện hợp đồng do loại hàng hoá xuất khẩu; và (vi) Bảo hiểm xuất khẩu là điều kiện tiên quyết ở một số quốc gia. *Xem* National Australia Bank Limited, Sđd, tr. 3-54.

[146] L. S. Sealy và R. J. A. Hooley, Sđd, tr. 853-854.

4. Thư tín dụng trả thẳng (hoặc đặc biệt khuyến cáo) và thư tín dụng có giá trị chiết khấu (hoặc thương lượng thanh toán - ND)

Trong một số thư tín dụng, được gọi là 'thư tín dụng trả thẳng' (straight credit), cam kết thanh toán của ngân hàng phát hành chỉ được gửi tới bên bán. Trong một số thư tín dụng khác, được gọi là 'thư tín dụng chiết khấu' (negotiation credit) (hoặc thư tín dụng thương lượng thanh toán - ND), cam kết thanh toán của ngân hàng phát hành không chỉ dành cho bên bán mà còn mở rộng tới một 'ngân hàng được chỉ định' được ủy quyền thương lượng thanh toán mua hối phiếu kí phát bởi bên bán.

Điều 2 UCP quy định: 'Thương lượng thanh toán là việc mua lại hối phiếu và/hoặc chứng từ khi xuất trình hợp lệ của một ngân hàng được chỉ định (được kí phát bởi một ngân hàng khác ngoài ngân hàng được chỉ định), bằng cách tạm ứng hoặc đồng ý tạm ứng cho người thụ hưởng trong hoặc trước ngày làm việc của ngân hàng mà vào ngày đó, số tiền hoàn trả đến hạn phải trả cho ngân hàng được chỉ định.'

Đối với thư tín dụng mở có giá trị chiết khấu, cam kết thanh toán được mở rộng tới tất cả các ngân hàng. Ngân hàng, sau khi đã thương lượng thanh toán với người thụ hưởng về hối phiếu hoặc chứng từ, có thể xuất trình các giấy tờ này theo thư tín dụng và nhận thanh toán khi đến hạn (Điều 7(c) và Điều 8(c) UCP 600).

5. Thư tín dụng 'điều khoản đỏ' và thư tín dụng 'điều khoản xanh'

Thư tín dụng 'điều khoản đỏ' ('Red clause' credit) là thư tín dụng cho phép bên bán kí phát thư tín dụng trước khi chuyển hàng. Việc tạm ứng được thực hiện trên cơ sở biên lai kho hàng (để chứng minh là có đủ hàng để giao theo thoả thuận - ND), mặc dù người thụ hưởng có khả năng xử lí lô hàng (chuyển hàng đi - ND). Loại thư tín dụng này dần dần được gọi là thư tín dụng 'điều khoản đỏ', do các điều khoản được in bằng mực đỏ. Mặc dù nguồn gốc của loại thư tín dụng này là từ lĩnh vực kinh doanh len sợi, nhưng việc sử dụng nó ngày nay không chỉ giới hạn trong ngành này. Do bên bán có khả năng xử lí lô hàng, loại thư tín dụng này được sử dụng khi các bên trong hợp đồng tin tưởng nhau ở mức độ cao.

Thư tín dụng 'điều khoản xanh' ('Green clause' credit) được đưa vào sử dụng trong kinh doanh cà phê ở Zaire và có tác dụng tương tự như thư tín dụng 'điều khoản đỏ'. Khác biệt duy nhất ở loại thư tín dụng này là hàng hoá được lưu kho dưới tên của ngân hàng.[147]

[147] Indira Carr, Sđd, tr. 493-494.

6. Thư tín dụng tuần hoàn (Revolving Credit)

Thư tín dụng, thay vì chỉ được sử dụng để thanh toán một khoản tiền xác định hoặc chỉ có giá trị trong một thời điểm cố định, có thể được phục hồi lại về giá trị hoặc thời gian. Thư tín dụng tuần hoàn về giá trị cho phép người thụ hưởng xuất trình chứng từ một cách thường xuyên theo mong muốn trong khoảng thời gian còn hiệu lực của thư tín dụng, miễn là không vượt quá tổng giới hạn được quy định trong thư tín dụng. Còn thư tín dụng tuần hoàn về thời gian cho phép người thụ hưởng rút khoản tiền nhất định trong một tháng theo giai đoạn được ghi trong thư tín dụng, cho phép hoặc không cho phép người thụ hưởng chuyển số tiền chưa rút từ tháng này sang tháng sau.[148]

7. Thư tín dụng chuyển nhượng (transferable credit) và thư tín dụng không được chuyển nhượng (non-transferable credit)

Thư tín dụng có thể chuyển nhượng hoặc không được chuyển nhượng. Thư tín dụng chuyển nhượng cho phép bên bán (người thụ hưởng ban đầu của thư tín dụng) chuyển giao quyền lợi trong thư tín dụng cho bên thứ ba, *ví dụ*, như các nhà cung ứng của bên bán. Điều 38 UCP quy định việc chuyển nhượng thư tín dụng được tiến hành khi đáp ứng đầy đủ một số điều kiện. Nổi bật trong số này là các yêu cầu mà ngân hàng chuyển nhượng phải tuyệt đối tuân thủ về mức độ và cách thức chuyển giao (Điều 38(a)), và thư tín dụng phải được ghi rõ là 'có thể được chuyển nhượng' bởi ngân hàng phát hành (Điều 38(b)).

Tuy nhiên, thuật ngữ 'chuyển nhượng' phần nào gây hiểu lầm. 'Có thể chuyển nhượng' không có nghĩa là 'có thể thương lượng thanh toán'. Thư tín dụng là văn bản không thể thương lượng thanh toán, nhưng lại có thể chuyển nhượng từ người này sang người khác, thông qua việc kí hậu (ghi rõ ra mặt sau - ND) (endorsement) và chuyển giao. Trên thực tế, khi người thụ hưởng thứ nhất (bên bán) muốn chuyển nhượng thư tín dụng cho người thụ hưởng thứ hai (thường là nhà cung ứng của bên bán), anh ta sẽ trả lại thư tín dụng cho ngân hàng chuyển nhượng; ngân hàng này, theo yêu cầu của người thụ hưởng thứ nhất, sẽ phát hành một thư tín dụng mới tới người thụ hưởng thứ hai về toàn bộ hoặc một phần tiền ghi trong thư tín dụng gốc. Nếu người thụ hưởng thứ nhất chỉ chuyển nhượng một phần giá trị ghi trong thư tín dụng, anh ta vẫn có thể nhận tiền từ số dư. Trừ trường hợp khác được ghi rõ trong thư tín dụng, thư tín dụng chuyển nhượng chỉ được chuyển nhượng một lần duy nhất (Điều 38(d) UCP 600). Điều này nghĩa là người thụ hưởng thứ hai không thể tiếp tục chuyển nhượng một phần (giá trị của) thư tín dụng nhằm phục vụ lợi ích cho nhà cung ứng của anh ta, nhưng người thụ hưởng thứ nhất lại không bị ngăn cản trong việc chuyển nhượng một phần (giá trị của) thư tín dụng cho nhiều người khác nhau, miễn là tổng số chuyển nhượng không vượt quá giá trị của thư tín dụng, đồng thời việc chuyển một phần hàng và rút một phần tiền không bị cấm theo các điều khoản ghi trong thư tín dụng (Điều 38(d) và (g) UCP 600).[149]

8. Thư tín dụng bảo lãnh theo yêu cầu (Demand Guarantees Credit) và thư tín dụng dự phòng (Standby Credit)

Các loại thư tín dụng này thuộc phạm vi điều chỉnh của UCP nhưng có tính chất khác với các loại hình thư tín dụng thông thường và sẽ được đề cập ở tiểu mục sau.

D. Sự vận hành của thư tín dụng

Giả sử rằng giao dịch dưới đây là một hợp đồng mua bán hàng hoá quốc tế, thì giao dịch thư tín dụng thông thường sẽ được vận hành như sau[150]:

- Bên bán và bên mua thoả thuận trong hợp đồng mua bán là việc trả tiền sẽ được thực hiện thông qua thư tín dụng;
- Bên mua (với tư cách 'người yêu cầu' trong thư tín dụng) yêu cầu một ngân hàng tại nước mình ('ngân hàng phát hành') mở thư tín dụng phục vụ lợi ích của bên bán ('người thụ hưởng') dựa trên các điều khoản xác định bởi bên mua theo mệnh lệnh của anh ta (thường được nêu tại yêu cầu mở thư tín dụng);
- Ngân hàng phát hành mở một thư tín dụng không huỷ ngang,[151] bằng các điều khoản trong thư tín dụng, cam kết (i) Trả số tiền nêu trong hợp đồng; hoặc (ii) Cam kết trả chậm và trả khi đến hạn; hoặc (iii) Chấp nhận hối phiếu kí phát bởi người thụ hưởng và trả khi đến hạn[152] với điều kiện các chứng từ được xuất trình đúng hạn[153] và phù hợp với các điều khoản và điều kiện nêu tại thư tín dụng;

148 R. M. Goode, Sđd, tr. 1075-1076.

149 L. S. Sealy và R. J. A. Hooley, Sđd, tr. 855-856.

150 L. S Sealy và R. J. A. Hooley, Sđd, tr. 849-850.

151 Thư tín dụng hủy ngang không thuộc phạm vi điều chỉnh của UCP 600 (xem tại Điều 2 về định nghĩa thư tín dụng) và trên thực tế rất hiếm khi được sử dụng.

152 Phụ thuộc vào loại thư tín dụng là loại trả ngay, chấp nhận hay trả chậm.

153 Trong trường hợp các chứng từ vận tải, *ví dụ*: vận đơn, hợp đồng bảo hiểm, hoá đơn tài chính và các chứng từ khác, quy định rõ tại thư tín dụng, như chứng nhận xuất xứ, giấy chứng nhận chất lượng và danh sách đóng gói.

- Ngân hàng phát hành mở thư tín dụng bằng cách gửi thông báo trực tiếp cho bên bán; ngoài ra, trong nhiều trường hợp, ngân hàng phát hành còn có thể sắp xếp cho một ngân hàng trong nước của bên bán (ngân hàng 'thông báo' hoặc 'chuyển phát') để thông báo tới bên bán là thư tín dụng đã được mở;

- Ngân hàng phát hành cũng có thể yêu cầu ngân hàng thông báo bổ sung sự 'xác nhận' của mình vào thư tín dụng. Nếu ngân hàng đồng ý làm như vậy, ngân hàng thông báo (bây giờ được gọi là ngân hàng 'xác nhận') cam kết thanh toán riêng cho bên bán, căn cứ vào các điều khoản tương tự được đặt ra bởi ngân hàng phát hành, người bán sẽ được hưởng lợi từ nghĩa vụ thanh toán ngay tại nước mình;

- Bên bán chuyển hàng và đệ trình các chứng từ bắt buộc (thường thông qua ngân hàng của bên bán, với tư cách đại diện) tới ngân hàng thông báo (với tư cách ngân hàng được chỉ định[154]) hoặc ngân hàng xác nhận. Nếu bộ chứng từ phù hợp với các điều khoản của thư tín dụng, ngân hàng thông báo (với tư cách ngân hàng được chỉ định[155]) hoặc ngân hàng xác nhận sẽ (i) trả số tiền nêu trong hợp đồng; hoặc (ii) cam kết trả chậm và trả khi đến hạn; hoặc (iii) chấp nhận hối phiếu và trả khi đến hạn; hoặc (iv) thương lượng thanh toán mua lại hối phiếu và nhận số tiền hoàn lại từ ngân hàng phát hành;

- Trước khi hoàn lại chứng từ cho bên mua, đến lượt mình, ngân hàng phát hành sẽ yêu cầu được thanh toán. Nếu bên mua không thể thanh toán vì chưa bán lại được hàng hoá, thì ngân hàng phát hành có thể hoàn lại chứng từ cho bên mua theo một 'biên lai ủy thác'[156] ('trust-receipt'), theo đó bên mua có quyền tiếp cận hàng khi hàng được vận tải tới nơi mà không làm thiệt hại đến lợi ích bảo đảm của ngân hàng đối với hàng hoá và trong quá trình mua bán.

[154] 'Ngân hàng được chỉ định' là ngân hàng được ủy quyền trong thư tín dụng để thanh toán hoặc thương lượng thanh toán, hoặc bất kì ngân hàng nào, trong trường hợp thư tín dụng không quy định (Điều 2 và Điều 6(a) UCP 600).

[155] Trừ trường hợp ngân hàng được chỉ định chính là ngân hàng xác nhận, sự ủy quyền thanh toán hoặc thương lượng thanh toán không làm phát sinh nghĩa vụ thanh toán hoặc thương lượng thanh toán của ngân hàng được chỉ định, trừ trường hợp có thoả thuận rõ ràng từ phía ngân hàng được chỉ định và đã được truyền đạt tới người thụ hưởng (Điều 12(a) UCP 600). Việc tiếp nhận, kiểm tra và chuyển tiếp chứng từ do một ngân hàng được chỉ định thực hiện, không đồng thời là ngân hàng xác nhận, không làm phát sinh trách nhiệm thanh toán hoặc thương lượng thanh toán, cũng không xác lập cam kết thanh toán hoặc thương lượng thanh toán (Điều 12(c) UCP 600).

[156] Trong trường hợp này, bên mua nhận chứng từ, bao gồm cả vận đơn, từ đó có quyền nhận hàng từ bên vận tải. Tuy nhiên, quyền sở hữu hàng hoá hợp pháp vẫn thuộc về ngân hàng, do đó ngân hàng có các lợi ích bảo đảm cần thiết.

E. *Các hợp đồng phát sinh từ giao dịch thư tín dụng*

Giao dịch thư tín dụng được triển khai đồng thời với chuỗi các quan hệ hợp đồng có liên quan đến nhau. *Thứ nhất*, đó là hợp đồng mua bán giữa bên bán và bên mua. *Thứ hai*, khi ngân hàng phát hành đồng ý thực hiện theo mệnh lệnh của bên mua, giữa họ đã tồn tại một hợp đồng. *Thứ ba*, khi ngân hàng chuyển phát đồng ý thực hiện theo mệnh lệnh của ngân hàng phát hành và thông báo hoặc xác nhận thư tín dụng, giữa hai ngân hàng này cũng có quan hệ hợp đồng. *Cuối cùng*, chính cam kết trả tiền cho bên bán của ngân hàng phát hành và ngân hàng xác nhận trong giao dịch thư tín dụng cũng là quan hệ mang bản chất hợp đồng.[157]

F. *Cam kết của ngân hàng phát hành và ngân hàng xác nhận*

Thông thường, nếu thư tín dụng là thư tín dụng xác nhận, thì người thụ hưởng sẽ được nhận thanh toán từ ngân hàng xác nhận. Nếu thư tín dụng là không xác nhận, thì người thụ hưởng sẽ được nhận thanh toán từ ngân hàng phát hành. Nếu có sự tham gia của ngân hàng được chỉ định,[158] thì người thụ hưởng sẽ được nhận thanh toán từ ngân hàng này. Nếu ngân hàng được chỉ định không thực hiện thanh toán, thì người thụ hưởng sẽ quay lại ngân hàng xác nhận hoặc ngân hàng phát hành. Do vậy, về mặt pháp lí, cam kết của ngân hàng phát hành và ngân hàng xác nhận đối với các bên liên quan, chẳng hạn cam kết trả tiền, là rất quan trọng đối với người thụ hưởng theo thư tín dụng (tức là bên mua).

Đối với cam kết của ngân hàng phát hành, Điều 7 UCP quy định như sau:

> a. Với điều kiện các chứng từ theo quy định được nộp cho ngân hàng được chỉ định hoặc ngân hàng phát hành, và với điều kiện chứng từ được xuất trình hợp lệ, ngân hàng phát hành phải thanh toán, nếu thư tín dụng ghi rõ:

[157] L. S. Sealy và R. J. A. Hooley, Sđd, tr. 850. Xem thêm sự phân tích sâu hơn về chuỗi quan hệ có tính hợp đồng này theo pháp luật Anh Quốc: R. Goode, Sđd, tr. 1085-1096.

[158] Ngân hàng được chỉ định là ngân hàng được ghi rõ trong thư tín dụng, hoặc là ngân hàng bất kì, trong trường hợp thư tín dụng không xác định (Điều 2 UCP).

i. Thư tín dụng có giá trị trả ngay, trả chậm hoặc chấp nhận tại ngân hàng phát hành;

ii. Trả ngay tại một ngân hàng được chỉ định mà ngân hàng được chỉ định đó không thanh toán;

iii. Trả chậm tại một ngân hàng được chỉ định mà ngân hàng được chỉ định đó không cam kết về nghĩa vụ trả chậm, hoặc có cam kết về nghĩa vụ trả chậm nhưng không thanh toán khi đến hạn;

iv. Chấp nhận [hối phiếu] tại một ngân hàng được chỉ định mà ngân hàng được chỉ định đó không chấp nhận hối phiếu đã kí phát, hoặc đã chấp nhận hối phiếu đã kí phát mà không thanh toán khi đến hạn;

v. Thương lượng thanh toán với một ngân hàng được chỉ định mà ngân hàng được chỉ định đó không thương lượng thanh toán.

b. Ngân hàng phát hành bị ràng buộc bởi nghĩa vụ thanh toán không thể huỷ bỏ ngay khi phát hành thư tín dụng.

c. Ngân hàng phát hành cam kết hoàn trả cho ngân hàng được chỉ định, mà ngân hàng này đã thanh toán hoặc thương lượng thanh toán trên cơ sở sự xuất trình chứng từ hợp lệ và chuyển các chứng từ này tới ngân hàng phát hành. Việc hoàn trả trên cơ sở xuất trình hợp lệ theo thư tín dụng có giá trị thanh toán bằng cách chấp nhận hoặc trả chậm là vào lúc đáo hạn, không phụ thuộc vào việc ngân hàng được xác định đã trả trước hoặc mua trước khi đến hạn. Cam kết hoàn trả của ngân hàng phát hành đối với ngân hàng được chỉ định là độc lập với cam kết thanh toán của ngân hàng phát hành với người thụ hưởng.

Đối với cam kết của ngân hàng xác nhận, Điều 8 UCP quy định như sau:

A. Với điều kiện các chứng từ theo quy định được nộp cho ngân hàng xác nhận hoặc cho bất kì ngân hàng được chỉ định nào, và với điều kiện chứng từ được xuất trình hợp lệ, ngân hàng xác nhận phải:

i. Thanh toán, nếu thư tín dụng có giá trị thanh toán theo cách:

a. Trả ngay, trả chậm hoặc chấp nhận thanh toán tại ngân hàng xác nhận;

b. Trả ngay với một ngân hàng được chỉ định khác mà ngân hàng được chỉ định này không thanh toán;

c. Trả chậm với một ngân hàng được chỉ định khác mà ngân hàng được chỉ định này không cam kết trả chậm, hoặc có cam kết trả chậm mà không thanh toán khi đáo hạn;

d. Chấp nhận [hối phiếu] với một ngân hàng được chỉ định khác mà ngân hàng được chỉ định này không chấp nhận hối phiếu đã kí phát, hoặc đã chấp nhận hối phiếu đã kí phát mà không thanh toán khi đến hạn;

e. Thương lượng thanh toán với một ngân hàng được chỉ định khác mà ngân hàng được chỉ định này không thương lượng thanh toán.

ii. Thương lượng thanh toán và không truy đòi, nếu thư tín dụng có giá trị thương lượng thanh toán tại ngân hàng xác nhận.

B. Ngân hàng xác nhận bị ràng buộc bởi nghĩa vụ thanh toán không thể huỷ bỏ, ngay khi xác nhận thư tín dụng.

C. Ngân hàng xác nhận cam kết hoàn trả cho một ngân hàng được chỉ định khác, mà ngân hàng này đã thanh toán hoặc thương lượng thanh toán trên cơ sở sự xuất trình chứng từ hợp lệ và chuyển các chứng từ này cho ngân hàng xác nhận. Việc hoàn trả trên cơ sở xuất trình hợp lệ theo thư tín dụng có giá trị thanh toán bằng cách chấp nhận hoặc trả chậm là vào lúc đáo hạn, không phụ thuộc vào việc một ngân hàng được xác định khác đã trả trước hoặc mua trước khi đến hạn. Cam kết hoàn trả của ngân hàng xác nhận cho một ngân hàng được chỉ định khác là độc lập với cam kết thanh toán của ngân hàng xác nhận cho người thụ hưởng.

D. Trường hợp một ngân hàng được ủy quyền hoặc được yêu cầu xác nhận thư tín dụng bởi ngân hàng phát hành mà không sẵn sàng làm việc đó, thì phải thông báo cho ngân hàng phát hành ngay lập tức và có thể thông báo thư tín dụng mà không cần xác nhận.

G. *Các nội dung cơ bản*

1. Nguyên tắc về tính độc lập của thư tín dụng

Thư tín dụng được xem là riêng biệt và độc lập với hợp đồng cơ bản giữa bên bán với bên mua và mối quan hệ giữa ngân hàng phát hành với bên mua. Vì vậy, nói chung, ngay cả khi bên bán [được coi là] đã vi phạm hợp đồng mua bán với bên mua, thì ngân hàng phát hành (hoặc ngân hàng xác nhận) vẫn không thể từ chối thực hiện cam kết thanh toán của mình. Thư tín dụng vẫn sẽ được thực hiện ngay cả khi bên mua đưa ra các cáo buộc, ví dụ, chất lượng của lô hàng được chuyển tới không đạt yêu cầu, không phù hợp với mục đích của họ hoặc có sự thiếu hụt trong khi giao hàng. Do đó, ngân hàng phát hành không thể từ chối cam kết thanh toán của mình, chỉ vì bên mua không làm tròn nghĩa vụ thanh toán.[159]

Nguyên tắc về tính độc lập của thư tín dụng được ghi nhận tại Điều 4 UCP như sau:

a. Về bản chất, thư tín dụng là giao dịch riêng biệt với hợp đồng mua bán hoặc các hợp đồng khác là cơ sở của thư tín dụng. Ngân hàng không thể liên quan đến hoặc bị ràng buộc bởi các hợp đồng này, ngay cả khi có bất kì sự dẫn chiếu nào tới chúng được nêu trong thư tín dụng. Vì vậy, cam kết của ngân hàng đối với việc thanh toán, thương lượng thanh toán hoặc thực hiện bất kì nghĩa vụ nào khác theo thư tín dụng không phụ thuộc vào các khiếu nại hoặc cáo buộc từ phía người yêu cầu mở thư tín dụng phát sinh từ mối quan hệ của họ với ngân hàng phát hành, hoặc người thụ hưởng. Người thụ hưởng, trong mọi trường hợp, không thể lợi dụng các quan hệ hợp đồng giữa các ngân hàng với nhau hoặc giữa người yêu cầu mở thư tín dụng với ngân hàng phát hành.

b. Ngân hàng phát hành không được phép ủng hộ mọi cố gắng của người yêu cầu mở thư tín dụng trong việc đưa các bản sao của hợp đồng cơ sở, hoá đơn quy ước và các chứng từ tương tự trở thành bộ phận không tách rời của thư tín dụng.

Lí do của nguyên tắc về tính độc lập của thư tín dụng:

Trong trường hợp bên mua đã chấp nhận một hối phiếu đòi nợ nhưng phát hiện ra rằng bên bán đã phá vỡ một số nghĩa vụ của mình trong hợp đồng mua bán, đáng chú ý nhất là số hàng hoá có chất lượng hoặc số lượng không như mong đợi. Thông thường, những gì bên mua cố gắng làm là ngăn chặn khoản tiền sẽ được ngân hàng thanh toán cho bên bán. Tuy nhiên, thực tế rất khó để làm điều này, trừ một số trường hợp ngoại lệ.[160]

Lí do đằng sau thực tế này được một thẩm phán người Anh giải thích như sau:

> Bên mua thường kiếm tìm một lệnh của toà án nhằm ngăn chặn ngân hàng trả tiền khi hàng hoá không phù hợp với mô tả trong hợp đồng, nhưng toà án không sẵn sàng ban hành lệnh đó. Lí do của việc này là: Nghĩa vụ thanh toán của ngân hàng theo thư tín dụng được tách khỏi hợp đồng mua bán, và toà án sẽ chỉ can thiệp khi có hậu quả đủ nghiêm trọng xảy ra. Việc cho phép bên mua can thiệp vào thoả thuận thanh toán giữa ngân hàng phát hành và bên bán (người thụ hưởng), khi hàng hoá không phù hợp với mô tả trong hợp đồng, sẽ gây tác động nghiêm trọng tới thương mại quốc tế, bởi vì bên bán, khi tham gia vào hợp đồng mua bán có hình thức thanh toán thông qua thư tín dụng, đã có niềm tin rằng anh ta sẽ được trả tiền thông qua một thư tín dụng không thể bị huỷ, và có thể dựa vào quy định tại thư tín dụng để mua hàng từ nhà sản xuất hoặc tự mình sản xuất hàng hoá. Nếu toà án can thiệp, thì tính vững chắc của việc thanh toán, thường gắn liền với thư tín dụng thương mại, sẽ bị tác động nghiêm trọng.[161]

2. Tiêu chuẩn kiểm tra chứng từ

Điều 14 UCP quy định rằng:

a. Ngân hàng được chỉ định hành động theo sự chỉ định, [với tư cách] ngân hàng xác nhận, nếu có, và ngân hàng phát hành phải kiểm tra việc xuất trình [chứng từ], chỉ dựa trên cơ sở chứng từ, để quyết định các chứng từ xuất hiện trước mặt họ có phải là sự xuất trình [chứng từ] hợp lệ hay không.

b. Ngân hàng được chỉ định hành động theo sự chỉ định, [với tư cách] ngân hàng xác nhận, nếu có, và ngân hàng phát hành sẽ có, cho mỗi ngân hàng, tối đa là năm ngày làm việc của ngân hàng sau ngày [chứng từ được] xuất trình để quyết định việc xuất trình

[159] L. S. Sealy và R. J. A. Hooley, Sđd, tr. 865.

[160] *Ví dụ*, trong trường hợp gian lận hoặc bất hợp pháp theo quy định của pháp luật Anh Quốc. Tuy nhiên, vì vấn đề rất phức tạp và có thể khác nhau theo các hệ thống pháp luật khác nhau nên không được đề cập ở đây.

[161] Tranh luận của thẩm phán Megarry J. trong vụ *Discount Records Ltd v. Barclays Bank Ltd* [1975] 1 Lloyd's Rep 444.

[chứng từ] có hợp lệ hay không. Thời hạn này không bị rút ngắn hoặc không bị tác động bằng bất cứ cách nào khác, nếu ngày hết hạn hoặc ngày xuất trình cuối cùng rơi đúng vào hoặc sau ngày xuất trình.

Trên thực tế, theo quy định tại Điều 14 UCP, ngân hàng được chỉ định, ngân hàng xác nhận (nếu có) và ngân hàng phát hành, thường chỉ quan tâm đến việc nhằm bảo đảm rằng chứng từ được xuất trình trước mặt họ là sự xuất trình [chứng từ] hợp lệ, không phải để kiểm tra tính xác thực của các thông tin trong chứng từ, lại càng không phải để kiểm tra hàng hoá là đối tượng của hợp đồng mua bán.

Ngoài ra, Điều 5 UCP cũng nhấn mạnh rằng: 'Ngân hàng xử lí chứng từ, không xử lí hàng hoá, dịch vụ hoặc sự thực hiện [các việc khác] có liên quan tới các chứng từ. Do đó, nếu chứng từ được xuất trình đúng trình tự, thì ngân hàng, nói chung, sau đó, sẽ có cả quyền và nghĩa vụ thanh toán. Ngược lại, nếu chứng từ không đúng theo quy định của thư tín dụng, thì ngân hàng có quyền từ chối thanh toán, ngay cả khi sự sai lệch này không hề quan trọng trên thực tế.[162]

H. Luật điều chỉnh tín dụng chứng từ (thư tín dụng)

Như đã nêu ở trên, trong một giao dịch thư tín dụng, có một số quan hệ hợp đồng khác nhau. Bỏ qua hợp đồng mua bán cơ sở, có các loại hợp đồng khác giữa: (i) Bên mua và ngân hàng phát hành; (ii) Ngân hàng phát hành và ngân hàng xác nhận; (iii) Ngân hàng xác nhận và bên bán; và (iv) Ngân hàng phát hành và bên bán.

Khi có tranh chấp phát sinh hoặc có liên quan tới quan hệ hợp đồng như vậy, câu hỏi quan trọng về mặt pháp luật có thể phát sinh là: Luật nào điều chỉnh thư tín dụng (hoặc tín dụng chứng từ)? Do mối quan hệ như vậy có tính chất phức tạp và liên quan tới nhiều nước, nên câu trả lời là không dễ dàng. Tuy nhiên, về nguyên tắc, Công ước Rome về Luật áp dụng cho các nghĩa vụ hợp đồng (sau đây gọi là 'Công ước Rome') có thể tích cực hỗ trợ giải quyết vấn đề.

Khoản 1 Điều 3 của Công ước quy định rằng luật thích hợp để điều chỉnh loại hợp đồng này, bất kể hợp đồng được thực hiện như thế nào, phải được xác định theo các quy định tại Công ước. Điều 4 Công ước, điều khoản hữu ích nhất, nhằm xác định luật điều chỉnh thư tín dụng, quy định như sau:

[162] R. M. Goods, Sđd, tr. 1082.

1. Khi không có sự lựa chọn luật áp dụng cho hợp đồng theo quy định tại Điều 3, hợp đồng sẽ được điều chỉnh bởi luật của nước mà nó có mối liên hệ mật thiết nhất. Tuy nhiên, một số phần của hợp đồng có mối liên hệ mật thiết hơn với một nước khác có thể là ngoại lệ và được điều chỉnh bởi luật của nước khác đó.

2. Theo quy định tại khoản 5 của Điều này, hợp đồng có thể được coi là có mối liên hệ mật thiết nhất với nước nơi bên có tác động tới sự thực hiện hợp đồng mà sự thực hiện này tạo nên tính chất của hợp đồng đó, tại thời điểm giao kết hợp đồng, có địa chỉ thường trú, hoặc trong trường hợp một nhóm hợp nhất hoặc không hợp nhất, là cơ quan hành chính trung tâm (của nhóm đó). Tuy vậy, nếu hợp đồng được đưa vào thực hiện trong hoạt động kinh doanh hoặc nghề nghiệp của bên đó, thì nước có mối liên hệ mật thiết nhất với hợp đồng sẽ là nước nơi bên đó có địa bàn kinh doanh chính, hoặc, nếu căn cứ theo các điều khoản của hợp đồng, việc thực hiện hợp đồng có hiệu lực tại một địa bàn kinh doanh khác với địa bàn kinh doanh chính, thì nước có địa bàn kinh doanh khác đó sẽ là nước có mối liên hệ mật thiết nhất với hợp đồng.

4. Thư tín dụng dự phòng (Standby Credits), trái phiếu bảo lãnh (Performance Bonds) và bảo lãnh (Guarantees)

Thư tín dụng dự phòng, trái phiếu bảo lãnh và bảo lãnh có chức năng khác với thư tín dụng (hay tín dụng chứng từ). Nếu như chức năng của thư tín dụng là nhằm thanh toán cho hàng hoá hoặc dịch vụ trên cơ sở chứng từ, thì chức năng của các công cụ nêu trên (thư tín dụng dự phòng, trái phiếu bảo lãnh và bảo lãnh) là nhằm bảo đảm trong trường hợp một bên không hoàn thành nghĩa vụ khi thực hiện hợp đồng cơ sở. Mặc dù thư tín dụng dự phòng, trái phiếu bảo lãnh và bảo lãnh có thể được sử dụng để bảo đảm việc thực hiện hợp đồng của bên mua và (thường là) bên bán trong hợp đồng mua bán hàng hoá quốc tế, các loại công cụ này thường được sử dụng trong các hợp đồng xây dựng quốc tế, khi bên sử dụng lao động ở nước ngoài yêu cầu sự bảo đảm tài chính từ bên thứ ba có uy tín (thường là ngân hàng), đề phòng trường hợp nhà thầu không hoàn thành nghĩa vụ thực hiện hợp đồng.[163]

A. Thư tín dụng dự phòng

Thư tín dụng dự phòng giống như thư tín dụng thông thường ở chỗ nó

[163] L. S. Sealy và R. J. A. Hooley, Sđd, tr. 913.

được phát hành bởi một ngân hàng, gắn với cam kết thanh toán cho bên thứ ba (người thụ hưởng) hoặc chấp nhận hối phiếu được kí phát bởi bên thứ ba này, với điều kiện người thụ hưởng xuất trình được các chứng từ phù hợp. Tuy nhiên, nếu như thư tín dụng là cơ chế thanh toán chính trong việc hoàn thành nghĩa vụ thanh toán được nêu trong hợp đồng cơ sở (nói khác đi, ngân hàng phát hành hoặc ngân hàng xác nhận là nơi đầu tiên thực hiện việc trả tiền), thì thư tín dụng dự phòng được lập ra như là biện pháp bảo đảm với mục đích là việc rút tiền chỉ được thực hiện khi bên thực hiện công việc, hoặc cung ứng hàng hoá, dịch vụ không hoàn thành việc thực hiện nghĩa vụ hợp đồng đối với người thụ hưởng.[164]

Trách nhiệm của ngân hàng trong thư tín dụng dự phòng được dự kiến là trách nhiệm thứ cấp, đứng sau bên chịu trách nhiệm chính (mặc dù, về mặt kĩ thuật, mẫu thư tín dụng dự phòng có thể khiến ngân hàng có vẻ như là bên chịu trách nhiệm chính), và thư tín dụng dự phòng thực hiện chức năng bảo đảm như một ngân hàng làm nhiệm vụ bảo lãnh. Tuy nhiên, khác với trường hợp bảo lãnh, thư tín dụng dự phòng có thể được sử dụng bằng cách đệ trình các chứng từ đã được xác định mà bên thụ hưởng không phải chứng minh sự vi phạm hợp đồng từ bên chịu trách nhiệm chính, *ví dụ:* chứng từ đã được xác định có thể chỉ đơn giản là yêu cầu hoặc lời khai của người thụ hưởng rằng bên có trách nhiệm chính đã vi phạm hợp đồng.

Thư tín dụng dự phòng được UCP điều chỉnh, do đó nói chung là nguyên tắc về tính độc lập của thư tín dụng cũng được áp dụng cho thư tín dụng dự phòng. Tuy nhiên, do UCP bị đánh giá là không phù hợp với bản chất bảo đảm của thư tín dụng dự phòng, nên ICC đã cộng tác với Viện Luật và thực tiễn ngân hàng quốc tế (Institute of International Banking Law and Practice) cho ra đời Quy tắc về thực hành thư tín dụng dự phòng quốc tế (Rules on International Standby Credit Practices) (Ấn phẩm của ICC, số 590) (viết tắt là 'ISP 98'), có hiệu lực từ ngày 01/01/1999. Thư tín dụng dự phòng có thể được coi là thuộc phạm vi điều chỉnh của UCP hoặc của Quy tắc nêu trên, tùy thuộc vào ý chí của các bên.[165]

ISP 98 đã phản ánh 'thông lệ và tập quán được chấp nhận'[166] liên quan tới thư tín dụng dự phòng. ISP 98 điều chỉnh nhiều nghĩa vụ như: cam kết thanh toán của bên phát hành, việc xuất trình chứng từ theo yêu cầu, sự kiểm tra chứng từ hợp lệ và các loại chứng từ dự phòng, và

[164] L. S. Sealy và R. J A. Hooley, Sđd, tr. 914.

[165] Lời nói đầu của ISP 98.

[166] Lời nói đầu của ISP 98.

sự chuyển nhượng quyền nhận thanh toán. ISP 98 có nhiều điểm tương đồng với UCP, nhưng được ban hành nhằm đặc biệt điều chỉnh thư tín dụng dự phòng, ví dụ, có quy tắc cho phép chuyển nhượng nhiều lần (Quy tắc 6.02), rút một phần tiền (Quy tắc 3.08).

Song song với UCP và ISP 98, còn một công cụ khác có thể được áp dụng để điều chỉnh thư tín dụng dự phòng. Đó là Công ước 1995 của Liên hợp quốc về bảo lãnh độc lập và thư tín dụng dự phòng (the United Nations Convention on Independent Guarantees and Standby Letters of Credit 1995). Mục tiêu của Công ước là nhằm cung cấp một tập hợp quy tắc đã được hài hoà hoá phục vụ cho việc sử dụng thư tín dụng dự phòng và các biện pháp bảo lãnh độc lập (thực hiện/yêu cầu bảo lãnh) và bảo đảm sự độc lập của các cam kết độc lập thông qua những nguyên tắc được Công ước đặt ra. Phạm vi áp dụng của Công ước được nêu tại Điều 1. Công ước áp dụng cho cam kết quốc tế, khi mà người bảo lãnh/phát hành thường trú ở một nước thành viên Công ước, hoặc trong trường hợp quy phạm tư pháp quốc tế dẫn chiếu tới việc áp dụng luật của một nước thành viên Công ước. Các bên có thể tùy ý loại trừ việc áp dụng Công ước.

B. Trái phiếu bảo lãnh (Performance Bonds) và bảo lãnh (Guarantees)

Thuật ngữ 'trái phiếu bảo lãnh' và 'bảo lãnh thực hiện' đôi khi được gọi là trái phiếu bảo lãnh theo yêu cầu hoặc bảo lãnh theo yêu cầu (sau đây được gọi là 'bảo lãnh theo yêu cầu' ('demand guarantee'). Ngân hàng chấp nhận bảo lãnh theo yêu cầu, theo đó đồng ý thanh toán theo yêu cầu bằng văn bản cho người thụ hưởng, hoặc tuyên bố của người thụ hưởng về việc không thực hiện đúng các nghĩa vụ hợp đồng của bên có trách nhiệm chính. Người thụ hưởng chỉ cần yêu cầu thanh toán mà không phải chứng minh rằng bên có trách nhiệm chính đã không thực hiện đúng các nghĩa vụ theo hợp đồng cơ sở (mặc dù đôi khi yêu cầu có thể phải kèm theo các chứng từ xác định như giấy chứng nhận của bên thứ ba độc lập về việc bên có trách nhiệm chính đã không thực hiện đúng hợp đồng, hoặc khoản thanh toán đã đáo hạn). Bảo lãnh theo yêu cầu có thể được chấp nhận bởi một ngân hàng tại nước của người thụ hưởng, trên cơ sở bảo lãnh đối ứng từ ngân hàng của bên có trách nhiệm chính (bảo lãnh theo yêu cầu gồm 4 bên). Trong bất cứ trường hợp nào, ngân hàng của bên có trách nhiệm chính cũng sẽ yêu cầu được bồi thường ngược lại từ khách hàng của mình.[167]

[167] L. S. Sealy và R. J. A. Hooley, Sđd, tr. 914-915.

Đối với bảo lãnh theo yêu cầu, bước tiến quan trọng gần đây là việc thông qua 'Quy tắc thống nhất về bảo lãnh theo yêu cầu (URDG), ấn phẩm số 758' ('Uniform Rules for Demand Guarantees, Brochure No. 758') (viết tắt là 'URDG') trên phạm vi toàn thế giới với đa số phiếu, tại cuộc họp của Ủy ban ICC về kĩ thuật và thực tiễn ngân hàng (ICC Commission on Banking Technique and Practice) ngày 24/11/2009. Tập hợp các quy tắc này (35 điều) sẽ mang đến câu trả lời và giải pháp công bằng cho lợi ích của các bên trong mọi trường hợp. Các quy tắc sẽ giúp tránh được sự do dự, hiểu lầm và hoang mang dẫn tới các vụ kiện kéo dài không cần thiết. Việc viện dẫn và áp dụng phổ biến các quy tắc này trong thế giới ngày nay nhằm mục đích lấp đầy các lỗ hổng trong thực tiễn, thuần túy dựa trên cơ sở đánh giá các điều khoản đã được thoả thuận. Trong nhiều trường hợp, thực tiễn cho thấy bảo lãnh là công cụ nhằm cứu vãn các tình huống khó và gây tranh cãi. Việc các bên chấp nhận các quy tắc, trừ trường hợp có sự sửa đổi hoặc loại bỏ, sẽ hỗ trợ chính họ trong công việc của mình, đồng thời tạo thuận lợi và đơn giản hoá cách thức thực hiện kinh doanh quốc tế.

TÓM TẮT CHƯƠNG 5

Chương 5 này giới thiệu khuôn khổ pháp luật điều chỉnh các quyền và nghĩa vụ của các chủ thể tham gia giao dịch mua bán hàng hoá quốc tế - một loại giao dịch thương mại quốc tế quan trọng bậc nhất. Năm mục của chương này nhằm mục đích cung cấp cái nhìn tổng thể về những vấn đề phức tạp của giao dịch mua bán hàng hoá quốc tế và luật điều chỉnh loại giao dịch quan trọng này. Bên cạnh việc xem xét nghĩa vụ của người bán và người mua theo các điều kiện giao hàng cơ sở được sử dụng trong hợp đồng mua bán hàng hoá quốc tế ('INCOTERMS'), Chương này tập trung nghiên cứu Công ước của Liên hợp quốc năm 1980 về hợp đồng mua bán hàng hoá quốc tế (Công ước Viên), do tầm ảnh hưởng toàn cầu của nó đối với việc xác định nghĩa vụ của người bán và người mua, cũng như các biện pháp khắc phục vi phạm hợp đồng. Các sáng kiến mới về luật điều chỉnh hợp đồng mua bán hàng hoá quốc tế cũng được đề cập trong Chương này, đó là Bộ nguyên tắc về hợp đồng thương mại quốc tế do UNIDROIT soạn thảo ('PICC'), và Bộ nguyên tắc về luật hợp đồng châu Âu ('PECL').

Do thanh toán là nội dung không thể thiếu của hợp đồng mua bán hàng hoá quốc tế, nên Chương này cũng giới thiệu khá nhiều phương thức thanh toán, *ví dụ*, thư tín dụng dự phòng. Việc lựa chọn phương thức thanh toán nào còn phụ thuộc vào nhiều yếu tố, như khả năng thoả thuận của các bên trong hợp đồng mua bán hàng hoá quốc tế, độ tin cậy mà các bên dành cho nhau, môi trường kinh tế và pháp luật, sự ổn định chính trị của nước xuất khẩu cũng như nước nhập khẩu và các nước khác có liên quan đến giao dịch thương mại quốc tế này.

CÂU HỎI/BÀI TẬP

1. Tại sao INCOTERMS 2010 bỏ điều kiện cơ sở giao hàng DES, DEQ và DDU?
2. Nêu điểm tương tự giữa CIF và FOB.
3. Nêu điểm khác nhau giữa CIF và DAT.
4. Ưu điểm của CISG là gì? Ưu điểm đó có thực tế không hay chỉ là nhận thức?
5. So sánh các biện pháp khắc phục vi phạm hợp đồng trong CISG và trong Luật Thương mại Việt Nam.
6. So sánh quy định về bất khả kháng theo pháp luật Việt Nam và theo CISG.
7. Giải thích nguyên tắc tự do hợp đồng theo PECL? Lợi thế của nguyên tắc này là gì?
8. So sánh giao kết hợp đồng theo PECL và theo CISG.
9. So sánh các biện pháp khắc phục vi phạm hợp đồng trong PECL và trong Luật Thương mại Việt Nam.
10. Có ý kiến cho rằng 'Trong thực tế, việc áp dụng PECL là rất hạn chế. Vì vậy, PECL dường như không có thật'. Hãy bình luận ý kiến nêu trên.
11. Nêu những khác biệt giữa hối phiếu kèm chứng từ (documentary bill) và tín dụng chứng từ (thư tín dụng). Nêu những lợi thế và bất lợi của từng loại?
12. Nguyên tắc tính độc lập của tín dụng chứng từ (thư tín dụng) là gì? Lí do của nguyên tắc này là gì?
13. Sự khác biệt giữa tín dụng chứng từ (thư tín dụng) và thư tín dụng dự phòng là gì?
14. Có bao nhiêu loại tín dụng chứng từ (thư tín dụng)? Loại nào là tốt nhất cho bên bán?

15. Trình bày về luật điều chỉnh tín dụng chứng từ (thư tín dụng).

16. Nieuwenhuis Vo.f, một công ty Hà Lan từ Alkmaar, cung cấp 1.500 kg pho mát Leerdammer cho Công ty Brown, một công ty được thành lập ở Anh Quốc. Người mua ở Anh Quốc chỉ trả một nửa giá, và tuyên bố rằng ông chỉ nhận được một nửa số lượng pho mát ông đã đặt hàng. Vì đây là yêu cầu vô lý, người bán ở Hà Lan đề nghị người mua ở Anh Quốc thanh toán phần còn lại. Hỏi: Liệu CISG có thể được áp dụng trong trường hợp này hay không?

17. Anders, một công ty được thành lập tại Đức chào hàng cho Egberts, một công ti được thành lập ở Hà Lan, một lô hàng cà phê. Anders thông báo Egberts bằng văn bản rằng thời hạn cho Egberts để chấp nhận chào hàng là ba tháng. Một tháng sau khi chào hàng cho Egberts, Anders có cơ hội bán hàng cho Christensen, một công ty Đan Mạch với mức giá cao hơn nhiều. Anders hủy bỏ chào hàng cho Egberts. Tuy nhiên Egberts chấp nhận chào hàng sau khi Anders đã hủy nó. Hỏi: Trong tình huống này, liệu hợp đồng đã được giao kết hay chưa?

18. Abels, một công ty được thành lập ở Hà Lan, bán cho Bartels, một công ty được thành lập ở Đức, một số máy thu phát với mức giá 150.000 Euro. Khi máy thu phát được giao cho Bartels thì phát hiện các máy thu phát đó bị lỗi điện tử. Hỏi: Người bán đã thực hiện đầy đủ nghĩa vụ pháp lí của mình hay chưa?

19. Người bán Hoa Kỳ bán 1000 MT khoai tây FOB Tokyo cho người mua Nhật Bản. Người mua chỉ định tàu SS Sunset để nhận hàng tại cầu cảng. Tuy nhiên, do một con tàu khác dỡ hàng chậm nên SS Sunset không cập cảng được, phải thả neo ở ngoài cầu cảng. Người bán phải dùng sà lan để chuyển khoai tây ra chỗ tàu neo đậu. Khi container hàng qua lan can tàu thì dây cẩu đứt, container rơi xuống sà lan và làm sà lan lật úp. Toàn bộ khoai tây bị rơi xuống biển. Người mua kiện người bán không giao hàng. Hỏi: Người bán có phải chịu trách nhiệm không?

20. Bạn đang đàm phán một hợp đồng mua bán hàng hoá quốc tế với bên mua là người nước ngoài, và CISG được chọn là luật áp dụng. Bạn có nghe về Bộ nguyên tắc của UNIDROIT về hợp đồng thương mại quốc tế và bạn đề xuất áp dụng chúng như là các quy phạm pháp luật để điều chỉnh hợp đồng. Bên kia phản đối rằng việc đó là vô nghĩa, vì CISG đã cung cấp các quy phạm pháp luật cần thiết; bên cạnh đó, bên mua lập luận rằng 'luật mềm', như Bộ nguyên tắc của UNIDROIT, không thể được lựa chọn như một nguồn luật áp dụng đối với hợp đồng.

21. Hỏi: Hãy cho biết ý kiến của bạn.

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CHƯƠNG 6 .
PHÁP LUẬT ĐIỀU CHỈNH MỘT SỐ GIAO DỊCH KINH DOANH QUỐC TẾ KHÁC - TỔNG QUAN

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Chương này tập trung trình bày tổng quan các quy định pháp luật điều chỉnh một số giao dịch kinh doanh quốc tế khác, ngoài giao dịch mua bán hàng hoá quốc tế đã trình bày ở Chương 5. Đó là các giao dịch về nhượng quyền thương mại quốc tế, logistics quốc tế và thương mại điện tử. Sau khi học xong Chương này, sinh viên có kiến thức cơ bản về khái niệm nhượng quyền thương mại, logistics và thương mại điện tử; vai trò quan trọng của các giao dịch nhượng quyền thương mại, logistics và thương mại điện tử trong kinh doanh quốc tế; các quy định pháp luật quốc tế và khung pháp luật Việt Nam điều chỉnh ba giao dịch kinh doanh quốc tế này. Sinh viên cũng có khả năng độc lập nghiên cứu sâu sắc thêm về các quy định pháp luật có liên quan, cũng như xác định các quy định pháp luật áp dụng cho các giao dịch quốc tế về nhượng quyền thương mại, logistics hay thương mại điện tử.

Mục 1. PHÁP LUẬT VỀ NHƯỢNG QUYỀN THƯƠNG MẠI QUỐC TẾ - TỔNG QUAN

1. Khái niệm nhượng quyền thương mại

Nhượng quyền thương mại là cách thức tổ chức kinh doanh đã tạo nên một cuộc cách mạng trong lĩnh vực phân phối hàng hoá và dịch vụ trong hầu hết các ngành kinh tế và làm thay đổi tình hình kinh tế của hầu hết các nước. Nghĩa gốc của thuật ngữ 'nhượng quyền thương mại' là trao cho ai đó quyền tự do thực hiện việc gì đó. Thuật ngữ này bắt nguồn từ động từ tiếng Pháp 'afranchir' có nghĩa là 'được tự do làm'.[1] Tuy vậy, ngày nay thuật ngữ nhượng quyền thương mại thường đề cập tới mối quan hệ thương mại trong phân phối hàng hoá và dịch vụ.[2] Ở nghĩa rộng nhất, nhượng quyền thương mại có thể được diễn giải là

> Các giao dịch trong đó một bên trao quyền cho bên khác được khai thác quyền sở hữu trí tuệ liên quan tới, nhưng không hàm nghĩa toàn bộ, tên thương mại, sáng chế, nhãn hiệu, phân phối trang thiết bị, nhân vật hư cấu, hoặc tên của nhân vật nổi tiếng, hoặc bản thiết kế kinh doanh - được coi là yếu tố cơ bản trong nhượng quyền công thức kinh doanh.[3]

[1] Dov Izraeli, *Franchising and the Total Distribution System* (1972), tr. 3.

[2] Andrew Terry, 'Business Format Franchising: The Cloning of Australian Business', trong sách *Business Format Franchising in Australia* (1991), tr. 2.

[3] Martin Mendelsohn, *The Guide to Franchising* (1992), tr. 37.

Nhượng quyền thương mại thường được chia thành ba loại: 'Nhượng quyền thương mại sản phẩm' (the 'product franchise'), 'nhượng quyền thương mại sản xuất hoặc chế biến' (the 'processing or manufacturing franchise'), và 'nhượng quyền công thức kinh doanh' (the 'business format franchise'). Trong 'nhượng quyền thương mại sản phẩm' (the 'product franchise'), bên nhận quyền là nhà phân phối, bán buôn hoặc bán lẻ, đối với một loại sản phẩm nhất định trong một phạm vi lãnh thổ nào đó và gắn liền với nhãn hiệu của bên nhượng quyền. Đối với 'nhượng quyền sản xuất hoặc chế biến' (the 'processing or manufacturing franchise'), bên nhượng quyền chuyển giao bí quyết hoặc nguyên liệu thiết yếu cho bên nhận quyền và có thể sử dụng dưới nhãn hiệu của bên nhượng quyền trong một phạm vi lãnh thổ nhất định. Cả hai loại nhượng quyền này được gọi chung là 'nhượng quyền sản phẩm và tên thương mại' (the 'product and trade name franchises'). Trong 'nhượng quyền công thức kinh doanh' (the 'business format franchise'), bên nhượng quyền cho phép bên nhận quyền sử dụng một công thức kinh doanh đặc biệt trong phạm vi lãnh thổ nào đó và dưới nhãn hiệu của bên nhượng quyền.

Quan hệ nhượng quyền thương mại bao gồm 'thoả thuận nhượng quyền đơn cơ sở' ('single-unit franchise arrangement') và 'thoả thuận nhượng quyền đa cơ sở' ('multi-unit franchise arrangement'). 'Nhượng quyền đơn cơ sở' là thoả thuận theo đó bên nhượng quyền cho phép bên nhận quyền được mở một cơ sở nhượng quyền. 'Nhượng quyền đa cơ sở' là thoả thuận theo đó bên nhượng quyền cho phép bên nhận quyền được mở từ hai cơ sở nhượng quyền trở lên. 'Nhượng quyền đa cơ sở có hai loại: 'nhượng quyền phát triển khu vực' (the 'area development franchise'[4]) và 'nhượng quyền thương mại tổng thể' (the 'master franchise'[5]). 'Nhượng quyền phát triển khu vực' là thoả thuận theo đó bên nhượng quyền trao cho bên nhận quyền (còn gọi là 'nhà phát triển khu vực') các quyền và nghĩa vụ để mở và vận hành từ hai cơ sở nhượng quyền trở lên trong một khu vực địa lí nhất định. 'Nhượng quyền thương mại tổng thể' là thoả thuận theo đó bên nhượng quyền trao cho bên nhận quyền quyền khai thác một khu vực địa lí nhất định, thông qua việc cho phép bên

[4] Pháp luật nhượng quyền thương mại Việt Nam hiện hành sử dụng thuật ngữ 'hợp đồng phát triển quyền thương mại' để đề cập loại hình nhượng quyền này (*xem* khoản 8 Điều 3 Nghị định của Chính phủ số 35/2006/NĐ-CP ngày 31/3/2006 quy định chi tiết Luật thương mại về hoạt động nhượng quyền thương mại).

[5] Pháp luật nhượng quyền thương mại Việt Nam hiện hành sử dụng thuật ngữ 'quyền thương mại chung' để đề cập loại hình nhượng quyền này (xem: khoản 9 Điều 3 Nghị định của Chính phủ số 35/2006/NĐ-CP ngày 31/3/2006 quy định chi tiết Luật thương mại về hoạt động nhượng quyền thương mại).

nhận quyền cấp lại quyền thương mại mà mình đã nhận từ bên nhượng quyền ban đầu cho bên nhận quyền thứ cấp, và trong hầu hết trường hợp còn được phép mở và tự vận hành các cơ sở nhượng quyền.

2. Sự phát triển của nhượng quyền thương mại

Có người cho rằng hoạt động nhượng quyền thương mại đầu tiên là các thoả thuận tài chính và cho phép bán sản phẩm bia giữa các xưởng sản xuất bia và chủ quán rượu ở Đức và ở Anh Quốc từ trước thế kỉ XVIII. Các học giả khác thì khẳng định nhượng quyền thương mại xuất hiện lần đầu tiên khi Nữ hoàng Isabella của Tây Ban Nha cho phép Cristoph Colombo tìm đường tới phương Đông.[6] Tuy nhiên, người ta cũng chấp nhận rộng rãi rằng nhượng quyền thương mại sớm nhất xuất hiện ở Hoa Kỳ khi công ty Máy khâu Singer thiết lập hệ thống phân phối vào khoảng năm 1850. Tuy thế, phải đến đầu thế kỉ XX thì nhượng quyền thương mại mới trở nên phổ biến. Sự thành công của cách mạng công nghiệp ở Hoa Kỳ trong thời kì chuyển giao từ thế kỉ XIX sang thế kỉ XX mang lại bước phát triển lớn về kĩ thuật, giao thông và truyền thông và đã tạo nên xã hội sản xuất phồn thịnh. Trong bối cảnh đó, các nhà sản xuất nhận ra rằng việc phân phối sản phẩm tới các thị trường địa phương là chìa khoá cho thành công.[7] Các nhà sản xuất đồ uống và ô-tô đi tiên phong trong việc sử dụng nhượng quyền thương mại như phương thức phân phối hiệu quả và nhượng quyền thương mại đã được sử dụng ngày càng phổ biến trong giai đoạn 1920-1949. Kể từ những năm cuối thập niên thứ tư của thế kỉ XX, sau khi Chiến tranh thế giới thứ II kết thúc, nhượng quyền thương mại đã phát triển như vũ bão ở nhiều quốc gia. Mặc dù tốc độ phát triển nhượng quyền thương mại bị giảm nhẹ do ảnh hưởng của khủng hoảng kinh tế toàn cầu trong thời gian vừa qua, nhưng nhượng quyền thương mại vẫn là một xu hướng kinh tế phổ biến và có thể giúp phục hồi kinh tế.[8]

Nhượng quyền thương mại phôi thai ở Việt Nam từ giữa những năm 90 của thế kỉ trước. Giống như hầu hết các nước, nhượng quyền thương mại bắt đầu xuất hiện ở Việt Nam thông qua sự xâm nhập của các nhà nhượng quyền nước ngoài. Các hệ thống nhượng quyền đồ ăn nhanh nước ngoài như *Jollibee* (xuất xứ Philippines, đến Việt Nam năm 1996), *Lotteria* (xuất xứ Nhật Bản, đến Việt Nam năm 1997), và *KFC* (xuất xứ Hoa Kỳ, đến Việt Nam năm 1997) là những nhà nhượng quyền tiên phong ở Việt Nam. Sự xâm nhập của các nhà nhượng quyền nước ngoài này đã giới thiệu hình ảnh rất thực tế về nhượng quyền và thu hút sự quan tâm của các doanh nghiệp nội địa. Các doanh nghiệp Việt Nam đã nhanh chóng tiếp thu mô hình nhượng quyền. Mặc dù các doanh nghiệp trong nước rất quan tâm đến hoạt động nhượng quyền thương mại, nhưng sự phát triển của nhượng quyền thương mại ở Việt Nam đã bị kìm hãm trong suốt thập niên 1996-2005 do sự thiếu vắng một khuôn khổ pháp luật rõ ràng cho lĩnh vực này. Nhượng quyền thương mại chuyển sang một giai đoạn phát triển ổn định kể từ khi Việt Nam giới thiệu các quy định pháp luật điều chỉnh riêng về nhượng quyền thương mại vào năm 2005.

3. Nhượng quyền thương mại quốc tế

Nhượng quyền thương mại quốc tế là 'phương thức xâm nhập thị trường nước ngoài liên quan tới mối quan hệ giữa bên xâm nhập (bên nhượng quyền) với một pháp nhân thuộc nước sở tại (bên nhận quyền), theo đó bên nhượng quyền thông qua hợp đồng chuyển giao một gói kinh doanh (hoặc công thức kinh doanh) thuộc sở hữu và được phát triển bởi bên nhượng quyền cho bên nhận quyền'.[9] Nhượng quyền thương mại đã và đang phát triển nhanh trên khắp thế giới trong những năm gần đây dưới sự ảnh hưởng của việc mở rộng các hệ thống nhượng quyền của Hoa Kỳ do phải đối mặt với sự tập trung ngày càng cao ở thị trường trong nước. Sự mở rộng ra quốc tế của nhượng quyền thương mại bắt đầu từ cuối thập niên thứ sáu và đầu thập niên thứ bảy của thế kỉ XX bởi các nhà nhượng quyền tiên phong của Hoa Kỳ như *McDonald, KFC* và *Pizza Hut*. Sự mở rộng ra quốc tế của những nhà nhượng quyền này đã giới thiệu khái niệm nhượng quyền thương mại tới các nước khác và kích thích sự phát triển của nhượng quyền thương mại ở nước sở tại. Quá trình xâm nhập nước ngoài của các nhà nhượng quyền Hoa Kỳ đầu tiên là vào thị trường các nước phát triển như Anh Quốc, Australia và Canada, sau đó lan rộng tới các DCs. Các nhà nhượng quyền ở nước sở tại đã không chỉ tiếp thu và áp dụng mô hình nhượng quyền thương mại, mà rốt cục còn triển khai nhượng quyền ra nước ngoài.

Có sáu cách thức xâm nhập thị trường nước ngoài của các nhà nhượng quyền thương mại, bao gồm: 'Nhượng quyền thương mại trực tiếp' ('direct franchising'), 'nhượng quyền thương mại tổng thể'

6 Donald W. Hackett, *Franchising: The State of the Art* (1977), tr. 5.

7 Donald W. Hackett, *supra*, tr. 12.

8 Alisa Harrison, 'Franchise Businesses Can Help Lead the Economic Recovery with Access to Capital', ngày 10/6/2009, http://www.franchise.org/Franchise-News-Detail.aspx?id=45912.

9 F. N. Burton và A. R. Cross, 'Franchising and Foreign Market Entry', trong sách của Stanley J. Paliwoda và John K. Ryans (chủ biên), *International Marketing Reader* (1995).

('master franchising'), 'hợp đồng phát triển khu vực' ('area development agreement'), 'lập chi nhánh' ('branch'), 'lập công ty con' ('subsidiary'), và 'lập liên doanh' ('joint-venture'). 'Nhượng quyền thương mại trực tiếp' là việc bên nhượng quyền trực tiếp kí hợp đồng nhượng quyền với từng bên nhận quyền ở nước sở tại mà không hề qua bất kì bên trung gian nào. Đối với việc xâm nhập thị trường nước ngoài bằng việc lập công ty con, bên nhượng quyền sẽ tiến hành thành lập công ty con ở nước sở tại. Công ty con này là một pháp nhân có tư cách pháp lí độc lập với bên nhượng quyền. Công ty con có thể mở cửa hàng thuộc sở hữu của mình hoặc kí hợp đồng nhượng quyền với bên nhận quyền ở nước sở tại. Trong trường hợp thiết lập chi nhánh ở nước sở tại, chi nhánh đó không phải là pháp nhân độc lập, vì thế bên nhượng quyền vẫn phải gánh chịu các trách nhiệm pháp lí đối với hoạt động kinh doanh của chi nhánh ở nước sở tại. Nếu xâm nhập thị trường nước ngoài qua con đường lập liên doanh, bên nhượng quyền sẽ kí hợp đồng liên doanh với đối tác - thường mang quốc tịch nước sở tại, theo đó thông thường một công ty liên doanh sẽ được ra đời, tuy nhiên cũng có trường hợp việc liên doanh chỉ đơn thuần là quan hệ hợp đồng. Bên nhượng quyền khi đó sẽ có thể kí 'hợp đồng phát triển khu vực' hoặc 'hợp đồng nhượng quyền tổng thể' với liên doanh, và kết quả là sự ra đời các cửa hàng nhượng quyền thuộc sở hữu của liên doanh hoặc các cửa hàng được nhượng quyền bởi liên doanh.

4. Pháp luật về nhượng quyền thương mại quốc tế

Với tư cách là hoạt động thương mại quốc tế, nhượng quyền thương mại quốc tế chịu sự điều chỉnh của pháp luật nước sở tại cũng như các điều ước quốc tế và tập quán quốc tế. Tính đến nay, chưa có bất kì điều ước quốc tế hay tập quán quốc tế nào chuyên biệt về nhượng quyền thương mại quốc tế. Tuy nhiên, nhượng quyền thương mại quốc tế có thể được điều chỉnh bằng các điều ước quốc tế và tập quán quốc tế áp dụng chung cho các giao dịch quốc tế, như: CISG, PICC, các hiệp định tương trợ tư pháp giữa các nước, và INCOTERMS.

ICC và UNIDROIT đã cố gắng khuyến khích sự thống nhất pháp luật về nhượng quyền thương mại. ICC giới thiệu Hợp đồng nhượng quyền thương mại quốc tế mẫu (Model International Franchise Contract) vào năm 2000 và sửa đổi vào năm 2010. UNIDROIT công bố sách hướng dẫn về 'thoả thuận nhượng quyền thương mại tổng thể' quốc tế (Guide to International Master Franchise Arrangements) vào năm 1998. Tuy nhiên, đến nay vẫn chưa có quy tắc chung cho việc điều chỉnh nhượng quyền thương mại quốc tế trên phạm vi toàn cầu. Hầu hết các nước đơn thuần dựa vào pháp luật thương mại nói chung hoặc thậm chí là các bộ quy tắc về thực tiễn và người tiêu dùng để điều chỉnh nhượng quyền thương mại. Tuy nhiên, hai thập niên vừa qua đã chứng kiến một xu hướng mạnh mẽ của việc ban hành pháp luật riêng về nhượng quyền thương mại. Đến nay, khoảng 33 nước, trong đó có Việt Nam, đã ban hành quy định riêng về nhượng quyền thương mại. Tuy nhiên, chỉ một số nước như Trung Quốc, Indonesia, Malaysia và Việt Nam ấn định một số điều khoản dành riêng cho các nhà nhượng quyền nước ngoài - nhìn chung đó là các vấn đề về đăng kí nhượng quyền và chấp thuận nhượng quyền. Mặc dù bị điều chỉnh trực tiếp bởi các quy định riêng về nhượng quyền, nhưng nhượng quyền thương mại ở những nước này vẫn chịu sự tác động của pháp luật thương mại nói chung.

Ở các nước ban hành pháp luật về nhượng quyền thương mại, thường có bốn loại công cụ được sử dụng để điều chỉnh nhượng quyền thương mại: Bản giới thiệu nhượng quyền thương mại (disclosure), sử dụng phương thức giải quyết tranh chấp thay thế (ADR), đăng kí nhượng quyền (registration), và hướng dẫn trách nhiệm thực thi của bên nhượng quyền và bên nhận quyền (standards of conduct). Trên cơ sở sử dụng đơn lẻ hoặc kết hợp các loại công cụ này, 33 nước nói trên đã quy định riêng về nhượng quyền thương mại theo một trong 9 mô hình sau đây:

Các mô hình pháp luật	Các nước áp dụng
Bản giới thiệu nhượng quyền thương mại	Bỉ, Brazil, Pháp, Nhật Bản, Thụy Điển, Đài Loan
Bản giới thiệu nhượng quyền thương mại và hướng dẫn trách nhiệm thực thi của bên nhượng quyền và bên nhận quyền	Albania, Canada (tỉnh Alberta, tỉnh Niu Brun-x-uých, tỉnh Ontario, Đảo Prin-xơ Ét-uốt, tỉnh Quebec), Georgia, Italia, Romania
Bản giới thiệu nhượng quyền thương mại và đăng kí nhượng quyền	Indonesia, Mexico, Tây Ban Nha

Bản giới thiệu nhượng quyền thương mại, đăng kí nhượng quyền và hướng dẫn trách nhiệm thực thi của bên nhượng quyền và bên nhận quyền	Trung Quốc, Macao, Malaysia, Mondova, Việt Nam
Bản giới thiệu nhượng quyền thương mại, hướng dẫn trách nhiệm thực thi của bên nhượng quyền và bên nhận quyền và giải quyết tranh chấp	Hàn Quốc, Australia
Đăng kí nhượng quyền	Croatia, Barbados
Hướng dẫn trách nhiệm thực thi của bên nhượng quyền và bên nhận quyền	Estonia, Litva, Nga, Ukraine, Venezuela
Đăng kí nhượng quyền và hướng dẫn trách nhiệm thực thi của bên nhượng quyền và bên nhận quyền	Belarus, Kazakhstan, Kyrgizie, Ả rập Xê út
Mô hình Hoa Kỳ	- Bản giới thiệu nhượng quyền thương mại: Áp dụng ở cấp liên bang. - Hướng dẫn trách nhiệm thực thi của bên nhượng quyền và bên nhận quyền: cấp liên bang (ô-tô/xăng dầu) và hầu hết các bang. - Đăng kí nhượng quyền: Áp dụng ở cấp bang (14 bang).

A. *Đăng kí nhượng quyền và báo cáo*

Mặc dù cơ chế đăng kí nhượng quyền được áp dụng ở Hoa Kỳ từ rất sớm theo quy định của pháp luật bang California và được tiếp tục áp dụng ở 13 bang khác, nhưng đã không nhận được nhiều sự ủng hộ của các nước khác. Chỉ có 14 bang của Hoa Kỳ và 14 nước khác áp đặt nghĩa vụ đăng kí nhượng quyền, và nghĩa vụ này cũng rất đa dạng, từ việc yêu cầu nộp một báo cáo kiểm toán đầy đủ cho tới đơn giản chỉ là việc lưu trữ thông tin. 14 bang của Hoa Kỳ giới thiệu cơ chế kiểm toán và đăng kí nhượng quyền nặng nề nhất, cho dù có sự khác biệt nhất định về mức độ kiểm soát giữa các bang cũng như đối với từng nhà nhượng quyền thương mại. Các bang của Hoa Kỳ và 5 nước khác có áp dụng cơ chế đăng kí nhượng quyền (Trung Quốc, Indonesia, Malaysia, Tây Ban Nha và Việt Nam) cũng yêu cầu nghĩa vụ thông báo thường niên đối với các nhà nhượng quyền thương mại.

B. *Bản giới thiệu nhượng quyền thương mại*

Bản giới thiệu nhượng quyền thương mại là nhân tố then chốt trong pháp luật về nhượng quyền. Nó được chấp nhận rộng rãi như công cụ để xử lí sự bất cân xứng thông tin cố hữu trong các quan hệ nhượng quyền. Công cụ này góp phần làm thuận lợi hoá việc tiếp cận các thông tin tin cậy và đầy đủ về hệ thống nhượng quyền, điều này hết sức hữu ích và cần thiết cho các bên dự kiến nhận quyền trong việc đưa ra quyết định nhận quyền thương mại một cách sáng suốt. Mặc dù các nhà nhượng quyền nói chung không ưa thích các vấn đề khác thuộc pháp luật riêng về nhượng quyền, 'nhưng có một sự đồng thuận rằng bản giới thiệu nhượng quyền đầy đủ dành cho các bên dự kiến nhận quyền giúp cải thiện quá trình tuyển dụng bên nhận quyền, và nhìn chung là tốt cho hoạt động nhượng quyền'.[10] Theo một trong những báo cáo đầu tiên của Australia, bản giới thiệu nhượng quyền thương mại không bị coi là sự hạn chế kinh doanh, mà là 'lẽ đương nhiên và nền tảng vững chắc cho việc kinh doanh, trong một mối quan hệ khăng khít đặc biệt như nhượng quyền thương mại, và nó phù hợp với thực tiễn kinh doanh thông thường'.[11]

Trên thực tế, nghĩa vụ cung cấp bản giới thiệu nhượng quyền là yếu tố thống nhất trong pháp luật nhượng quyền của các nước trên thế giới, trừ Kazakhstan, Litva và Nga.[12] Ấn phẩm 'Luật mẫu về bản giới thiệu nhượng quyền thương mại' (Model Franchise Disclosure Law) của UNIDROIT, với sự gợi ý về nội dung tối thiểu của bản giới thiệu nhượng quyền, được mong đợi sẽ ảnh hưởng tới việc đẩy mạnh sự chấp thuận luật về bản giới thiệu nhượng quyền thương mại cũng như định hướng nội dung của nó.[13]

[10] Lewis G. Rudnick, 'Trends: Where do Franchisors and Franchisees Stand on Regulation?' trong *Franchising World* (1999), tr. 24.

[11] Parliament of Australia Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* (1979), [11.32].

[12] Andrew Terry, 'A Census of International Franchise Regulation', Bài tham luận trình bày tại *Hội thảo lần thứ 21 của Hiệp hội nhượng quyền quốc tế*, Las Vegas, Nevada, Hoa Kỳ, (2007).

[13] Lena Peters, 'UNIDROIT Prepares A Model Franchise Disclosure Law', trong *Business Law International* (2000), tr. 279.

Mặc dù bản giới thiệu nhượng quyền được chấp nhận rộng rãi trong luật nhượng quyền của hầu hết các nước, chỉ có vài nước đòi hỏi bản nhượng quyền theo mẫu với việc chứa đựng các nội dung bắt buộc. Ở các nước có yêu cầu bản nhượng quyền thương mại bắt buộc, thì nhìn chung còn yêu cầu việc cập nhật thông tin hàng năm. Yêu cầu về bản nhượng quyền thương mại theo mẫu, cũng như việc báo cáo cập nhật thông tin hàng năm, được cho là sẽ làm thuận lợi hoá việc sưu tập số liệu về lĩnh vực này.

C. Hợp đồng nhượng quyền thương mại

Hợp đồng nhượng quyền là điểm tham chiếu cốt lõi trong việc làm rõ mối quan hệ giữa bên nhượng quyền và bên nhận quyền. Tuy nhiên, không phải tất cả các nước đều đòi hỏi hợp đồng nhượng quyền phải bằng văn bản. Hơn nữa, chỉ có một số nước quy định nội dung bắt buộc của hợp đồng nhượng quyền thương mại. Đối với các nước không yêu cầu nội dung bắt buộc của hợp đồng nhượng quyền thương mại, thì phần lớn bắt buộc bản giới thiệu nhượng quyền thương mại phải có ít nhất một vài điều khoản hợp đồng then chốt. Chỉ có pháp luật Australia yêu cầu một điều khoản hợp lí rằng trước khi kí hợp đồng, bên dự kiến nhận quyền phải xác nhận rằng đã nhận được sự tư vấn từ nhà tư vấn kinh doanh hoặc nhà tư vấn pháp luật độc lập, hoặc kế toán viên độc lập hoặc đã được khuyên cần có sự tư vấn như thế nhưng chưa tiến hành tìm kiếm. Pháp luật Australia và Malaysia còn cho phép bên nhận quyền một giai đoạn 'cân nhắc' ('cooling off'), theo đó bên nhận quyền có thể rút lại đề nghị kí kết hợp đồng và được bồi hoàn các khoản phí, sau khi đã trừ đi các chi phí hợp lí mà bên nhượng quyền phải gánh chịu, với điều kiện là điều này được ghi rõ trong hợp đồng.

D. Các vấn đề về tiêu chuẩn thực thi, hay quan hệ giữa bên nhượng quyền và bên nhận quyền

Hầu hết các nước có luật về nhượng quyền thương mại đều quy định về các vấn đề cụ thể trong quan hệ giữa bên nhượng quyền và bên nhận quyền. Đa phần các nước (trừ Nhật Bản) ấn định các hạn chế đối với việc đơn phương chấm dứt hợp đồng bởi bên nhượng quyền, với công thức phổ biến nhất là đưa ra các sự kiện được phép chấm dứt hợp đồng, và/hoặc thông báo về vi phạm và cơ hội khắc phục. Thay vì quy định một thời hạn cố định cho mối quan hệ nhượng quyền, pháp luật nhượng quyền của hầu hết nước chỉ đơn thuần yêu cầu một thời hạn đủ dài cho bên nhận quyền thu hồi khoản đầu tư ban đầu. Trong khi quyền gia hạn hợp đồng không được ấn định bởi hầu hết nước có luật về nhượng quyền thương mại, thì việc phải thông báo trước về việc không gia hạn được quy định rất phổ biến. Hầu hết các nước sử dụng cơ chế điều chỉnh bằng bản giới thiệu nhượng quyền thương mại đều yêu cầu thông báo về việc chuyển giao hợp đồng, nhưng chỉ một vài nước trong đó quy định quyền được chuyển giao hợp đồng. Rất nhiều vấn đề khác về quan hệ giữa bên nhượng quyền và bên nhận quyền cũng được điều chỉnh một cách đặc thù như vấn đề vi phạm hợp đồng, thay đổi đơn phương, miễn trách nhiệm, quyền liên kết, bảo mật, không cạnh tranh. Tuy nhiên, không có 'một cách tiếp cận chung trên phạm vi toàn thế giới về pháp luật điều chỉnh quan hệ giữa bên nhượng quyền và bên nhận quyền'.[14]

Các chuẩn mực thực thi chung đối với bên nhượng quyền và bên nhận quyền được ấn định bởi pháp luật một vài nước (bang) như các bang của Canada, Trung Quốc, Italia, Hàn Quốc, và Malaysia, bao gồm yêu cầu về 'thương mại trung thực' (Canada), 'thương ngay thẳng và trung thực' (Trung Quốc), 'thiện chí' (Italia và Hàn Quốc), và 'kinh doanh nhượng quyền tốt nhất theo thời gian và khu vực' (Malaysia). Ở các nước khác, các vấn đề này được quy định bởi luật chung. Pháp luật Australia là trường hợp điển hình, khi quy định cấm thực hiện 'hành vi lừa dối' và 'hành vi trái đạo đức' trong Luật về người tiêu dùng và cạnh tranh (the Competition and Consumer Act) 2010, nhằm nâng tiêu chuẩn thực thi của các bên trong lĩnh vực nhượng quyền thương mại. Một vài nước như Hàn Quốc và Nhật Bản quy định cấm các hành vi hạn chế cạnh tranh theo chiều dọc, các hành vi vốn thường được ghi nhận trong luật cạnh tranh của nhiều nước khác. Cũng cần lưu ý rằng ở một số nước, đặc biệt là các DCs, các quyền và nghĩa vụ của bên nhượng quyền và bên nhận quyền cũng được quy định rõ và điều này hết sức có ý nghĩa ở khía cạnh 'giáo dục'.

E. Giải quyết tranh chấp

Rất nhiều nước quy định rằng quy trình giải quyết tranh chấp phải được nêu rõ trong hợp đồng hoặc bản giới thiệu nhượng quyền thương mại. Tuy nhiên, chỉ một số nước (bang) như Australia, Alberta (Canada) và Hàn Quốc ấn định thủ tục hoà giải như là yêu cầu tiên quyết trước khi đưa ra kiện tụng. Australia đã rất thành công trong việc sử dụng hoà giải như là một giai đoạn không thể thiếu của cơ chế điều chỉnh pháp luật. Hơn 75% tranh chấp được gửi tới Văn phòng cố vấn hoà giải nhượng

[14] Andrew Terry, Sđd.

quyền thương mại (Văn phòng này thành lập theo Bộ luật thực thi nhượng quyền thương mại ở Australia (Franchising Code of Conduct in Australia) - được Chính phủ bảo trợ - để hoà giải và được giải quyết chỉ trong vòng một ngày với chi phí rất thấp trong tương quan so sánh với giải quyết tranh chấp theo kiểu truyền thống.

5. Pháp luật Việt Nam về nhượng quyền thương mại quốc tế

Ngày 12/7/1999, Bộ Khoa học, Công nghệ và Môi trường (nay là Bộ Khoa học và Công nghệ) của Việt Nam đã ban hành Thông tư số 1254/1999/TT-BKCNMT hướng dẫn Nghị định của Chính phủ số 45/1998/NĐ-CP về chuyển giao công nghệ, trong đó thuật ngữ 'cấp phép đặc quyền kinh doanh', nghĩa là 'nhượng quyền thương mại' ('*franchise*'), lần đầu tiên được đề cập trong một văn bản quy phạm pháp luật. Tại Thông tư này, mặc dù chưa có định nghĩa nào về nhượng quyền thương mại, nhưng qua nội dung của mục 4.1.1.a, nhượng quyền thương mại có thể được hiểu là một hợp đồng chứa đựng các điều khoản liên quan tới việc cấp quyền sử dụng nhãn hiệu gắn liền với sản phẩm hoặc bí quyết kinh doanh. Cách quan niệm này chỉ đơn thuần là sự kết hợp giữa li-xăng nhãn hiệu với việc mua bán sản phẩm hoặc bí quyết kinh doanh, và rõ ràng điều này hết sức xa lạ với khái niệm nhượng quyền thương mại ở các nước phương Tây, và phản ánh sự hiểu biết chưa đầy đủ về nhượng quyền thương mại ở Việt Nam lúc đó. Ở đây đã có sự nhầm lẫn giữa nhượng quyền thương mại và chuyển giao công nghệ. Được điều chỉnh bởi văn bản quy phạm pháp luật về chuyển giao công nghệ, theo Thông tư số 1254/1999/TT-BKCNMT, nhượng quyền thương mại chỉ được coi như một dạng chuyển giao công nghệ mà không phải là cách thức tổ chức kinh doanh riêng biệt.

Khoảng một thập niên sau khi nhượng quyền thương mại xuất hiện ở Việt Nam và cũng là khoảng sau 6 năm được điều chỉnh bởi các quy định pháp luật về chuyển giao công nghệ, như là một phần của tiến trình hiện đại hoá pháp luật chuẩn bị cho việc gia nhập WTO, Việt Nam đã ban hành quy định pháp luật riêng biệt về nhượng quyền thương mại (sau đây gọi tắt là Luật riêng về nhượng quyền thương mại) nhằm tạo dựng khuôn khổ cho sự phát triển vững chắc của lĩnh vực này ở Việt Nam. Luật riêng về nhượng quyền thương mại bao gồm Mục 8 Chương VI Luật Thương mại 2005 (sau đây gọi tắt là Luật Thương mại), Nghị định của Chính phủ số 35/2006/NĐ-CP ngày 31/3/2006 quy định chi tiết Luật Thương mại về hoạt động nhượng quyền thương mại (sau đây gọi tắt là Nghị định 35), Nghị định của Chính phủ số 120/2011/NĐ-CP ngày 16/12/2011 sửa đổi, bổ sung thủ tục hành chính tại một số Nghị định của Chính phủ quy định chi tiết Luật Thương mại (sau đây gọi tắt là Nghị định 120; Nghị định này sửa đổi một số Điều của Nghị định 35), Thông tư của Bộ Thương mại số 09/2006/TT-BTM ngày 25/5/2006 hướng dẫn đăng kí hoạt động nhượng quyền thương mại (sau đây gọi tắt là Thông tư 09) và Quyết định của Bộ trưởng Bộ Tài chính số 106/2008/QĐ-BTC ngày 17/11/2008 về việc quy định mức thu, nộp, quản lí và sử dụng lệ phí đăng kí hoạt động nhượng quyền thương mại.

Luật riêng về nhượng quyền thương mại áp dụng đối với tất cả các hoạt động nhượng quyền thương mại tại Việt Nam, được thực hiện bởi thương nhân Việt Nam và thương nhân nước ngoài (Điều 1 và Điều 2 Nghị định 35) và tuân theo mô hình pháp luật rất quen thuộc - đó là quy định nghĩa vụ cung cấp bản giới thiệu nhượng quyền thương mại kết hợp với các yêu cầu về tiêu chuẩn thực thi và đăng kí nhượng quyền ở mức độ vừa phải.

A. *Định nghĩa nhượng quyền thương mại*

Luật Thương mại bao gồm định nghĩa tổng quát về nhượng quyền thương mại tại Điều 284:

> Nhượng quyền thương mại là hoạt động thương mại, theo đó bên nhượng quyền cho phép và yêu cầu bên nhận quyền tự mình tiến hành việc mua bán hàng hoá, cung ứng dịch vụ theo các điều kiện sau đây:
>
> 1. Việc mua bán hàng hoá, cung ứng dịch vụ được tiến hành theo cách thức tổ chức kinh doanh do bên nhượng quyền quy định và được gắn với nhãn hiệu hàng hoá, tên thương mại, bí quyết kinh doanh, khẩu hiệu kinh doanh, biểu tượng kinh doanh, quảng cáo của bên nhượng quyền;
>
> 2. Bên nhượng quyền có quyền kiểm soát và trợ giúp cho bên nhận quyền trong việc điều hành công việc kinh doanh.

Nghị định 35 tiếp tục làm rõ: nhượng quyền thương mại bao gồm 'nhượng quyền thương mại tổng thể' - 'master franchising' (các quyền được bên nhượng quyền trao cho bên nhượng quyền thứ cấp được phép cấp lại quyền thương mại cho bên nhận quyền thứ cấp), và 'hợp đồng phát triển khu vực' - 'franchise development contracts' (các

quyền được bên nhượng quyền trao cho bên nhận quyền được phép thành lập nhiều hơn một cơ sở của mình để kinh doanh theo phương thức nhượng quyền thương mại trong phạm vi một khu vực địa lí nhất định) (Điều 3). Nghị định 35 ngăn cấm việc bên nhận quyền thứ cấp cấp lại quyền thương mại đó (Điều 3).

B. *Điều kiện đối với bên nhượng quyền và bên nhận quyền*

Theo quy định của Nghị định 35, bên nhượng quyền phải đáp ứng các điều kiện sau đây:

- Hệ thống kinh doanh dự định dùng để nhượng quyền đã được hoạt động ít nhất 1 năm;
- Đã đăng kí hoạt động nhượng quyền thương mại với cơ quan có thẩm quyền;
- Hàng hoá, dịch vụ kinh doanh thuộc đối tượng của quyền thương mại không vi phạm quy định pháp luật.

Chỉ có duy nhất một yêu cầu tiên quyết cho bên nhận quyền - đó là phải có đăng kí kinh doanh ngành nghề phù hợp với đối tượng của quyền thương mại (Điều 6 Nghị định 35).

Yêu cầu về một năm hoạt động: Nghị định 35 yêu cầu các nhà nhượng quyền, cả nước ngoài lẫn Việt Nam, phải hoạt động ít nhất là 1 năm trước khi nhượng quyền vào Việt Nam hoặc nhượng quyền cho một thương nhân Việt Nam khác (khoản 1 Điều 5 Nghị định 35). Trong trường hợp thương nhân Việt Nam là bên nhận quyền sơ cấp từ bên nhượng quyền nước ngoài, thì thương nhân Việt Nam đó phải kinh doanh hệ thống được nhượng quyền ít nhất 1 năm trước khi cấp lại quyền thương mại (khoản 1 Điều 5 Nghị định 35).

Hàng hoá, dịch vụ được phép kinh doanh nhượng quyền: Bất kì hàng hoá hoặc dịch vụ nào đều có thể được nhượng quyền với điều kiện là: (i) Hàng hoá, dịch vụ không thuộc Danh mục hàng hoá, dịch vụ cấm kinh doanh; và (ii) Trong tường hợp hàng hoá, dịch vụ thuộc Danh mục hàng hoá, dịch vụ hạn chế kinh doanh, Danh mục hàng hoá, dịch vụ kinh doanh có điều kiện, thì doanh nghiệp chỉ được phép kinh doanh sau khi được cơ quan quản lí ngành cấp giấy phép kinh doanh, giấy tờ có giá trị tương đương, hoặc có đủ điều kiện kinh doanh (Điều 7 Nghị định 35). Nhà nhượng quyền nước ngoài phải đối mặt thêm với một hạn chế. Doanh nghiệp có vốn đầu tư nước ngoài chuyên hoạt động mua bán hàng hoá và các hoạt động liên quan trực tiếp đến mua bán hàng hoá chỉ được thực hiện hoạt động nhượng quyền thương mại đối với những mặt hàng mà doanh nghiệp đó được kinh doanh dịch vụ phân phối theo cam kết quốc tế của Việt Nam (khoản 2 Điều 2 Nghị định 35).[15]

C. *Bản giới thiệu nhượng quyền thương mại*

Bên nhượng quyền phải cung cấp bản sao hợp đồng nhượng quyền và bản giới thiệu nhượng quyền thương mại ít nhất 15 ngày làm việc trước khi kí kết hợp đồng nhượng quyền thương mại, 'nếu các bên không có thoả thuận khác' (khoản 1 Điều 8 Nghị định 35). Nghị định 35 quy định Bộ thương mại (nay là Bộ công thương) có trách nhiệm quy định và công bố các nội dung bắt buộc của bản giới thiệu nhượng quyền thương mại, và các nội dung này đã được ban hành tại Phụ lục III - Bản giới thiệu về nhượng quyền thương mại của Thông tư 09. Bản giới thiệu nhượng quyền thương mại phải bao gồm một 'cảnh báo' cho bên dự kiến nhận quyền phải nghiên cứu kĩ lưỡng và đưa ra lời khuyên đối với bên nhận quyền cần tìm kiếm các tư vấn độc lập, thảo luận với những nhà nhận quyền khác và tham gia các khoá đào tạo. Bên dự kiến nhượng quyền phải cung cấp một loạt các thông tin cụ thể về các chủ đề sau đây:

- Thông tin chung về bên nhượng quyền;
- Nhãn hiệu hàng hoá/dịch vụ và IPRs;
- Chi phí ban đầu mà bên nhận quyền phải trả;
- Các nghĩa vụ tài chính khác của bên nhận quyền;
- Đầu tư ban đầu của bên nhận quyền;
- Nghĩa vụ của bên nhận quyền phải mua hoặc thuê những thiết bị để phù hợp với hệ thống kinh doanh do bên nhượng quyền quy định;
- Nghĩa vụ của bên nhượng quyền;
- Mô tả thị trường của hàng hoá/dịch vụ được kinh doanh theo phương thức nhượng quyền thương mại;
- Hợp đồng nhượng quyền thương mại mẫu;

[15] Các cam kết quốc tế của Việt Nam đã được nội luật hoá trong Quyết định của Bộ Thương mại số 10/2007/QĐ-BTM ngày 21/5/2007.

- Thông tin về hệ thống nhượng quyền thương mại;
- Báo cáo tài chính của bên nhượng quyền;
- Phần thưởng, sự công nhận sẽ nhận được hoặc tổ chức cần phải tham gia.

Cùng với bản giới thiệu nhượng quyền thương mại, Nghị định 35 còn yêu cầu bên nhượng quyền phải

> thông báo ngay cho tất cả các bên nhận quyền về mọi thay đổi quan trọng trong hệ thống nhượng quyền thương mại làm ảnh hưởng đến hoạt động kinh doanh theo phương thức nhượng quyền thương mại của bên nhận quyền' (khoản 2 Điều 8).

Trong trường hợp nhượng quyền thương mại thứ cấp, bên nhượng quyền thứ cấp phải cung cấp cho bên nhận quyền thứ cấp không chỉ bản giới thiệu nhượng quyền thương mại mà còn là thông tin về bên nhượng quyền đã cấp quyền thương mại cho mình, nội dung của 'hợp đồng nhượng quyền thương mại tổng thể' ('master franchising agreement'), và cách thức xử lí hợp đồng nhượng quyền thương mại thứ cấp, trong trường hợp chấm dứt 'hợp đồng nhượng quyền thương mại tổng thể' (khoản 3 Điều 8).

Nghị định 35 cũng yêu cầu việc tiết lộ thông tin của bên nhận quyền: Bên dự kiến nhận quyền phải cung cấp cho bên nhượng quyền các thông tin mà bên nhượng quyền yêu cầu một cách hợp lí để quyết định việc trao quyền thương mại cho bên dự kiến nhận quyền (Điều 9).

D. *Hợp đồng nhượng quyền thương mại*

Luật thương mại chỉ quy định hợp đồng nhượng quyền thương mại 'phải được lập thành văn bản[16] hoặc bằng hình thức khác có giá trị pháp lí tương đương' (Điều 285). Nghị định 35 cũng theo nguyên tắc của Bộ luật Dân sự 2005 (có hiệu lực từ ngày 01/01/2006) (sau đây gọi tắt là Bộ luật Dân sự) về quyền tự do thoả thuận trong hợp đồng để thiết lập các quyền và nghĩa vụ, với điều kiện là các cam kết đó không trái với pháp luật hoặc trật tự công cộng. Nghị định 35 chỉ đơn thuần quy định tại Điều 11 rằng hợp đồng nhượng quyền thương mại có thể có các nội dung chủ yếu sau đây, nếu các bên lựa chọn áp dụng pháp luật Việt Nam:

[16] Trừ trường hợp nhượng quyền thương mại từ Việt Nam ra nước ngoài, theo đó các bên có thể thỏa thuận về ngôn ngữ của hợp đồng, còn lại hợp đồng nhượng quyền thương mại phải được lập bằng tiếng Việt (Điều 12 Nghị định 35).

- Nội dung của quyền thương mại;
- Quyền, nghĩa vụ của bên nhượng quyền;
- Quyền, nghĩa vụ của bên nhận quyền;
- Giá cả, phí nhượng quyền định kì và phương thức thanh toán;
- Thời hạn hiệu lực của hợp đồng;
- Gia hạn, chấm dứt hợp đồng;
- Giải quyết tranh chấp.

Thời hạn của hợp đồng nhượng quyền thương mại do các bên thoả thuận (Điều 13 Nghị định 35) và hợp đồng có hiệu lực từ thời điểm giao kết, trừ trường hợp các bên có thoả thuận khác (Điều 14 Nghị định 35).

Nếu bên nhượng quyền chuyển giao quyền sử dụng các đối tượng IPs cùng với các nội dung của quyền thương mại, thì việc chuyển giao quyền sử dụng các đối tượng IPs đó có thể lập thành một phần riêng trong hợp đồng nhượng quyền thương mại. Việc chuyển giao IPRs trong hợp đồng nhượng quyền thương mại phải phù hợp với pháp luật về IP của Việt Nam (Điều 10 Nghị định 35).

E. *Các vấn đề về tiêu chuẩn thực thi và quan hệ giữa bên nhượng quyền và bên nhận quyền*

Luật thương mại quy định 5 điều khoản khá cơ bản về các quyền và nghĩa vụ của bên nhượng quyền (các Điều 286 và 287) và bên nhận quyền (các điều 288, 289 và 290). Bên nhận quyền có quyền nhận tiền phí nhượng quyền, tổ chức quảng cáo cho hệ thống nhượng quyền thương mại và kiểm tra bên nhận quyền để đảm bảo sự thống nhất của hệ thống nhượng quyền thương mại và sự ổn định về chất lượng hàng hoá, dịch vụ. Bên nhượng quyền có nghĩa vụ: cung cấp bản giới thiệu nhượng quyền thương mại, đào tạo ban đầu, trợ giúp kĩ thuật thường xuyên và bảo đảm IPRs đối với các đối tượng được ghi trong hợp đồng nhượng quyền; thiết kế và sắp xếp địa điểm bán hàng, cung ứng dịch vụ bằng chi phí của thương nhân nhận quyền; đối xử bình đẳng với các bên nhận quyền trong cùng hệ thống nhượng quyền thương mại. Bên nhận quyền có quyền yêu cầu bên nhượng quyền cung ứng các hỗ trợ kĩ thuật, đối xử bình đẳng với các bên nhận quyền khác trong

cùng hệ thống nhượng quyền thương mại, và có quyền cấp lại quyền thương mại cho bên thứ ba nếu được sự đồng ý của bên nhượng quyền. Bên nhận quyền có nghĩa vụ: Trả các khoản thanh toán theo hợp đồng nhượng quyền thương mại, đầu tư cơ sở vật chất, tài chính và nhân lực; chấp nhận sự kiểm soát, giám sát và hướng dẫn của bên nhượng quyền; giữ bí mật về bí quyết kinh doanh đã được nhượng quyền trong suốt thời gian nhận nhượng quyền và kể cả sau khi hết hợp đồng nhượng quyền; ngừng sử dụng nhãn hiệu hàng hoá, tên thương mại, khẩu hiệu kinh doanh và các IPRs khác (nếu có), hoặc hệ thống của bên nhượng quyền khi kết thúc hoặc chấm dứt hợp đồng nhượng quyền thương mại; vận hành kinh doanh phù hợp với hệ thống nhượng quyền thương mại; không được nhượng quyền lại nếu không có sự đồng ý của bên nhượng quyền.

Chuyển giao quyền thương mại: Nghị định 35 cho phép bên nhận quyền được chuyển giao quyền thương mại cho bên dự kiến nhận quyền khác (Điều 15), nếu bên dự kiến nhận chuyển giao có đăng kí ngành nghề kinh doanh phù hợp với đối tượng của quyền thương mại và được sự đồng ý của bên nhượng quyền. Bên nhượng quyền trực tiếp chỉ có quyền từ chối việc chuyển giao quyền thương mại của bên nhận quyền, khi có một trong các lí do như sau:

- Bên dự kiến nhận chuyển giao không đáp ứng được các nghĩa vụ tài chính mà bên dự kiến nhận chuyển giao phải thực hiện theo hợp đồng nhượng quyền thương mại;
- Bên dự kiến nhận chuyển giao chưa đáp ứng được các tiêu chuẩn lựa chọn của bên nhượng quyền trực tiếp;
- Việc chuyển giao quyền thương mại sẽ có ảnh hưởng bất lợi lớn đối với hệ thống nhượng quyền thương mại hiện tại;
- Bên dự kiến nhận chuyển giao không đồng ý bằng văn bản sẽ tuân thủ các nghĩa vụ của bên nhận quyền theo hợp đồng nhượng quyền thương mại;
- Bên nhận quyền chưa hoàn thành các nghĩa vụ đối với bên nhượng quyền trực tiếp, trừ trường hợp bên dự kiến nhận chuyển giao cam kết bằng văn bản thực hiện các nghĩa vụ đó thay cho bên nhận quyền.

Bên nhận quyền dự định chuyển giao quyền thương mại phải gửi yêu cầu bằng văn bản về việc chuyển giao quyền thương mại cho bên nhượng quyền trực tiếp, và trong vòng 15 ngày, bên nhượng quyền trực tiếp phải có văn bản trả lời, trong đó nêu rõ chấp thuận hoặc từ chối dựa trên một trong các lí do nêu trên. Trong thời hạn 15 ngày, nếu bên nhận quyền không nhận được văn bản trả lời của bên nhượng quyền trực tiếp, thì coi như việc dự kiến chuyển giao quyền thương mại được chấp thuận bởi bên nhượng quyền trực tiếp. Đối với việc chuyển giao quyền thương mại, tất cả các quyền và nghĩa vụ liên quan đến quyền thương mại của bên chuyển giao đều được chuyển cho bên nhận chuyển giao, trừ trường hợp các bên có thoả thuận khác.

Chấm dứt hợp đồng nhượng quyền thương mại: Bên nhận quyền có quyền đơn phương chấm dứt hợp đồng nhượng quyền thương mại (Điều 16 Nghị định 35), nếu bên nhượng quyền vi phạm nghĩa vụ quy định tại Điều 287 Luật thương mại:

- Cung cấp bản giới thiệu nhượng quyền thương mại cho bên nhận quyền;
- Đào tạo ban đầu và hỗ trợ kĩ thuật thường xuyên cho bên nhận quyền để đảm bảo sự hoạt động của hệ thống nhượng quyền thương mại;
- Thiết kế và sắp xếp địa điểm bán hàng, cung ứng dịch vụ bằng chi phí của bên nhận quyền;
- Đảm bảo tính hiệu lực của IPRs được chuyển giao trong hợp đồng nhượng quyền thương mại;
- Đối xử bình đẳng đối với các bên nhận quyền trong cùng hệ thống nhượng quyền thương mại.

Bên nhượng quyền có quyền đơn phương chấm dứt hợp đồng nhượng quyền thương mại (Điều 16 Nghị định 35) trong các trường hợp sau đây:

- Bên nhận quyền không còn giấy phép kinh doanh hoặc giấy tờ có giá trị tương đương, mà theo quy định của pháp luật bên nhận quyền phải có để tiến hành công việc kinh doanh theo phương thức nhượng quyền thương mại;
- Bên nhận quyền bị giải thể hoặc bị phá sản theo quy định của pháp luật Việt Nam;
- Bên nhận quyền 'vi phạm pháp luật nghiêm trọng', có khả

năng gây thiệt hại lớn cho uy tín của hệ thống nhượng quyền thương mại;

- Bên nhận quyền không khắc phục những vi phạm không cơ bản trong hợp đồng nhượng quyền thương mại trong một thời gian hợp lí, mặc dù đã nhận được thông báo bằng văn bản yêu cầu khắc phục vi phạm đó từ bên nhượng quyền.

F. *Đăng kí nhượng quyền và báo cáo*

Theo Luật thương mại, trước khi nhượng quyền, 'bên dự kiến nhượng quyền phải đăng kí với Bộ Thương mại' (nay là Bộ Công Thương), và Chính phủ sẽ quy định chi tiết 'điều kiện kinh doanh theo phương thức nhượng quyền thương mại và trình tự, thủ tục đăng kí nhượng quyền thương mại' (Điều 291). Việc đăng kí cũng được quy định tại Nghị định 35, theo đó các hoạt động nhượng quyền thương mại (trên thực tế là hệ thống nhượng quyền) - chứ không phải bên dự kiến nhượng quyền - phải được đăng kí (Điều 17). Chi tiết về việc đăng kí nhượng quyền thương mại được quy định tại Thông tư 09. Bên nhượng quyền chỉ phải đăng kí một lần thay vì từng lần một cho từng hợp đồng nhượng quyền thương mại.

Bộ Thương mại (nay là Bộ Công Thương) chịu trách nhiệm thực hiện việc đăng kí hoạt động nhượng quyền thương mại từ nước ngoài vào Việt Nam và từ Việt Nam ra nước ngoài. Trong các trường hợp khác, Sở Thương mại (nay là Sở Công Thương) ở các tỉnh, nơi bên nhượng quyền đăng kí kinh doanh, sẽ thực hiện đăng kí hoạt động nhượng quyền trong nước (Điều 18). Tuy nhiên, Nghị định 120 (có hiệu lực từ ngày 01/02/2012) đã xóa bỏ nghĩa vụ đăng ký của các nhà nhượng quyền từ Việt Nam ra nước ngoài (Điều 3.2). Điều này có nghĩa là chỉ còn các nhà nhượng quyền nước ngoài thực hiện việc nhượng quyền vào Việt Nam phải đăng ký hệ thống nhượng quyền với Bộ Công Thương Việt Nam.

Bên nhượng quyền phải lập hồ sơ đề nghị đăng kí hoạt động nhượng quyền thương mại theo mẫu quy định và kèm theo là bản giới thiệu nhượng quyền thương mại, các văn bản xác nhận về tư cách pháp lí của bên nhượng quyền, các văn bằng bảo hộ quyền sở hữu công nghiệp tại Việt Nam hoặc tại nước ngoài, nếu bên nhượng quyền có chuyển giao quyền sử dụng các đối tượng sở hữu công nghiệp đó. Nếu bất kì giấy tờ nào thuộc hồ sơ đề nghị đăng kí hoạt động nhượng quyền thương mại được lập bằng tiếng nước ngoài, thì sẽ phải được dịch ra tiếng Việt và được hợp pháp hóa lãnh sự phù hợp với quy định của pháp luật Việt Nam (Điều 3.4 Nghị định 120). Nếu thương nhân nộp đơn là bên nhượng quyền thứ cấp, thì còn phải nộp giấy tờ chứng minh sự cho phép nhượng quyền lại từ bên nhượng quyền ban đầu (Điều 19 Nghị định 35 và Thông tư 09).

Việc đăng kí hoạt động nhượng quyền có thể bị hủy bỏ, nếu bên nhượng quyền ngừng kinh doanh, hoặc chuyển đổi ngành nghề kinh doanh, hoặc bị thu hồi giấy chứng nhận đăng kí kinh doanh hoặc giấy chứng nhận đầu tư (Điều 22 Nghị định 35).

Ngoài ra luật riêng về nhượng quyền thương mại còn yêu cầu việc báo cáo thường niên của bên nhượng quyền cho cơ quan nhà nước đăng kí hoạt động nhượng quyền. Bên nhượng quyền phải thông báo cho cơ quan đăng kí hoạt động nhượng quyền thương mại về các thay đổi thông tin thuộc về thông tin chung về bên nhượng quyền, và nhãn hiệu hàng hoá/dịch vụ và IPRs khác trong vòng 30 ngày, kể từ ngày có thay đổi các thông tin đó (Thông tư 09). Bên nhượng quyền cũng phải thông báo thường niên cho cơ quan đăng kí về các thông tin về bên nhượng quyền, chi phí ban đầu mà bên nhận quyền phải trả, các nghĩa vụ tài chính khác của bên nhận quyền, đầu tư ban đầu của bên nhận quyền, nghĩa vụ của bên nhận quyền phải mua hoặc thuê những thiết bị phù hợp với hệ thống kinh doanh do bên nhượng quyền quy định, nghĩa vụ của bên nhượng quyền, mô tả thị trường của hàng hoá/dịch vụ được kinh doanh theo phương thức nhượng quyền thương mại, hợp đồng nhượng quyền thương mại mẫu, thông tin về hệ thống nhượng quyền thương mại, báo cáo tài chính của bên nhượng quyền, và phần thưởng, sự công nhận sẽ nhận được hoặc tổ chức cần phải tham gia, chậm nhất là ngày 15/1 hàng năm (Thông tư 09). Mặc dù Nghị định 120 đã xóa bỏ nghĩa vụ đăng ký của các nhà nhượng quyền thực hiện việc nhượng quyền từ Việt Nam ra nước ngoài, các nhà nhượng quyền này vẫn còn phải thực hiện nghĩa vụ báo cáo theo như quy định tại Nghị định 35.

G. *Bên nhượng quyền nước ngoài*

Mặc dù áp dụng cơ chế pháp lí khá thống nhất cho cả bên nhượng quyền nước ngoài và trong nước giống như thực tiễn pháp luật các nước trên thế giới, Việt Nam đã từng đưa ra một số hạn chế đối với các doanh nghiệp có vốn đầu tư nước ngoài hoạt động nhượng quyền thương mại. Những hạn chế này đã được loại bỏ cho phù hợp với các cam kết về mở cửa thị trường

dịch vụ của Việt Nam khi gia nhập WTO. Tất cả các hạn chế về các hình thức doanh nghiệp đầu tư nước ngoài bị loại bỏ vào ngày 01/01/2009. Cho tới ngày 01/01/2008, các doanh nghiệp đầu tư nước ngoài tham gia hoạt động nhượng quyền thương mại phải dưới hình thức doanh nghiệp liên doanh với mức vốn góp tối đa của bên nước ngoài là 49%. Giới hạn về vốn góp của bên nước ngoài được loại bỏ vào ngày 01/01/2008, nhưng yêu cầu về hình thức doanh nghiệp liên doanh thì vẫn được duy trì. Từ ngày 01/01/2009, các doanh nghiệp đầu tư nước ngoài được thành lập ở Việt Nam tham gia vào hoạt động nhượng quyền thương mại có thể là doanh nghiệp 100% vốn đầu tư nước ngoài.

Mặc dù Luật riêng về nhượng quyền thương mại của Việt Nam không quy định trực tiếp về vấn đề chọn luật áp dụng cho các hợp đồng nhượng quyền thương mại, cụm từ 'trong trường hợp các bên lựa chọn áp dụng luật Việt Nam' đã mở đầu cho điều luật tại Nghị định 35 quy định về nội dung của hợp đồng nhượng quyền thương mại (Điều 11 Nghị định 35). Cụm từ này ám chỉ khả năng các bên lựa chọn pháp luật áp dụng cho hợp đồng nhượng quyền thương mại giữa họ là pháp luật nước ngoài chứ không phải pháp luật Việt Nam. Điều đó có nghĩa là mặc dù bên nhượng quyền nước ngoài phải tuân thủ luật riêng về nhượng quyền thương mại của Việt Nam về một vài vấn đề như đăng kí hoạt động nhượng quyền thương mại, điều kiện của bên nhượng quyền và bản giới thiệu nhượng quyền thương mại, nhưng họ vẫn có thể lựa chọn hệ thống pháp luật nước ngoài để điều chỉnh các vấn đề khác của hợp đồng. Nhượng quyền thương mại là một dạng quan hệ dân sự và việc lựa chọn luật áp dụng cho hợp đồng nhượng quyền thương mại ở Việt Nam tuân theo các nguyên tắc của Bộ luật dân sự, vốn được coi như đạo luật 'mẹ' điều chỉnh các quan hệ dân sự nói chung.

Mục 2. PHÁP LUẬT VỀ LOGISTICS QUỐC TẾ - TỔNG QUAN

1. Giới thiệu

Một trong những thách thức mà người hoạt động trong lĩnh vực logistics phải đối mặt khi quản lí sự dịch chuyển của dòng hàng hoá, dịch vụ và thông tin liên quan giữa các nước, hay còn gọi là quản lí logistics quốc tế, là hệ thống pháp luật.[17] Khi một hoạt động logistics vượt qua biên giới một quốc gia, nó không chỉ chịu sự điều chỉnh của pháp luật của nước nơi dòng logistics xuất phát, mà nó còn có thể chịu sự điều chỉnh của pháp luật tại các nước liên quan (*ví dụ*, nước đến hay nước quá cảnh), hoặc pháp luật quốc tế. Do hệ thống pháp luật quốc tế điều chỉnh logistics và các dịch vụ liên quan đến logistics quá rộng, Mục này chỉ tập trung vào một số quy định pháp luật quốc tế phổ biến mà những người hoạt động trong lĩnh vực logistics tại Việt Nam cần biết.

Trong khi pháp luật điều chỉnh dịch vụ logistics và các dịch vụ liên quan phụ thuộc vào nội hàm của khái niệm logistics, thì định nghĩa logistics vẫn còn nhiều điểm không thống nhất. Vì vậy, việc điểm qua các quan điểm phổ biến về logistics là điều cần thiết.

Mục này được chia thành 4 nội dung: (i) Giới thiệu; (ii) Các cách tiếp cận khác nhau về khái niệm logistics và hoạt động logistics; (iii) Giới thiệu tổng quan pháp luật điều chỉnh logistics quốc tế; và (iv) Kết luận.

2. Khái niệm chung về logistics

Hiện nay có rất nhiều định nghĩa khác nhau về logistics và nội hàm của khái niệm này cũng có nhiều điểm còn tranh cãi. *Ví dụ,* theo Johnson và Wood,[18] logistics là một bộ phận chức năng chịu trách nhiệm về dòng vật chất đi vào, dịch chuyển bên trong và ra khỏi một tổ chức. Tuy nhiên, theo Wood,[19] logistics còn bao gồm cả dòng dịch vụ và nhân sự. Theo Lummus,[20] quá trình logistics bắt đầu từ người cung cấp trực tiếp đến người tiêu dùng trực tiếp của một doanh nghiệp, trong khi đó theo Waters[21] thì quá trình này có thể bao gồm nhiều cấp người cung ứng và tiêu dùng, thậm chí có thể mở rộng từ người cung ứng đầu tiên cho đến người tiêu dùng cuối cùng của chuỗi cung ứng. Cũng có nhiều quan điểm khác nhau về hai khái niệm 'logistics' và 'quản lí chuỗi cung ứng'. Waters[22] và Ballou[23] cho rằng logistics và quản lí chuỗi cung ứng là hai thuật ngữ mô tả cùng một khái niệm. Tuy nhiên, Hội đồng các nhà quản lí chuỗi cung ứng chuyên nghiệp (Council of Supply Chain Management Professionals[24]) và Mentzer[25] lại phân biệt rõ ràng giữa hai khái niệm này,

17 D. F. Wood, *International Logistics* (1995).

18 J. C. Johnson và D. F. Wood, *Contemporary Logistics* (1996).

19 D. F. Wood, Sđd.

20 Lummus và các tác giả khác, 'The Relationship of Logistics to Supply Chain Management: Developing a Common Industry Definition', 101 *Industrial Management + Data Systems*, tr. 426.

21 C. D. J. Waters, *Logistics: An Introduction to Supply Chain Management,* (2003).

22 Như trên.

23 R. H. Ballou, *Business Logistics/Supply Chain Management: Planning, Organizing, and Controlling the Supply Chain* (2004).

24 *CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

25 J. T. Mentzer, *Fundamentals of Supply Chain Management: Twelve Drivers of Competitive Advantage* (2004).

theo đó logistics là một khái niệm hẹp hơn, chỉ là một phần của quản lí chuỗi cung ứng.

Do sự thiếu thống nhất trong định nghĩa logistics, người đọc có thể sẽ gặp khó khăn trong việc tìm hiểu khái niệm logistics và các chủ đề liên quan, ví dụ như luật điều chỉnh logistics quốc tế. Vì vậy, trước khi đi vào chủ đề chính của phần này, chúng ta cần phải phân loại các khái niệm về logistics.

A. *Định nghĩa logistics*

Theo quan điểm thứ nhất, logistics là một bộ phận chức năng trực thuộc một doanh nghiệp quản lí dòng dịch chuyển và bảo quản một số đối tượng bắt đầu từ người cung ứng trực tiếp và kết thúc ở người tiêu dùng trực tiếp của doanh nghiệp đó. Một số đối tượng của dòng logistics bao gồm: Sản phẩm vật chất;[26] [27] [28] [29] Sản phẩm vật chất và thông tin;[30] Sản phẩm vật chất và dịch vụ;[31] [32] Hàng hoá, dịch vụ và con người;[33] Hàng hoá, dịch vụ và thông tin liên quan.[34] [35] Nói một cách đơn giản, theo quan điểm này, dòng logistics bắt đầu từ người cung ứng trực tiếp đến người tiêu dùng trực tiếp, và đó có thể là dòng hàng hoá, dịch vụ, thông tin liên quan và đôi khi là cả con người.

Theo quan điểm thứ hai, logistics có phạm vi rộng hơn, trải dài cả kênh marketing hay chuỗi cung ứng chứ không phải chỉ giới hạn trong phạm vi từ người cung ứng trực tiếp đến người tiêu dùng trực tiếp. Theo Bowersox,[36] quan điểm này là sự phát triển quan trọng nhất trong tư duy logistics. Chính vì vậy, Waters[37] và Ballou[38] coi khái niệm logistics và quản lí chuỗi cung ứng là giống nhau.

Tuy nhiên, theo Hội đồng các nhà quản lí chuỗi cung ứng chuyên nghiệp (Council of Supply Chain Management Professionals[39]) và Mentzer,[40] quản lí chuỗi cung ứng khác với logistics. Quản lí chuỗi cung ứng là việc quản lí dòng hàng hoá, dịch vụ, thông tin và tài chính cũng như các quá trình có liên quan đến các dòng này, *ví dụ*: mua bán, sản xuất, tiếp thị, dịch vụ sau bán hàng, nhân sự và hệ thống thông tin trong chuỗi cung ứng. Như vậy, quản lí chuỗi cung ứng là khái niệm rộng hơn logistics rất nhiều, cả về nội hàm lẫn phạm vi. Quản lí chuỗi cung ứng bao gồm cả những yếu tố không có trong khái niệm logistics, *ví dụ*: các quá trình và thông tin không liên quan đến việc dịch chuyển và bảo quản hàng hoá và dịch vụ. Thêm nữa, quản lí chuỗi cung ứng trải dài cả chuỗi cung ứng[41] chứ không chỉ giữa người cung ứng trực tiếp và khách hàng trực tiếp của một doanh nghiệp nào đó. Vì vậy, Hội đồng các quản lí chuỗi cung ứng chuyên nghiệp (Council of Supply Chain Management Professionals (2011)[42] coi logistics là một bộ phận của quản lí chuỗi cung ứng.

Tuy Hội đồng các nhà quản lí chuỗi cung ứng chuyên nghiệp (Council of Supply Chain Management Professionals[43]) và Mentzer[44] đã phân biệt rõ ràng hai khái niệm quản lí chuỗi cung ứng và logistics, nhưng vì logistics tương tác chặt chẽ với khái niệm quản lí chuỗi cung ứng (*ví dụ*: sản xuất, tiếp thị và kế toán), nên trên thực tế vẫn có sự nhầm lẫn giữa hai khái niệm này. *Ví dụ,* rất khó có thể phân biệt rạch ròi thông tin logistics (là các thông tiên liên quan đến sự dịch chuyển, bảo quản hàng hoá và dịch vụ) với các thông tin khác. Thêm nữa, việc phân biệt trách nhiệm của bộ phận logistics và bộ phận sản xuất trong việc quản lí dòng nguyên liệu và bán thành phẩm trong quá trình sản xuất cũng không hề đơn giản. Vì vậy, Arlbjorn và Halldorsson[45] đã đưa ra một cách

[26] Bureau of Transport Economics of Australia, *Logistics in Australia: A Preliminary Analysis* (2001).

[27] J. F. Cox và J. H. Blackstone, *APICS: Dictionary* (1998).

[28] J. C. Johnson và D. F. Wood, *Contemporary Logistics* (1996).

[29] R. Demkes và các tác giả khác, *TRILOG-Europe Summary Report* (1999).

[30] M. Christopher, *Logistics and Supply Chain Management: Strategies for Reducing Costs and Improving Services* (1992).

[31] Allen, 'The Logistics Revolution and Transportation', 553 *The Annals of the American Academy of Political and Social Socience* (1997), tr. 106-116.

[32] Lummus và các tác giả khác, Sđd, tr. 426.

[33] D. F. Wood, Sđd.

[34] J. T. Mentzer, Sđd.

[35] *CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

[36] D. J. Bowersox và các tác giả khác, *21st Century Logistics: Making Supply Chain Integration A Reality* (1999).

[37] C. D. J. Waters, Sđd.

[38] R.H. Ballou, Sđd.

[39] *CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

[40] J. T. Mentzer, Sđd.

[41] Như trên.

[42] *CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

[43] Như trên.

[44] J.T. Mentzer, Sđd.

[45] Arlbjorn và Halldorsson, 'Logistics Knowledge Creation: Reflections on Content, Context and Processes', 32 *International Journal of Physical Distribution & Logistics Management* (2002), tr. 22.

định nghĩa logistics khác, trong đó sử dụng khái niệm 'hạt nhân' và 'vành đai bảo vệ' của Lakatos.[46] Thuật ngữ 'hạt nhân' dùng để mô tả bản chất của vấn đề nào đó và bản chất này không thay đổi trong khi 'vành đai bảo vệ' bao gồm tất cả những gì có thể giúp hiểu thêm về 'hạt nhân'.[47] Hạt nhân của logistics 'hướng tới dòng nguyên liệu, thông tin và dịch vụ, theo chiều dọc hoặc chiều ngang của chuỗi giá trị (hay còn gọi là chuỗi cung ứng), nhằm liên kết các dòng này và có nền tảng là tư duy hệ thống (cách nhìn tổng thể), và đơn vị phân tích là dòng'.[48] 'Vành đai bảo vệ' của logistics có thể mở rộng, dường như là không có giới hạn, bao gồm tất cả mọi thứ có liên quan đến logistics. *Ví dụ,* đó có thể là vấn đề về động lực (một khái niệm trong học thuyết về tổ chức), nếu khái niệm này được áp dụng trong logistics. Điều đó có nghĩa là 'vành đai bảo vệ' của logistics có thể vô cùng lớn.[49]

Trong Mục này, định nghĩa logistics của Hội đồng các nhà quản lí chuỗi cung ứng chuyên nghiệp (Council of Supply Chain Management Professionals[50]) được sử dụng, theo đó: Quản lí logistics là một bộ phận của quản lí chuỗi cung ứng, có chức năng lên kế hoạch, thực hiện và kiểm soát một cách hiệu quả việc dịch chuyển (xuôi hoặc ngược) và bảo quản hàng hoá, dịch vụ và thông tin có liên quan từ điểm bắt đầu đến điểm tiêu dùng thoả mãn yêu cầu của khách hàng.[51]

B. *Các hoạt động logistics*

Về bản chất, logistics là quá trình liên kết nhiều hoạt động khác nhau nhằm đạt được sự dịch chuyển và bảo quản hàng hoá, dịch vụ và thông tin liên quan một cách hiệu quả nhất. Vì vậy, chúng ta có thể xác định được các hoạt động logistics bằng cách bám theo các dòng logistics.

Hàng hoá tạo ra các dòng vật chất bên trong và giữa các tổ chức. Đối với sản phẩm hữu hình, có khoảng cách về không gian và thời gian giữa sản xuất và tiêu dùng.[52] Hàng hoá có thể lưu kho, lưu bãi và vận chuyển từ nơi cung ứng đến nơi có nhu cầu. Do vậy, việc quản lí dòng sản phẩm hữu hình sẽ bao gồm các hoạt động như xử lí đơn hàng, vận

[46] Lakatos, 'Falsification and the Methodology of Scientific Research Programmes', trong sách của I. Lakatos and A. Musgrave (chủ biên), *Criticism and the Growth of Knowledge* (1970), tr. 91-196.

[47] Như trên.

[48] Arlbjorn và Halldorsson, Sđd, tr. 22.

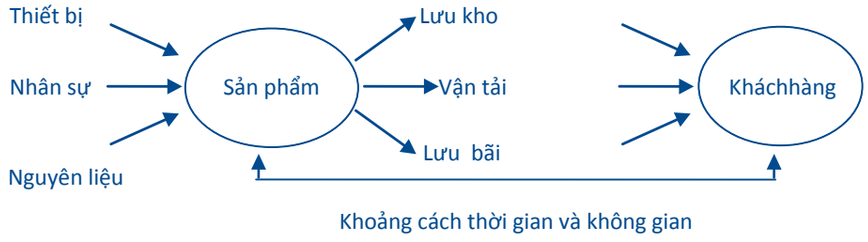
[49] Như trên.

[50] *CSCMP Supply Chain Management Definitions*, http://www.cscmp.org/aboutcscmp/definitions.asp.

[51] Như trên.

[52] K. Marx, Sđd.

tải, lưu kho, bảo quản, xử lí nguyên liệu, bao gói bao bì như mô tả trong hình 6.2.1 dưới đây:[53]



Hình 6.2.1: *Các hoạt động logistics đối với dòng sản phẩm hữu hình*

Sản phẩm vật chất là hữu hình, còn dịch vụ thì vô hình. Đối với dịch vụ, quá trình sản xuất và tiêu dùng diễn ra cùng một lúc. Khi quá trình sản xuất bắt đầu, quá trình tiêu dùng cũng bắt đầu. Dịch vụ sẽ được tiêu dùng hết khi quá trình sản xuất kết thúc.[54] Đối với dịch vụ, không có khoảng cách không gian và thời gian giữa sản xuất và tiêu dùng. Vì vậy trong quản lí dịch vụ, không có một số khái niệm giống như trong ngành sản xuất.

Hình 6.2.2: *Các hoạt động logistics đối với dòng dịch vụ*

Như mô tả trong hình 6.2.1 và hình 6.2.2, việc quản lí 'sự dịch chuyển và bảo quản dịch vụ' đòi hỏi những công việc hoàn toàn khác so với việc quản lí dòng sản phẩm hữu hình. Đối với dịch vụ, không phải là vận tải, lưu kho lưu bãi, xử lí nguyên vật liệu hay bao bì đóng gói. Để cung ứng dịch vụ cho khách hàng, người cung ứng dịch vụ phải quản lí khả năng cung ứng dịch vụ[55] và điều phối việc cung ứng dịch vụ.[56]

[53] D.G. Bloomberg và các tác giả khác, *Logistics* (2002).

[54] K. Marx, Sđd.

[55] D. G. Bloomberg và các tác giả khác, Sđd.

[56] Davis và Mandrodt, 'Teaching Service Response Logistics', 13 *Journal of Business Logistics* (1992), tr. 199-229.

Quản lí khả năng cung ứng dịch vụ bao gồm nhiều việc như dự đoán nhu cầu và xác định công suất cần thiết để đáp ứng nhu cầu đó. Quản lí khả năng cung ứng dịch vụ nhằm 'đảm bảo đủ công suất khi nhu cầu đạt đỉnh và giảm thiểu công suất khi cần thiết'.[57] Ngược lại, quản lí cầu đòi hỏi 'điều chỉnh thời điểm phát sinh nhu cầu sao cho "giảm bớt" nhu cầu lúc cao điểm, và chuyển sang lúc nhàn rỗi khi công suất cung ứng dịch vụ dư thừa'.[58] Trong quản lí cung cầu, luôn nhớ rằng công suất quá nhiều sẽ làm tăng chi phí, trong khi thiếu công suất sẽ mất khách hàng.[59] Tuy nhiên, các quyết định dài hạn liên quan đến việc quản lí khả năng cung cấp dịch vụ, *ví dụ* như việc thành lập chi nhánh mới, là vấn đề của các nhà quản lí cấp cao chứ không chỉ do bộ phận logistics quyết định.[60] Tất nhiên, việc ra những quyết định dài hạn như vậy cũng một phần dựa trên những thông tin và ý kiến của các giám đốc logistics.[61]

Điều phối việc cung ứng dịch vụ cũng là một trong những hoạt động cơ bản của quản lí logistics trong ngành dịch vụ. Công việc này bao gồm lên kế hoạch một cách linh hoạt, thực hiện việc cung ứng dịch vụ và thu thập ý kiến phản hồi. Mục tiêu chính của việc này là để đảm bảo cho các bộ phận trong công ty phối hợp chặt chẽ với nhau, nhằm cung ứng dịch vụ chất lượng tốt.[62]

Gắn liền với việc quản lí dòng hàng hoá và dịch vụ là quản lí thông tin logistics. Thông tin logistics cho biết chính xác địa điểm phát sinh cung cầu trong hệ thống logistics. Để hoạt động logistics hiệu quả, thông tin logistics phải chính xác, kịp thời với giá cả hợp lí.[63] Quản lí thông tin logistics thực chất là một bộ phận cấu thành của việc quản lí dòng hàng hoá và dịch vụ. Công việc quản lí thông tin logistics phổ biến nhất cho đến nay là áp dụng công nghệ thông tin (*ví dụ*: Internet và các phần mềm khác nhau) trong quản lí thông tin trong chuỗi cung ứng.[64]

Có thể thấy, logistics là quá trình bao gồm nhiều hoạt động khác nhau. Vì thế, logistics cũng chịu sự điều chỉnh của nhiều quy định pháp luật trong các lĩnh vực tương ứng như vận tải, kho bãi, bao bì, xếp dỡ hàng hoá, môi giới dịch vụ (*ví dụ*, giao nhận), bảo hiểm, thương mại và kinh doanh, cạnh tranh, đầu tư và doanh nghiệp. Thêm nữa, pháp luật trong mỗi lĩnh vực lại có nhiều cấp độ khác nhau, bao gồm cấp độ quốc gia, cấp độ song phương, cấp độ khu vực/tiểu khu vực và cấp độ toàn cầu.

Riêng các quy định pháp luật ở cấp độ toàn cầu trong lĩnh vực logistics cũng rất rộng. *Ví dụ,* luật trong lĩnh vực hàng hải được chia thành nhiều nhóm, bao gồm: Trọng tài và thủ tục tố tụng, bắt giữ, chuyên chở hàng hoá và hành khách, tổn thất chung, luật biển, cầm cố, giới hạn trách nhiệm, ô nhiễm và môi trường, an toàn hàng hải, cứu hộ cứu nạn, người đi biển và thủ tục hải quan. Trong mỗi nhóm lại có nhiều luật cụ thể khác nhau. *Ví dụ,* một số công ước quốc tế thuộc nhóm 'trọng tài và thủ tục tố tụng' như sau: Công ước về việc công nhận và thi hành phán quyết của trọng tài nước ngoài 1958; Công ước La Haye 1971 về công nhận và thi hành phán quyết của toà án nước ngoài về các vấn đề dân sự và thương mại; Công ước La Haye 1970 về việc xem xét bằng chứng nước ngoài trong những vấn đề dân sự và thương mại.[65] Do hệ thống luật pháp quốc tế liên quan đến logistics quá rộng, nội dung tiếp theo chỉ tập trung giới thiệu: (A) Một số công ước phổ biến ở cấp độ toàn cầu liên quan đến vận tải hàng hoá; và (B) Một số hiệp định ASEAN trong lĩnh vực vận tải mà các nhà hoạt động logistics tại Việt Nam cần biết.

3. Các công ước toàn cầu về vận tải hàng hoá và các hiệp định ASEAN về vận tải

A. *Các công ước toàn cầu về vận tải hàng hoá*

1. Vận tải đường sắt

(a) Các Quy tắc thống nhất về hợp đồng vận tải hàng hoá quốc tế bằng đường sắt (Uniform Rules Concerning the Contract for International Carriage of Goods by Rail - CIM): Các Quy tắc này được kí lần đầu tiên tại Bern năm 1890. Tháng 5/1980, các Quy tắc này được đưa vào Phụ lục B của Công ước về vận tải quốc tế bằng đường sắt (gọi là 'COTIF 1980'). Tháng 6/1999, theo Nghị định thư Vin-nhi-u-xơ (còn gọi là 'Nghị định thư 1999'), 'COTIF 1980'được sửa đổi và trở thành 'COTIF 1999'. Trong phiên bản 'COTIF 1999', các Quy tắc 'CIM' vẫn nằm trong Phụ lục B và có hiệu lực từ ngày 1/7/2006.

57 R. W. Schmenner, *Service Operations Management* (1995), tr. 133.

58 R. W. Schmenner, Sđd, tr. 134.

59 A. D. Little và The Pennsylvania State University, *Logistics in the Service Industries* (1991).

60 R. W. Schmenner, *Service Operations Management* (1995).

61 R. H. Ballou, Sđd.

62 Davis và Mandrodt, Sđd, tr. 199-229.

63 D. J. Bowersox và các tác giả khác, *Supply Chain Logistics Management* (2010).

64 Power, 'Supply Chain Management Integration and Implementation: A Literature Review', 10 *Supply Chain Management: An International Journal,* tr. 252-263.

65 *International Conventions*, http://www.admiraltylawguide.com/interconv.html#CG.

Các Quy tắc 'CIM' trong 'COTIFF 1999' áp dụng cho vận tải hàng hoá bằng đường sắt, nếu nơi nhận hàng và nơi giao hàng ở hai nước khác nhau, trong đó ít nhất một bên là thành viên của Công ước 'CIM' và các bên đồng ý chọn 'CIM' làm luật điều chỉnh hợp đồng.[66]

(b) Hiệp định vận tải hàng hoá quốc tế bằng đường sắt 1951(Agreement 1951 on International Goods Transport by Rail) (hay còn gọi là Hiệp định 'SMGS'). Hiệp định này được sửa đổi và cập nhật một số lần vào các năm 1953, 1997 và 2007. Hiệp định này áp dụng khi hàng hoá được vận tải bằng đường sắt giữa các nước thành viên.[67]

(c) Hiện nay, dự án CIT/OSJD đang được thực hiện nhằm hài hoà hoá hai hệ thống luật trên với nhau. Dự án dự kiến thực hiện trong ba giai đoạn: (i) Giấy gửi hàng chung CIM/SMGS; (ii) Tiêu chuẩn hoá cơ chế giải quyết khiếu nại; và (iii) Hài hoà hoá CIM/SMGS. Dự án đang trong quá trình thực hiện giai đoạn 1.[68]

2. Vận tải ô-tô

Công ước về hợp đồng vận tải hàng hoá quốc tế bằng đường ô-tô 1956 (Convention 1956 on the Contract for the International Carriage of Goods by Road - 'CMR'): Công ước này áp dụng cho việc vận tải hàng hoá bằng ô-tô bắt đầu hoặc kết thúc tại nước phê chuẩn Công ước này.[69]

3. Vận tải biển

(a) Công ước quốc tế thống nhất một số quy tắc về vận đơn đường biển 1924 (International Convention for the Unification of Certain Rules Relating to Bills of Lading) (hay còn gọi là Quy tắc La Haye hoặc Công ước Brussels): Quy tắc La Haye ra đời khi cộng đồng quốc tế lần đầu tiên nỗ lực tìm kiếm một giải pháp thống nhất và khả thi để giải quyết tình trạng các chủ tàu thường trốn tránh toàn bộ trách nhiệm đối với mất mát, tổn thất của hàng hoá. Theo Quy tắc La Haye, người gửi hàng phải chịu trách nhiệm về hàng hoá bị mất mát hoặc hư hỏng, nếu họ không thể chứng minh được tàu không có đủ khả năng đi biển, không đủ nhân sự hoặc không đủ điều kiện để vận tải và bảo quản hàng hoá một cách an toàn. Nói cách khác, người chuyên chở có thể thoát trách nhiệm đối với rủi ro do lỗi nhân công, nếu họ chứng minh được đã làm việc mẫn cán một cách thích đáng và tàu được trang bị đủ nhân sự và có đủ khả năng đi biển.[70]

66 Hoàng Văn Châu và các tác giả khác, *Các công ước quốc tế về vận tải và hàng hải* (1999).

67 *Organization for Cooperation between Railways*, http://www.osjd.org.

68 Như trên.

69 Hoàng Văn Châu và các tác giả khác, Sđd.

70 *Hague Rules of 1924*, http://www.bws.dk/conditions/sea-transport/hague-rules.aspx.

(b) Nghị định thư 1968 sửa đổi Công ước quốc tế thống nhất một số quy tắc liên quan đến vận đơn đường biển 1924 (hay còn gọi là Quy tắc La Haye/Visby): Quy tắc La Haye/Visby áp dụng trong trường hợp vận đơn được phát hành tại một nước tham gia Công ước, hoặc hành trình vận tải bắt đầu từ một cảng ở một nước kí Công ước, hoặc vận đơn hoặc hợp đồng vận tải ghi rõ luật điều chỉnh là Công ước. Những thay đổi cơ bản so với Quy tắc La Haye là (i) Cách tính toán bồi thường trong trường hợp hàng hoá chuyên chở trong container, tấm nâng hàng (pallet) hay xe moóc (trailer); và (ii) Thay đổi giới hạn trách nhiệm (10.000 francs/kiện hoặc đơn vị, hoặc 30 francs/kg tổng trọng lượng hàng bị mất mát, hư hỏng, tùy theo giới hạn nào cao hơn thì tính).[71]

(c) Nghị định thư 1979 sửa đổi Công ước quốc tế thống nhất một số quy tắc về vận đơn đường biển 1924 đã được sửa đổi bởi Nghị định thư 1968: Nghị định thư này quy định giới hạn trách nhiệm của người chuyên chở được tính tiền bằng 'quyền rút vốn đặc biệt' ('SDR') theo định nghĩa của Quỹ tiền tệ quốc tế (IMF).[72]

(d) Công ước của Liên hợp quốc về vận tải hàng hoá bằng đường biển 1978 (hay còn gọi là Quy tắc Hambourg): Quy tắc Hambourg ra đời nhằm giải quyết sự bất bình đẳng về quyền lợi giữa chủ tàu và người gửi hàng, cũng như để bắt kịp tình hình mới (*ví dụ,* chủng loại hàng hoá chuyên chở tăng lên, công nghệ và phương pháp xếp dỡ mới và các vấn đề khác tổn thất do chậm giao hàng). Công ước áp dụng quan điểm mới về trách nhiệm đối với hàng hoá. Theo Công ước này, người chuyên chở phải chịu trách nhiệm về mất mát hay tổn thất đối với hàng hoá khi hàng hoá đang nằm trong sự quản lí của họ, trừ khi họ chứng minh được rằng họ đã áp dụng mọi biện pháp cần thiết để tránh tổn thất hay mất mát. Giới hạn trách nhiệm cũng cao hơn so với Quy tắc La Haye và La Haye/Visby.[73]

(e) Công ước của Liên hợp quốc về hợp đồng vận tải hàng hoá hoàn toàn hoặc một phần bằng đường biển 2008 (hay còn gọi là Quy tắc Roterdam):

> Quy tắc Roterdam mở rộng và hiện đại hoá các quy tắc quốc tế hiện hành liên quan đến vận tải hàng hoá bằng đường biển. Mục đích của Công ước này là: (i) Thay thế Quy tắc La Haye, Quy tắc La Haye/Visby và Quy tắc Hambourg; (ii) Đạt được sự thống nhất về

71 Hoàng Văn Châu và các tác giả khác, Sđd.

72 Như trên.

73 *Hamburg Rules of 1978*, http://www.bws.dk/conditions/sea-transport/hague-rules.aspx.

mặt pháp luật trong lĩnh vực vận tải hàng hải; (iii) Đáp ứng nhu cầu mới đối với vận tải 'từ điểm xuất phát đến điểm đến' ('door-to-door'). Quy tắc Roterdam là những quy tắc đầu tiên điều chỉnh cả việc vận tải hàng hoá bằng đường biển và chặng chuyên chở chuyển tải, hoặc trước đó trên đất liền.[74]

4. Vận tải hàng không

(a) Công ước về thống nhất một số quy tắc về vận tải quốc tế bằng đường hàng không 1929 (hay còn gọi là Công ước hay Quy tắc Vác-xa-va): Công ước Vác-xa-va điều chỉnh việc vận tải hàng hoá bằng máy bay thuê hoặc để thu phí khi nơi khởi hành và nơi đến cùng nằm trên lãnh thổ quốc gia kí Công ước. Đặc biệt, Công ước Vác-xa-va: (i) Quy định người chuyên chở phải phát hành vé hành khách; (ii) Yêu cầu người chuyên chở phải phát hành phiếu hành lí đối với hành lí kí gửi; và (iii) Quy định giới hạn trách nhiệm của người chuyên chở là 17 SDR/kg hàng hoá hay hành lí kí gửi.[75]

(b) Nghị định thư sửa đổi Công ước Vác-xa-va 1955 (hay còn gọi là Nghị định thư La Haye): Nghị định thư La Haye điều chỉnh cơ sở trách nhiệm của người chuyên chở.[76]

(c) Nghị định thư Goa-đa-la-gia-ra sửa đổi Công ước Vác-xa-va 1961 (hay còn gọi là 'Nghị định thư 1961'): Nghị định thư này bổ sung trách nhiệm của người chuyên chở trong trường hợp vận tải hàng không quốc tế được tiến hành bởi người không phải là người chuyên chở theo hợp đồng.[77]

(d) Nghị định thư Montreal sửa đổi Công ước Vác-xa-va 1966 (hay còn gọi là 'Nghị định thư Montreal 1966'): Nghị định thư này sửa đổi Công ước Vác-xa-va đã được sửa đổi theo Nghị định thư La Haye 1955.[78]

(e) Nghị định thư sửa đổi Công ước Vác-xa-va đã được sửa đổi bởi Nghị định thư La Haye 1955 kí tại thành phố Guatemala năm 1971 (hay còn gọi là 'Nghị định thư Guatemala 1971'): Nghị định thư này quy định chi tiết hơn về việc tính toán mức bồi thường.[79]

74 *Rotterdam Rules*, http://www.rotterdamrules2009.com.

75 Hoàng Văn Châu và các tác giả khác, Sđd.

76 Như trên.

77 Như trên.

78 Như trên.

79 Như trên.

(f) Các nghị định thư bổ sung số 1, 2, 3 và Nghị định thư Montreal số 4 sửa đổi Công ước Vác-xa-va đã được sửa đổi theo Nghị định thư La Haye 1955, hoặc được sửa đổi theo cả hai Nghị định thư La Haye 1955 và Guatemala 1971, kí tại Montreal năm 1975: Những nghị định thư này sửa đổi giới hạn trách nhiệm của người chuyên chở hàng không.[80]

(g) Công ước thống nhất một số quy tắc vận tải quốc tế bằng đường hàng không 1999 (hay còn gọi là Công ước Montreal): Công ước này nhằm hiện đại hoá và thống nhất Công ước Vác-xa-va và các nghị định thư sửa đổi. Công ước áp dụng cho tất cả hành trình chuyên chở hành khách, hành lí hay hàng hoá bằng máy bay thuê hay để thu phí, cũng như việc chuyên chở không thu phí bằng hàng không.[81]

5. Vận tải đa phương thức

(a) Công ước của Liên hợp quốc về vận tải hàng hoá quốc tế đa phương thức 1980: Công ước áp dụng cho tất cả hợp đồng vận tải đa phương thức giữa hai nước, nếu nơi nhận hàng hoặc nơi giao hàng nằm ở một nước tham gia Công ước. Nhà vận tải đa phương thức (MTO) chịu trách nhiệm đối với mất mát, tổn thất hàng hoá cũng như tổn thất do chậm giao hàng, trừ khi anh ta chứng minh được rằng anh ta, người làm công, đại lí hay thầu phụ, đã thực hiện mọi biện pháp hợp lí để tránh tổn thất cũng như hậu quả của tổn thất.[82]

(b) Quy tắc của UNCTAD/ICC về chứng từ vận tải đa phương thức 1992: Quy tắc này không phải là luật mà chỉ mang tính chất thoả thuận thuần tuý, và chỉ có hiệu lực nếu được đưa vào hợp đồng, cho dù đó là vận tải đơn hay đa phương thức, hay chứng từ vận tải có được phát hành hay không. MTO phải chịu trách nhiệm về mất mát, tổn thất đối với hàng hoá cũng như chậm giao hàng, trừ trường hợp MTO chứng minh được rằng anh ta, hay người làm công, đại lí hoặc thầu phụ, không có lỗi trong việc gây ra tổn thất, mất mát hay chậm giao hàng.[83]

6. Pháp luật điều chỉnh hợp đồng: bao gồm một số quy định quan trọng, như CISG, INCOTERMS, PICC (xem Chương 5 của Giáo trình).

80 Như trên

81 Như trên

82 Như trên

83 Như trên

7. Các công ước quốc tế về hải quan

(a) Công ước quốc tế về đơn giản hoá và hài hoà hoá thủ tục hải quan 1973 (còn gọi là 'Công ước Kyoto'): Công ước này nhằm đạt được sự đơn giản hoá và hài hoà hoá các thủ tục hải quan của các bên tham gia công ước ở mức độ cao, nhằm góp phần thúc đẩy sự phát triển thương mại quốc tế và các trao đổi quốc tế khác, và nhằm tuân thủ các tiêu chuẩn và thực tiễn quy định trong phụ lục của Công ước.[84]

(b) Công ước hải quan về vận tải hàng hoá quốc tế theo giấy gửi hàng TIR 1975 (còn gọi là 'Công ước TIR'): TIR là một trong những công ước về vận tải quốc tế thành công nhất, và cho đến nay là hệ thống chuyển tải hải quan toàn cầu duy nhất đang có hiệu lực. Đến thời điểm tháng 02/2012, có 68 quốc gia kí kết Công nước này, bao gồm cả EU. Mỗi năm có hơn 40 nghìn nhà vận tải được phép sử dụng hệ thống TIR và khoảng 3 triệu hành trình vận tải TIR được thực hiện.[85]

B. *Các hiệp định ASEAN*

ASEAN hướng tới thành lập Cộng đồng kinh tế ASEAN (AEC) vào năm 2015. Theo kế hoạch này, AEC sẽ trở thành: (i) Một cơ sở sản xuất và thị trường thống nhất (có nghĩa là trong khu vực này, hàng hoá, dịch vụ, đầu tư, lao động có tay nghề sẽ được tự do dịch chuyển); (ii) Một khu vực kinh tế có tính cạnh tranh cao; (iii) Một khu vực phát triển kinh tế công bằng; và (iv) Một khu vực hội nhập hoàn toàn với nền kinh tế toàn cầu.[86]

Nhằm đạt được sự tự do dịch chuyển của hàng hoá và dịch vụ, nhiều biện pháp đã được đề ra và thực thi, *ví dụ:* Loại bỏ các hàng rào thuế quan và phi thuế quan, thuận lợi hoá thương mại, liên kết hải quan, đơn giản hoá, hài hoà hoá và tiêu chuẩn hoá thương mại, hải quan, các quy trình, thủ tục cũng như ứng dụng công nghệ thông tin trong tất cả các lĩnh vực liên quan đến thuận lợi hoá thương mại, tự do hoá một số ngành dịch vụ như vận tải hàng không, ASEAN điện tử, chăm sóc sức khoẻ, du lịch và thừa nhận bằng cấp chuyên môn.[87]

Trong đó, hợp tác vận tải được coi là một trong những biện pháp cơ bản nhằm đạt được hai mục tiêu đầu tiên của AEC. Cho đến nay,

[84] Nguyễn Hồng Đàm và các tác giả khác, Vận tải và giao nhận trong ngoại thương (2005).

[85] *Introducing TIR*, http://www.unece.org/tir.

[86] *ASEAN Economic Community Blueprint*, http://www.aseansec.org.

[87] Như trên.

nhiều hiệp định, thoả thuận đã được kí kết giữa các nước thành viên ASEAN và giữa ASEAN và các nước khác,[88] *ví dụ*:

- Thoả thuận về vận tải hàng không giữa ASEAN và Trung Quốc, kí tại Ban-đa Sê-ri Bê-ga-oăn, ngày 12/11/2010;
- Kế hoạch hành động Brunei (hay còn gọi là Kế hoạch vận tải chiến lược ASEAN) 2011-2015;
- Thoả thuận đa phương ASEAN về tự do hoá hoàn toàn dịch vụ vận tải hành khách bằng đường hàng không, kí tại Ban-đa Sê-ri Bê-ga-oăn, ngày 12/11/2010;
- Nghị định thư số 1 về quyền vận tải tự do không giới hạn thứ 3 và thứ 4 giữa bất kì địa điểm nào trong các nước thành viên, kí tại Ban-đa Sê-ri Bê-ga-oăn, ngày 12/11/2010;
- Nghị định thư số 2 về quyền vận tải tự do không giới hạn thứ 5 kí tại Ban-đa Sê-ri Bê-ga-oăn, ngày 12/11/2010;
- Biên bản ghi nhớ giữa ASEAN và Trung Quốc về cơ chế tư vấn hàng hải, kí tại Ban-đa Sê-ri Bê-ga-oăn, ngày 12/11/2010;
- Hiệp định khung ASEAN về thuận lợi hoá vận tải giữa các nước, kí tại Manila, ngày 10/10/2009;
- Hiệp định đa phương ASEAN về dịch vụ hàng không, kí tại Manila, ngày 20/5/2009;
- Biên bản ghi nhớ ASEAN về hợp tác liên quan đến tai nạn và điều tra sự cố hàng không, kí tại Cebu, Philippines, ngày 29/5/2008;
- Thoả thuận về vận tải hàng hải giữa ASEAN và Trung Quốc, kí tại Singapore, ngày 02/11/2007;
- Nghị định thư hội nhập ngành dịch vụ ASEAN liên quan đến ngành dịch vụ logistics, kí tại Makati, Philippines, ngày 24/08/2007;
- Nghị định thư số 1 - Chỉ định tuyến vận tải trung chuyển và phụ lục danh sách các tuyến vận tải trung chuyển, kí tại Bangkok, ngày 8/02/2007;

[88] *Agreements on Transportation and Communication*, http://www.aseansec.org/19867.htm

- Tuyên bố cấp bộ trưởng ASEAN - Nhật Bản về an ninh vận tải, kí tại Bangkok, ngày 09/02/2007;
- Hiệp định khung ASEAN về vận tải đa phương thức 2005;
- Kế hoạch hành động vận tải ASEAN 2005-2010;
- Tuyên bố Manila 2002;
- Biên bản ghi nhớ cấp bộ trưởng về phát triển dự án mạng lưới đường cao tốc ASEAN 1999;
- Hiệp định khung ASEAN về thuận lợi hoá trung chuyển hàng hoá, kí tại Hà Nội, ngày 16/12/1998;
- Thoả thuận về việc công nhận chứng chỉ thanh tra xe thương mại đối với xe vận tải hàng hoá và xe vận tải dịch vụ công cộng do các nước thành viên ASEAN cấp 1998;
- Thoả thuận về việc tạo thuận lợi cho việc tìm kiếm tàu biển gặp nạn và cứu hộ nạn nhân sống sót sau tai nạn tàu biển 1975;
- Thoả thuận về việc tạo thuận lợi cho việc tìm kiếm máy bay gặp nạn và cứu hộ nạn nhân sống sót sau tai nạn máy bay 1972.

4. Kết luận

Logistics là khái niệm bao gồm nhiều hoạt động trong nhiều lĩnh vực khác nhau. Vì vậy, nguồn luật điều chỉnh logistics cấp độ quốc gia, cấp độ khu vực/tiểu khu vực hay cấp độ quốc tế rất rộng. Như bước đầu nghiên cứu luật điều chỉnh logistics. Mục này trình bày ngắn gọn một số công ước quốc tế phổ biến và một số thoả thuận ASEAN liên quan đến dòng dịch chuyển của hàng hoá mà những người hoạt động logistics tại Việt Nam cần biết. Điều quan trọng là: để đạt được thành công trong hoạt động logistics, các nhà logistics phải thường xuyên tích lũy và cập nhật kiến thức về lĩnh vực pháp luật này.

Mục 3. PHÁP LUẬT VỀ THƯƠNG MẠI ĐIỆN TỬ TRONG GIAO DỊCH KINH DOANH QUỐC TẾ - TỔNG QUAN

Đặt vấn đề

Cùng với sự bùng nổ của công nghệ thông tin và Internet,[89] kinh doanh quốc tế đã có một công cụ hữu hiệu để hỗ trợ và phát triển các hoạt động thương mại của nó, đó là thương mại điện tử. Thương mại điện tử - công cụ được mong đợi là sẽ mang lại tác động to lớn đến nền kinh tế, và trên thực tế chúng đã có sự tác động qua lại với nhau, còn có nhiều tên gọi khác, *ví dụ*: thương mại trực tuyến, thương mại trên mạng, thương mại phi giấy tờ, hay kinh doanh điện tử. Sự phát triển của thương mại điện tử và ảnh hưởng của nó đến thực tiễn thương mại đã trở thành một hiện tượng.[90] Nó giảm chi phí và tiết kiệm thời gian cho cả thương mại quốc tế lẫn thương mại nội địa - đó chính là đòi hỏi đặt ra đối với kinh doanh, do đó đã thu hút mạnh mẽ sự quan tâm của các cá nhân, các tập đoàn cũng như các chính phủ. Tuy nhiên, thương mại điện tử với đặc tính là không biên giới và vô hình, luôn làm phát sinh nhiều vấn đề, đó là những tác động của công nghệ đến kinh tế, đạo đức và xã hội, đó là các cơ hội mới cho hành vi lừa đảo hoặc các tội phạm khác.[91] Thương mại điện tử hiện còn thiếu khuôn khổ pháp luật để tạo nên quyền và nghĩa vụ cho các chủ thể[92] tham gia sử dụng công nghệ này.[93] Một thương nhân sử dụng thương mại điện tử phải nhận biết được tất cả những vấn đề nêu trên để giảm thiểu rủi ro cho chính mình. Trong mục này sẽ đề cập những khía cạnh hài hoà hoá pháp luật trong một số vấn đề nhất định có liên quan đến thương mại điện tử nói chung, và hợp đồng thương mại điện tử và chữ kí điện tử nói riêng, theo các quy định của một số tổ chức quốc tế, bao gồm UNCITRAL, EU và ICC. Những vấn đề khác như giải quyết tranh chấp, luật áp dụng, bảo vệ dữ liệu và thông tin cá nhân, IPRs, pháp luật điều chỉnh tội phạm liên quan đến Internet sẽ không thuộc phạm vi của mục này.

[89] Số lượng người sử dụng Internet từ năm 2000 đến 2011 tăng 480,4%, http://www.internetworld stats.com/stats.htm.

[90] Schimitthopff, 'Chapter 33: Electronic Commerce and Electronic Data Interchange', trong sách *Export Trade: The Law and Practice of International Trade*, Thompson, tr. 858.

[91] Sharon Curry, *An Inside Look at E-commerce Fraud - Prevention and Solutions*, (2000).

[92] Các bên tham gia thương mại điện tử có thể là: Người mua, người bán, người cung ứng dịch vụ, nhưng thường được xem như là: Khách hàng, doanh nghiệp và chính phủ. Mặc dù có rất nhiều mô hình thương mại điện tử như B2C, B2B, B2G, C2B, C2C, C2G, G2B, G2C, G2G, nhưng nghĩa thực tế của thương mại điện tử thì chỉ đề cập đến mô hình B2B, *xem*: Michael Chissick và Alistair Kelman, *Electronic Commerce: Law and Practice*, Sweet & Maxell, 3rd edn., London, (2002), tr. 143.

[93] Indira Carr, *supra*, tr. 103.

1. Thương mại điện tử - Những vấn đề pháp lí và sự hài hoà hoá

A. *Thương mại điện tử và trao đổi dữ liệu điện tử ('EDI')*

Với sự phát triển của thương mại điện tử nói chung, EDI đã ngày càng được sử dụng phổ biến trong mô hình kinh doanh 'doanh nghiệp với doanh nghiệp' ('business-to-business' - viết tắt là 'B2B'). Mặc dù thường xuyên gây nên sự nhầm lẫn, nhưng thương mại điện tử và EDI là không giống nhau. Thương mại điện tử là thuật ngữ chung bao gồm cả EDI và các công nghệ liên lạc điện tử khác, *ví dụ*: thư điện tử và Internet.[94] EDI được định nghĩa là: 'Việc chuyển giao thông tin từ máy tính này sang máy tính khác của những giao dịch tiêu chuẩn theo một định dạng tiêu chuẩn nhất định, cho phép các bên tiếp nhận để thực hiện các giao dịch dự kiến'.[95] Mặt nổi bật nhất của EDI, đó là tạo ra môi trường trao đổi dữ liệu điện tử thuần túy - môi trường không có sự can thiệp của con người và các máy tính liên lạc trực tiếp với nhau trong suốt quá trình cung cấp và xử lí số liệu. Chức năng của EDI cực kì đa dạng và là trao đổi thông tin giữa các máy tính, do đó có thể làm thay đổi năng suất sản xuất của một công ty, với tốc độ xử lí các đơn đặt hàng và chuẩn bị hàng hoá để gửi đi nhanh hơn. Rào cản lớn nhất mà thương mại điện tử nói chung và EDI nói riêng phải vượt qua, đó là làm sao để hai hoặc nhiều bên có thể trao đổi dữ liệu với nhau, bởi vì mỗi bên sử dụng những máy tính và phần mềm khác nhau. Do đó, để loại bỏ tình huống mà các bên phải đàm phán các điều khoản, nội dung và cấu trúc của thông điệp trước khi họ có thể liên lạc với nhau, ở đây chưa đề cập đến vấn đề thương mại, thì cần phải có một tiêu chuẩn được quốc tế chấp nhận. Các ngành công nghiệp như công nghiệp mô-tô ở châu Âu đã tự xây dựng một tiêu chuẩn riêng trong ODETTE,[96] hoặc tiêu chuẩn ngành công nghiệp hoá học được quy định bởi CEFIC.[97] Sau đó, UNECE[98] và ISO[99] đã xây dựng những nguyên tắc UN/EDIFACT[100] và trở thành tiêu chuẩn chung toàn cầu cho cấu trúc thông điệp của EDI. EDIFACT hoạt động với nguyên tắc là các bên cần thiết lập những dạng thông điệp để các bên có thể

94 *Theo Liên hợp quốc, sáu công cụ của thương mại điện tử có thể là: Điện thoại, fax, ti-vi, thanh toán điện tử và hệ thống chuyển tiền, trao đổi dữ liệu điện tử và Internet.*

95 Sokol, *Electronic Data Interchange: The Competitive Edge*, McGraw-Hill, (1989).

96 Tổ chức trao đổi dữ liệu bằng truyền hình viễn thông châu Âu, http://www.odette.org.

97 Conseil Européen des Fédérations de l'Industrie Chimique, http://www.cefic.be.

98 Ủy ban kinh tế của Liên hợp quốc về châu Âu. *Xem* thêm: Troye, *The Development of Legal Issues of EDI under the European Union TEDIS Programmer* (1994).

99 Tổ chức tiêu chuẩn quốc tế.

100 Liên hợp quốc, Trao đổi thông điệp dữ liệu cho quản lí, thương mại và vận tải.

được liên lạc, nhưng trong những dạng thông điệp này có mức độ linh hoạt cho phép người sử dụng có thể xác định yêu cầu riêng của họ. Để thuận tiện trong việc sử dụng EDI trong thương mại quốc tế, vào tháng 9/1987, ICC đã xây dựng nên một bộ nguyên tắc được biết dưới cái tên là UNCID và cũng được phê chuẩn bởi UNECE, với mục đích giúp người sử dụng EDI tham gia các hợp đồng liên lạc một cách công bằng (những thoả thuận trao đổi dữ liệu).[101] Rất nhiều điều khoản trong Luật mẫu của UNCITRAL về thương mại điện tử sau này dựa trên những ý tưởng của UNCID. Sau khi ban hành UNCID (chỉ áp dụng đối với mạng khép kín),[102] ICC tiếp tục ban hành các hướng dẫn mang tính quốc tế cho thương mại điện tử với mạng mở,[103] trong đó tập trung vào các vấn đề như các thiết bị xác thực, chính sách chứng thực, chứng nhận chìa khoá công khai và lưu trữ hồ sơ.

B. *Luật mẫu của UNCITRAL về thương mại điện tử năm 1996*

Việc nghiên cứu về những vấn đề pháp lí liên quan đến thương mại quốc tế và thương mại điện tử sẽ là không hoàn chỉnh, nếu không biết đến những công trình của UNCITRAL. Một Luật mẫu đã được UNCITRAL soạn thảo vào năm 1996, trong bối cảnh chưa có những quy định thống nhất của pháp luật các nước trên toàn thế giới, trong đó một phần lớn liên quan đến vấn đề sử dụng kĩ thuật liên lạc hiện đại. Cùng với Luật mẫu này, một văn bản hướng dẫn đi kèm cũng được ban hành trong cùng năm. Mục đích của Luật mẫu này, bao gồm cả việc cho phép và tạo thuận lợi cho việc sử dụng thương mại điện tử, đồng thời đối xử bình đẳng giữa người sử dụng tài liệu bằng giấy tờ và người sử dụng dữ liệu qua máy tính, nhằm thúc đẩy nền kinh tế và tính hiệu quả trong thương mại quốc tế.[104] Luật mẫu này áp dụng với tất cả các loại thông tin dưới dạng một thông điệp dữ liệu[105] được sử dụng trong hoạt động thương mại.[106] Các nước có thể giới hạn phạm vi của thông điệp dữ liệu liên quan đến hoạt động

101 Andreas Mitrakas, *Open EDI and Law in Europe: A Regulatory Framework*, Kluwer Law International, Netherlands, (1997), tr. 170. UNCID được thiết kế chuyên biệt cho mạng khép kín và không đủ để tạo lập sự tin tưởng và tin cậy trong các mạng mở, sau này được xuất bản trong cuốn *General Usage for International Digitally Ensured Commerce (GUIDEC)* năm 1997 và tài liệu hướng dẫn *GUIDEC II* kèm theo vào năm 2001.

102 *GUIDEC General Usage for International Digitally Ensured Commerce*.

103 Như trên.

104 *Xem* thêm: Mục đích của Luật mẫu, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* (1996), tr. 16.

105 Thông điệp dữ liệu được định nghĩa ở Điều 2 của Luật mẫu.

106 Điều 1, Luật mẫu.

thương mại quốc tế.[107] Tuy nhiên, trong văn bản hướng dẫn nêu khuyến nghị rằng Luật mẫu có thể được áp dụng càng rộng rãi càng tốt,[108] khi mà mục đích của nó là thúc đẩy tính chắc chắn của pháp luật. *Ví dụ*, rất nhiều thủ tục, được điều chỉnh bởi Luật mẫu (từ Điều 6 đến Điều 8), có thể cho phép giới hạn việc sử dụng thông điệp dữ liệu, nếu cần thiết.

Dựa vào Luật mẫu, nhiều nước thành viên của Liên hợp quốc đã ban hành văn bản pháp luật nước mình, với ý nghĩa là luật 'khung' về thương mại điện tử.[109]

Kết cấu của Luật mẫu được chia làm hai phần với 17 điều khoản, phần thứ nhất đề cập đến thương mại điện tử nói chung, và phần còn lại đề cập đến thương mại điện tử trong một số hoạt động cụ thể, bao gồm:

- Phần I với ba chương: Chương I đề cập các nguyên tắc chung với 4 điều khoản về phạm vi áp dụng, giải thích từ ngữ có liên quan, giải thích luật và các trường hợp ngoại lệ theo thoả thuận của các bên. Chương II quy định các điều kiện luật định đối với thông điệp dữ liệu, với 6 điều khoản (từ Điều 5 đến Điều 10) công nhận giá trị pháp lí của thông điệp dữ liệu; về văn bản; chữ kí; bản gốc của thông điệp dữ liệu; tính xác thực và khả năng được chấp nhận của thông điệp dữ liệu. Chương III (từ Điều 11 đến Điều 15) đề cập đến thông tin liên lạc bằng thông điệp dữ liệu, *ví dụ*: giá trị pháp lí của thông điệp.
- Phần II bao gồm một chương với Điều 16 và Điều 17 liên quan đến một số hoạt động cụ thể, bao gồm vấn đề hợp đồng vận tải hàng hoá và chứng từ vận tải.

Cần lưu ý một số nội dung quan trọng sau đây của Luật mẫu:

- Khẳng định giá trị pháp lí của thông điệp dữ liệu, vì vậy nó đã loại bỏ và giải quyết được những rào cản từ những quy định khác nhau trong hệ thống pháp luật của các nước, về yêu cầu thông tin phải được thể hiện hoặc lưu giữ dưới dạng bản gốc của nó: là văn bản.

[107] Như trên.

[108] Văn bản hướng dẫn, đoạn 29, tr. 25.

[109] *Ví dụ,* Australia (1999), Trung Quốc (2004), Pháp (2000), Singapore (1998), các lãnh thổ của Anh Quốc và 48 bang của Hoa Kỳ. Các nước Đông Nam Á ban đầu chậm chạp trong việc áp dụng Luật mẫu, nhưng sự tiên phong của Thái Lan và Hàn Quốc đã khuyến khích các nước khác thông qua các văn bản pháp luật phù hợp với Luật mẫu. Việt Nam cũng đã ban hành Luật giao dịch điện tử 2005, về cơ bản dựa trên Luật mẫu.

- Khẳng định rằng thông điệp dữ liệu thoả mãn những yêu cầu của một văn bản.
- Về chữ kí điện tử (Điều 7), Luật đã khẳng định là nó có giá trị tương đương với chữ kí truyền thống, nếu nó đáp ứng những yêu cầu tại các khoản 1(a) và 1(b) Điều 7.110 Hơn nữa, chữ kí điện tử không chỉ sử dụng nhằm mục đích nhận dạng mà còn để mã hoá một tài liệu.111 Ngoài ra, để hỗ trợ cho giá trị pháp lí của thông điệp dữ liệu, Điều 8 và Điều 9 quy định không được từ chối bản gốc; chấp nhận và bằng chứng của thông điệp dữ liệu.
- Điều 11 quy định công nhận việc giao kết và giá trị của hợp đồng điện tử:

Trong bối cảnh giao kết hợp đồng, trừ trường hợp các bên có thoả thuận khác, chào hàng và chấp nhận chào hàng được phép thể hiện bằng phương tiện thông điệp dữ liệu. Khi một thông diệp dữ liệu được sử dụng trong việc giao kết hợp đồng, thì giá trị và hiệu lực thi hành của hợp đồng đó không thể bị phủ nhận chỉ với lí do rằng đã sử dụng một thông điệp dữ liệu vào mục đích ấy.

Mặc dù không thể bao quát hết tất cả khía cạnh của hợp đồng, nhưng Điều 11 này là nền tảng pháp lí cho những giao dịch kinh doanh quốc tế được thiết lập bởi thương mại điện tử, và không phải lo ngại rằng hiệu lực pháp lí và giá trị của giao dịch này sẽ bị phủ nhận, chỉ bởi vì nó được sử dụng hoàn toàn trong môi trường thông điệp (Điều 12).

- Sự điều chỉnh về thời gian và địa điểm của việc gửi/nhận thông điệp có thể làm chấm dứt sự xung đột giữa nguyên tắc 'tống phát' trong hệ thống luật common law với các hệ thống pháp luật khác. Gửi một thông điệp dữ liệu, nghĩa là khi thông điệp ấy bước vào một hệ thống thông tin nằm ngoài sự kiểm soát của người khởi tạo, và thời điểm nhận được thông điệp dữ liệu được xác định khi thông điệp dữ liệu đó vào hệ thống thông tin của người nhận.112

[110] Điều 7.1:
(a) Có sử dụng một phương pháp nào đó để xác minh được người ấy, và chứng tỏ được sự xác nhận của người ấy về thông tin chứa đựng trong thông điệp dữ liệu đó;
(b) Phương pháp ấy là đủ tin cậy với nghĩa là thích hợp cho mục đích mà theo đó thông điệp dữ liệu ấy đã được tạo ra và truyền đi, tính đến tất cả các tình huống, bao gồm cả các thoả thuận bất kì có liên quan.

[111] Văn bản hướng dẫn, Chương 4, Đoạn 126, tr. 28.

[112] Điều 15 Luật mẫu.

- Trong Phần II, Luật mẫu cung cấp khuôn khổ pháp lí cho giao dịch vận tải hàng hoá sử dụng chứng từ vận tải điện tử, như vận đơn hàng không, vận đơn đường biển, chứng từ vận tải đa phương thức và thuê tàu chuyến, vì vậy nó không chỉ áp dụng trong lĩnh vực hàng hải mà còn các lĩnh vực vận tải khác.113

Tất cả các nội dung nói trên đã khẳng định giá trị pháp lí của thông điệp dữ liệu, hợp đồng điện tử và chữ kí điện tử. Đó là khẳng định mang tính chất nền tảng cho việc công nhận và sử dụng thương mại điện tử. Mặc dù Luật mẫu không có giá trị pháp lí như điều ước, và có lẽ nó không dẫn tới sự thống nhất luật, nhưng nó là tài liệu có giá trị để UNCITRAL và các nước tiếp tục nghiên cứu sâu hơn và ban hành các văn bản pháp lí khác về thương mại điện tử.

C. *Chỉ thị của EU về thương mại điện tử*

Châu Âu là một trong những khu vực đi đầu trong việc phát triển thương mại điện tử. Để tạo ra môi trường pháp lí cho hoạt động này, năm 1997, tài liệu mang tên 'Sáng kiến châu Âu trong thương mại điện tử ('A European Initiative in Electronic Commerce') đã được Uỷ ban châu Âu ban hành. Dựa vào tài liệu đầu tiên này, rất nhiều quy định đã được ban hành sau đó, trong số đó là Chỉ thị số 2000/31/EC về một số quy định liên quan đến những khía cạnh của dịch vụ xã hội thông tin, về thương mại điện tử nói riêng trong thị trường chung. Mục đích của Chỉ thị này nhằm đưa ra khuôn khổ pháp luật nói chung bao trùm tất cả các khía cạnh pháp lí về thương mại điện tử, để bảo đảm sự tự do dịch chuyển của 'dịch vụ xã hội thông tin'[114] giữa các nước thành viên và bảo vệ khách hàng trực tuyến.

Kết cấu của Chỉ thị bao gồm 4 chương với 24 điều khoản. Sau đây là một số điểm cơ bản của Chỉ thị:

- Điều 1 của Chỉ thị nhấn mạnh rằng phạm vi điều chỉnh không bao gồm vấn đề thuế và luật về cartel (thỏa thuận hạn chế cạnh tranh),115 và ủng hộ dịch chuyển tự do của dịch vụ xã hội thông tin, theo đó Điều 4 loại bỏ thủ tục cho phép trước của các nước thành viên. Chị thị quy định rằng những thông tin của người nhận dịch vụ và cơ quan có thẩm quyền phải cung cấp là: Tên, địa chỉ đăng kí và các chi tiết khác.116

- Những vấn đề về hợp đồng được đề cập ở Điều 9 như sau: Yêu cầu tất cả các nước thành viên phải thừa nhận giá trị của hợp đồng điện tử, không gây cản trở cho việc sử dụng các hợp đồng điện tử hay loại bỏ hiệu lực pháp lí và giá trị của những hợp đồng này chỉ vì chúng được giao kết bằng phương tiện điện tử. Một số loại hợp đồng nằm ngoài phạm vi điều chỉnh117 mặc dù sự loại trừ này không liên quan đến phạm vi của Chỉ thị này, và địa điểm chào hàng118 cũng được đề cập. Với điều khoản này thì hợp đồng điện tử ở châu Âu có thể có giá trị không chỉ ở từng nước thành viên EU, mà còn có giá trị trên toàn bộ lãnh thổ EU. Quy định này cũng giống với Luật mẫu về thương mại điện tử của UNCITRAL về hợp đồng điện tử.

- Trách nhiệm pháp lí của bên thứ ba là người cung ứng dịch vụ cũng được quy định trong Phần 4 của Chỉ thị, nhằm giúp các bên liên quan có thể biết được quyền và nghĩa vụ của những người cung ứng dịch vụ Internet.

- Vấn đề thực thi cũng được quy định tại Điều 20 của Chỉ thị: Các nước thành viên được tự do xác định chế tài đối với hành vi vi phạm các quy định pháp luật trong nước được soạn thảo và thông qua trên cơ sở của Chỉ thị này.

Luật mẫu về thương mại điện tử của UNCITRAL và Chỉ thị của EU chỉ điều chỉnh một số vấn đề về tạo thuận lợi cho giao dịch điện tử. Một vấn đề phức tạp khác trong thương mại điện tử là chữ kí điện tử - là công cụ hỗ trợ cho tính xác thực và chứng thực của một thông điệp, cũng được UNCITRAL và EU quan tâm và soạn thảo luật để điều chỉnh. Phần tiếp theo sẽ nghiên cứu một số quy định của các luật về vấn đề này.

113 Bao gồm: Đường bộ, đường không, đường sắt và vận tải đa phương thức.

114 Dịch vụ xã hội thông tin bao gồm các dịch vụ cung ứng bình thường như tiền thù lao, với một khoảng cách, bằng các phương tiện điện tử cho quá trình (bao gồm cả nén kĩ thuật số) và lưu trữ dữ liệu và theo yêu cầu cá nhân của người sử dụng dịch vụ. *Xem*: Phụ lục V của Chỉ thị số 98/34/EC để rõ hơn về dịch vụ xã hội thông tin. Khoản 5 Điều 1 của Chỉ thị này đã đưa một số loại dịch vụ xã hội thông tin ra ngoài phạm vi điều chỉnh của nó.

115 Khoản 5 Điều 1 của Chỉ thị 2000/31/EC.

116 Điều 5 của Chỉ thị 2000/31/EC.

117 Khoản 2 Điều 9 của Chỉ thị 2000/31/EC.

118 Điều 11 của Chỉ thị 2000/31/EC.

2. Chữ kí điện tử

A. *UNCITRAL - Luật mẫu về chữ kí điện tử*

Năm năm sau khi ban hành Luật mẫu về thương mại điện tử, vào ngày 05/7/2001,[119] UNCITRAL đã thông qua Luật mẫu khác liên quan cụ thể đến các vấn đề về chữ kí điện tử, đó là Luật mẫu về chữ kí điện tử. Mục đích của Luật mẫu này là mở rộng những nguyên tắc đã được nêu ra trong Điều 7 của Luật mẫu về thương mại điện tử trong việc khuyến khích sử dụng các biện pháp điện tử tương đương để thay thế chữ kí tay.[120] Phạm vi của Luật mẫu bao gồm các hoạt động thương mại,[121] và nó không hướng tới việc loại bỏ luật bảo vệ người tiêu dùng.[122] Luật mẫu bao gồm 12 điều khoản với các nội dung chính sau đây:

- Thừa nhận giá trị pháp lí của chữ kí điện tử;
- Đưa ra những điều kiện tin cậy để một chữ kí điện tử có hiệu lực pháp lí.123 Một chữ kí được xem là tin cậy, nếu dữ liệu tạo ra chữ kí đó được liên kết chỉ với người tạo ra nó chứ không với ai khác, và dữ liệu tạo ra chữ kí đó tại thời điểm kí phải dưới sự kiểm soát của người kí chứ không phải ai khác, tất cả các thay thế chữ kí điện tử sau thời điểm kí đều phải được phát hiện.
- Chỉ thị cũng quy định trách nhiệm của các bên liên quan, bao gồm: Người kí; người chấp nhận chữ kí điện tử và người cung ứng dịch vụ chứng nhận chữ kí điện tử hay còn gọi là bên thứ ba.124
- Nhận thức được vai trò của chữ kí điện tử và chứng thực chữ kí điện tử trong thương mại quốc tế, Điều 12 quy định rằng trong việc xác định phạm vi có hiệu lực pháp lí của chữ kí điện tử và chứng thực chữ kí điện tử, sẽ không xem xét về vị trí địa lí nơi nó được tạo ra, hoặc nơi cư trú của người sử dụng chữ kí điện tử; tiếp theo, chữ kí điện tử có giá trị pháp lí tương đương với chữ kí tay, bất kể nó có được kí ở nước thành viên kí kết hay không.

Với nội dung trên, Luật mẫu đã đưa ra những quy định để loại bỏ sự phân biệt và các rào cản trong việc sử dụng chữ kí điện tử. Nó tạo ra niềm tin trong giao dịch kinh doanh quốc tế khi sử dụng chữ kí điện tử. Trên một mặt cụ thể nào đó, Luật mẫu đã đóng góp cho việc hài hoà hoá các quy định về chữ kí điện tử và nó sẽ trở thành công cụ hữu ích cho các nước soạn thảo các văn bản pháp luật của nước mình.

B. *Chỉ thị của EU về chữ kí điện tử*

Nhận thức được tầm quan trọng và sự phức tạp của chữ kí điện tử trong giao dịch kinh doanh quốc tế, vào ngày 19/02/2000, Ủy ban châu Âu đã ban hành Chỉ thị số 1999/93/EC liên quan đến khuôn khổ pháp lí về chữ kí điện tử của Cộng đồng, với những nội dung tương tự Luật mẫu về chữ kí điện tử của UNCITRAL. Tuy nhiên, phạm vi điều chỉnh của Chỉ thị này chỉ nhằm khuyến khích sự phát triển của thị trường nội khối, bao gồm các nhu cầu của khách hàng. Tại Điều 5, Chỉ thị nhấn mạnh rằng: 'Tất cả các nước thành viên phải đảm bảo rằng giá trị pháp lí, việc công nhận như bằng chứng pháp lí của một chữ kí điện tử, không thể bị phủ nhận chỉ vì lí do chữ kí này được thể hiện dưới dạng điện tử. Điều này cho thấy chữ kí điện tử có giá trị tương đương như chữ kí tay. Để làm rõ hơn về chữ kí điện tử, Chỉ thị này đưa ra định nghĩa về chữ kí điện tử cao cấp (advanced electronic signature),[125] bao gồm những quy định mà một chữ kí điện tử thường phải đáp ứng để được tin cậy.

Cũng giống như Chỉ thị của EU về thương mại điện tử, Chỉ thị này cũng đảm bảo sự tự do dịch chuyển của dịch vụ. Các nước thành viên không thể tạo ra các quy định theo đó đòi hỏi việc cung ứng dịch vụ chứng nhận chữ kí điện tử cần phải có sự cho phép trước của cơ quan có thẩm quyền,[126] nhưng cho phép các nước 'giới thiệu hoặc duy trì những

[119] Được phê duyệt bởi Đại hội đồng, xem tài liệu A/Res/56/80, ngày 24/02/2002.

[120] Chữ kí điện tử có nghĩa rộng hơn với chữ kí số. Chữ kí điện tử có thể là một chữ kí số, một hình ảnh được số hoá và một hình ảnh của chữ kí bằng tay dựa vào sinh trắc học như một vân tay hoặc tròng mắt được quét bằng máy.

[121] Hoạt động thương mại ở đây được giải thích theo nghĩa rộng. *Xem* thêm: Điều 1 của Luật mẫu về chữ kí điện tử.

[122] Như trên.

[123] Như trên, Điều 6.

[124] Như trên, *xem*: Điều 2 - những định nghĩa; Điều 8 và Điều 9 quy định trách nhiệm cụ thể cho các bên.

[125] Chỉ thị EU về chữ kí điện tử, định nghĩa ở Điều 2 như sau:
… [M]ột chữ kí điện tử phải đáp ứng những yêu cầu sau đây:
Chữ kí phải gắn liền với một người kí;
Người kí phải được xác minh cụ thể;
Chữ kí phải được tạo ra bằng các cách thức mà người kí có thể hoàn toàn kiểm soát được;
Chữ kí phải được gắn liền với những dữ liệu đi liền với nó sao cho có thể loại trừ mọi sự sửa đổi dữ liệu.

[126] Như trên, khoản 1 Điều 3.

các đề án công nhận tự nguyện, nhằm mục đích nâng cao cấp độ của những quy định về dịch vụ chứng nhận,[127] với điều kiện là các dự án đó phải "khách quan, minh bạch, tương xứng và không phân biệt đối xử".

Trên cơ sở phân biệt hai khái niệm 'chứng nhận' và 'chứng nhận chất lượng cao'[128], Chỉ thị quy định trách nhiệm và yêu cầu của người cung ứng dịch vụ 'chứng nhận chất lượng cao' ở Phụ lục II. Theo đó, họ phải chứng minh được sự tin cậy của sự chứng nhận[129] và quản lí hệ thống, năng lực của đội ngũ nhân sự, và dịch vụ mà họ cung ứng. Họ cũng phải chịu trách nhiệm đối với những thiệt hại gây ra cho những tổ chức hay cá nhân[130] đã tin tưởng vào sự chứng nhận mà họ cung ứng.[131] Bên cạnh đó, Chỉ thị cũng đưa ra những quy định liên quan đến yếu tố quốc tế, để chấp nhận 'chứng nhận chất lượng cao' do người cung cấp dịch vụ chứng nhận lập ở một bên thứ ba.[132]

Việc bảo vệ dữ liệu là vấn đề mới xuất hiện và được đề cập trong Chỉ thị của EU về chữ kí điện tử. Điều 8 yêu cầu các nước thành viên phải bảo đảm rằng người cung ứng dịch vụ chứng nhận phải tuân thủ Chỉ thị số 95/96[133] về bảo vệ cá nhân liên quan đến quá trình tạo dữ liệu cá nhân và sự tự do dịch chuyển của dữ liệu. Vì vậy, những người cung ứng dịch vụ chứng nhận chỉ có thể tập hợp dữ liệu trực tiếp từ chủ thể của dữ liệu hoặc sau khi có sự cho phép của họ.

3. Công ước của Liên hợp quốc về sử dụng phương tiện điện tử trong hợp đồng quốc tế 2005

Hai luật mẫu về thương mại điện tử và chữ kí điện tử đã được UNCITRAL ban hành. Năm 2005, Đại hội đồng Liên hợp quốc tiếp tục thông qua Công ước về sử dụng phương tiện điện tử trong hợp đồng quốc tế. Đây là Công ước đầu tiên xây dựng khuôn khổ pháp lí về kí kết và thực thi hợp đồng điện tử quốc tế. Nền tảng của Công ước này là phê chuẩn việc sử dụng phương tiện điện tử trong thương mại quốc tế.[134] Công ước này có mối quan hệ chặt chẽ với CISG và Luật mẫu về thương mại điện tử 1996.[135] Công ước bao gồm 25 điều khoản được quy định trong 4 chương, và chỉ áp dụng đối với những hợp đồng giữa các bên có trụ sở thương mại ở các nước khác nhau, mà không quan tâm đến quốc tịch của các bên hoặc tính chất thương mại hay dân sự của hợp đồng,[136] với những lĩnh vực được loại trừ trong Điều 2 của Công ước.[137] Công ước là một bước đi tích cực trong việc giải quyết và làm rõ ràng các vấn đề cần thiết, như về thời gian và địa điểm gửi và nhận phương tiện điện tử, cũng như ý nghĩa của hệ thống tự động trong giao kết hợp đồng. Một số vấn đề của Công ước cần được biết như sau:

- Định nghĩa về hợp đồng điện tử được hiểu với ý nghĩa rộng hơn, không chỉ đơn thuần là hợp đồng mua bán hàng hoá mà còn là những cam kết của các bên, ví dụ: thoả thuận về trọng tài.
- Để xác định địa điểm của các bên - đây là vấn đề quan trọng để xác định hợp đồng được kí kết ở đâu. Điều 6 chỉ ra rằng trong trường hợp không xác định được địa kiểm kinh doanh, hoặc có nhiều hơn một địa điểm kinh doanh, thì địa điểm kinh doanh sẽ là nơi 'có mối quan hệ gần gũi nhất với hợp đồng, xét trong từng hoàn cảnh', tại thời điểm hợp đồng được lập.
- Giá trị pháp lí của phương tiện điện tử được thể hiện tại Điều 8, theo đó một sự liên lạc hoặc một hợp đồng sẽ không bị phủ nhận giá trị pháp lí hoặc hiệu lực thực thi chỉ bởi vì nó được lập dưới dạng một phương tiện điện tử.
- Điều 9 đảm bảo rằng không có một phương tiện hoặc một hợp đồng nào bắt buộc phải được lập hoặc chứng minh bởi một hình thức cụ thể, và Công ước không yêu cầu rằng một phương tiện hoặc hợp đồng phải được thực hiện dưới dạng văn bản hoặc tạo ra một hậu quả khi không có văn bản, và phương tiện điện tử cũng đáp ứng những yêu cầu đó.
- Thời gian và địa điểm để gửi và nhận được quy định trong

127 Như trên, khoản 2 Điều 3.

128 *Xem*: Định nghĩa tại Điều 2 và các yêu cầu cho 'chứng nhận chất lượng cao' ở Phụ lục I.

129 Xuất phát từ việc nhận dạng người chứng nhận thông qua sự bảo vệ và tin cậy của hệ thống và sản phẩm được sử dụng.

130 Bao gồm pháp nhân và cá nhân.

131 Chỉ thị của EU, khoản 1 Điều 6.

132 Như trên, Điều 7.

133 Chỉ thị số 95/46/EC của Nghị viện châu Âu và Hội đồng châu Âu ngày 24/10/1995.

134 Amelia H. Boss, Wolfgang Kilian, *United Nations Convention on the Use of Electronic Communication in International Contracts - An In-depth Guide and Sourcebook*, Kluwer Law, Netherlands, (2008), tr. 4.

135 Bởi vì Công ước chỉ đề cập về khía cạnh sử dụng phương điện tử trong thương mại quốc tế, còn các khía cạnh khác vẫn được điều chỉnh bởi luật luật nội dung như CSIG hoặc luật quốc gia.

136 Công ước, Điều 1.

137 Những hợp đồng vì mục đích cá nhân hay gia đình; những giao dịch liên quan đến các quy định về ngoại hối; chuyển tiền liên ngân hàng; và chuyển quyền trong chứng khoán; hoá đơn chuyển tiền, vận đơn, giấy nhận kho hoặc bất kì giấy tờ chuyển nhượng nào liên quan đến việc giao và trả tiền đối với hàng hoá.

Điều 10 như sau: Khi một thông tin rời khỏi (gửi đi) và đến hệ thống của người nhận, và có khả năng lấy lại (khôi phục) được (nhận được).

- Công ước chỉ áp dụng đối với các giao dịch điện tử và hợp đồng điện tử giữa 'doanh nghiệp với doanh nghiệp' ('business-to-business' - viết tắt là 'B2B'). Những hợp đồng được thực hiện bởi 'khách hàng với khách hàng' ('customer-to-customer' - viết tắt là 'C2C'); 'khách hàng với doanh nghiệp' ('customer-to-business' - viết tắt là 'C2B'); và 'doanh nghiệp với khách hàng' ('business-to-customer' - viết tắt là 'B2C') nằm ngoài phạm vi điều chỉnh của Công ước này.

Công ước đã hướng tới việc tạo thuận lợi cho hài hoà hoá pháp luật của các nước về sử dụng phương tiện điện tử trong hợp đồng quốc tế.

4. Pháp luật Việt Nam về thương mại điện tử

Vào tháng 11/1997, Internet đã xuất hiện ở Việt Nam và phát triển với tốc độ rất nhanh. Tuy nhiên, cho đến năm 2004, mới chỉ có một số giao dịch được thành lập theo mô hình 'doanh nghiệp với khách hàng' ('business-to-customer' - viết tắt là 'B2C'), hầu hết trong số đó là giải quyết các thủ tục hành chính và trao đổi thông tin.[138] Để phát triển thương mại điện tử, Việt Nam đã kí Hiệp định khung e-ASEAN,[139] theo đó cam kết phát triển cơ sở hạ tầng thông tin của ASEAN. Để tạo thuận lợi cho thương mại điện tử, Việt Nam cũng xây dựng khuôn khổ pháp luật với những nghị định, thông tư, quyết định, chỉ thị để hướng dẫn và ủng hộ cho sự phát triển của thương mại điện tử. Nền tảng quan trọng cho sự phát triển của khuôn khổ pháp luật về thương mại điện tử chính là Luật giao dịch điện tử với 54 điều khoản được quy định trong 8 chương, được ban hành ngày 29/11/2005. Phạm vi áp dụng của Luật rất rộng, bao gồm tất cả các giao dịch điện tử trong lĩnh vực hành chính, dân sự và thương mại.[140] Định nghĩa về hợp đồng điện tử[141]; giao dịch hợp đồng điện tử[142] và các quy định về giao dịch điện tử[143] đã được đề cập. Luật cũng nhấn mạnh rằng giá trị pháp lí của giao dịch điện tử không thể bị phủ nhận

138 GS. TS. Nguyễn Thị Mơ, *Cẩm nang hợp đồng điện tử*, Nxb. Lao động, Việt Nam, (2005), tr. 133.

139 Tại kì họp lần thứ 4 của ASEAN ở Xin-ga-po, ngày 22-25/12/2000.

140 Điều 1 Luật giao dịch điện tử 2005.

141 Như trên, Điều 33.

142 Như trên, Điều 37.

143 Như trên, Điều 36.

chỉ vì nó là thông điệp dữ liệu.[144] Hơn nữa, chữ kí điện tử, các quy định sử dụng chữ kí điện tử, dịch vụ chứng nhận chữ kí điện tử cũng được quy định trong luật. Có thể nói, luật giao dịch điện tử được soạn thảo dựa trên sự kết hợp của những luật mẫu và công ước mà chúng ta vừa đề cập ở trên. Mặc dù, Luật giao dịch điện tử không thể bao trùm hết tất cả các lĩnh vực của thương mại điện tử, nhưng nó là nền tảng cơ bản để xây dựng những nghị định và các văn bản hướng dẫn khác[145] nhằm điều chỉnh hoạt động thương mại điện tử ở Việt Nam.

Kết luận

Mục này đã giới thiệu tổng quan các khía cạnh pháp lí về thương mại điện tử được quy định trong Luật mẫu của UNCITRAL, Chỉ thị của EU, cũng như Hướng dẫn của ICC trong nỗ lực hài hoà hoá pháp luật các nước về thương mại điện tử trong giao dịch kinh doanh quốc tế nói chung và chữ kí điện tử, hợp đồng điện tử nói riêng. Nền tảng của sự hài hoà hoá này là thừa nhận giá trị pháp lí của việc sử dụng phương tiện điện tử trong thương mại quốc tế, đồng thời loại bỏ những phân biệt, rào cản để phát triển thương mại điện tử. Trong tương lai, với sự phát triển nhanh chóng của công nghệ số và sự mở rộng của mạng lưới máy tính, thương mại điện tử sẽ được sử dụng ngày càng nhiều trong các giao dịch kinh doanh quốc tế. Vì vậy, những quy tắc này sẽ là nền tảng để các nước soạn thảo khuôn khổ pháp luật nhằm phát triển thương mại điện tử.

TÓM TẮT CHƯƠNG 6

Chương này nêu tổng quát các nguồn luật điều chỉnh ba lĩnh vực quan trọng trong giao dịch kinh doanh quốc tế: Nhượng quyền thương mại (Franchising), logistics và thương mại điện tử. Trước mỗi phần chính của Chương, các tác giả cung cấp thông tin cơ bản về franchising, logistics và thương mại điện tử. Một điều cần lưu ý là Chương này không thể trình bày tất cả các quy định pháp luật liên quan đến ba lĩnh vực nêu trên. Tuy nhiên, trên cơ sở các nguồn luật được đưa ra, sinh viên và người làm việc trong các lĩnh vực này có thể nghiên cứu thêm để xác định và tìm kiếm những quy định điều chỉnh một giao dịch trong lĩnh vực liên quan.

144 Như trên, Điều 34.

145 Việt Nam đã ban hành Thông tư số 09/2008/TT-BCT ngày 21/7/2008 về giao dịch hợp đồng trên website thương mại điện tử; Nghị định số 106/2011/NĐ-CP về sửa đổi và bổ sung một số điều khoản của Nghị định số 26/2007/NĐ-CP hướng dẫn chi tiết về thi hành Luật giao dịch điện tử, cung cấp dịch vụ chứng thực chữ kí điện tử và các văn bản pháp luật chuyên ngành khác.

CÂU HỎI/BÀI TẬP

1. *Business format franchising* và *product and trade name franchising* khác nhau như thế nào?
2. Hãy trình bày các hình thức xâm nhập thị trường cơ bản trong franchising?
3. Các nguồn luật có thể ảnh hưởng đến franchising quốc tế là gì?
4. Theo pháp luật về nhượng quyền thương mại của Việt Nam, người nhượng quyền nước ngoài phải thoả mãn những yêu cầu pháp luật nào, nếu họ muốn mở rộng thị trường vào Việt Nam?
5. Xác định trách nhiệm của người chuyên chở trong các công ước quốc tế về vận tải (đường sắt, đường ô-tô, đường biển, hàng không, vận tải đa phương thức) theo ba tiêu chí sau đây: Cơ sở trách nhiệm; thời hạn trách nhiệm; và giới hạn trách nhiệm.
6. Thương mại điện tử là gì? Sự khác nhau giữa EDI (Trao đổi dữ liệu điện tử) và thương mại điện tử là gì?
7. So sánh phạm vi điều chỉnh của Luật mẫu UNCITRAL với Chỉ thị của EU về thương mại điện tử.
8. Trình bày trách nhiệm và yêu cầu của người cung ứng dịch vụ xác nhận chữ kí điện tử theo Chỉ thị của EU về chữ kí điện tử.
9. Một công ty Việt Nam có trụ sở ở Hà Nội nhập khẩu máy điều hoà không khí (máy công suất lớn dùng cho công nghiệp) từ Singapore theo điều kiện FOB cảng Singapore (INCOTERMS 2010). Hàng hoá sẽ được vận tải bằng đường biển. Hãy mô tả dòng hàng hoá của giao dịch trên, cũng như các hoạt động logistics và luật quốc tế điều chỉnh các hoạt động nêu trên.
10. Ông Philip là thương nhân có trụ sở công ty tại Đức. Trong một chuyến bay từ Bắc Kinh đến London, ông đặt mua 1.000 chiếc đồng hồ qua website alibaba.com. Hãy xác định thời gian và địa điểm kí kết hợp đồng này?
11. Ông Nam là người Việt Nam. Công ty của ông có trụ sở tại Paris và kí hợp đồng điện tử với một công ty khác ở New York. Luật nào về thương mại điện tử trình bày trong chương này sẽ điều chỉnh giao dịch này?

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CHƯƠNG 7 .
GIẢI QUYẾT TRANH CHẤP THƯƠNG MẠI QUỐC TẾ GIỮA CÁC THƯƠNG NHÂN

GIẢI QUYẾT TRANH CHẤP THƯƠNG MẠI QUỐC TẾ GIỮA CÁC THƯƠNG NHÂN

Mục 1. GIỚI THIỆU

Trong một nền kinh tế thế giới năng động như hiện nay, thể hiện sinh động bởi sự bùng nổ các quan hệ thương mại quốc tế, thì số lượng những vụ tranh chấp thương mại quốc tế tăng nhanh là điều dễ hiểu. Những tranh chấp thương mại quốc tế, với đặc trưng là tính pháp lí phức tạp, quá trình giải quyết kéo dài và chi phí rất tốn kém, nếu xảy ra thì thường đem đến những khó khăn to lớn cho các bên tranh chấp. Khi các bên kí kết hợp đồng thương mại quốc tế, điều mà họ phải cân nhắc trước tiên, nhằm giảm bớt sự khắc nghiệt của tranh chấp, là phương thức nào sẽ được áp dụng để giải quyết tranh chấp, một khi tranh chấp xảy ra. Họ có thể chọn một phương thức giải quyết tranh chấp, trước hoặc trong quá trình giải quyết tranh chấp, sau khi đã cân nhắc kĩ những ưu, nhược điểm của từng phương thức, tính tương thích của từng phương thức đối với từng quan hệ thương mại cụ thể, cũng như xem xét cơ sở pháp lí, kinh tế và thương mại của tranh chấp đó. Cho tới nay, các bên tranh chấp có thể sử dụng một số phương thức phổ biến để giải quyết các tranh chấp thương mại quốc tế, *ví dụ*: thương lượng, trung gian/hoà giải, trọng tài và tranh tụng trước toà án. Theo phương thức truyền thống, các bên đưa tranh chấp của họ ra toà án tại một địa phương được lựa chọn, và tranh chấp sẽ được giải quyết theo các quy định pháp luật nghiêm ngặt. Tuy nhiên, các bên hiện nay ngày càng sử dụng thịnh hành các phương thức giải quyết tranh chấp thay thế tranh tụng trước toà án (viết tắt là 'ADR'). Do vậy, các bên có thể thoả thuận trong hợp đồng việc sử dụng các phương thức ADR không mang tính ràng buộc, *ví dụ*: thương lượng, trung gian/hoà giải. Nếu các phương thức này thất bại, họ sẽ sử dụng phương thức ADR mang tính ràng buộc, *ví dụ*: trọng tài. Cũng cần nhấn mạnh rằng trọng tài đang là phương thức chủ đạo để giải quyết các tranh chấp thương mại quốc tế giữa các bên tư nhân,[1] vì trên thực tế, các bên không thể có được nhiều lợi ích, nếu sử dụng phương thức tranh tụng trước toà án.[2] Hơn thế nữa, các bên có thể tận dụng các phương thức ADR không mang tính ràng buộc khác, như thương lượng, trung gian/hoà giải để trợ giúp phương thức trọng tài hoặc tranh tụng trước toà án, nhằm đạt được kết quả có lợi hơn cho các bên tranh chấp. Trọng tài, như vậy, sẽ trao cho các bên một quyền tự chủ thực chất và quyền kiểm soát sẽ được họ sử dụng để giải quyết các tranh chấp giữa họ với nhau.[3]

Mục 2 của Chương này sẽ giới thiệu sơ bộ lần lượt từng phương thức giải quyết tranh chấp thương mại quốc tế, bao gồm: thương lượng, trung gian/hoà giải, trọng tài và tranh tụng trước toà án, và quyền lựa chọn luật áp dụng của các bên tranh chấp. Đồng thời, Mục 2 cũng nhằm đưa ra một số khuyến nghị đối với các bên tranh chấp khi lựa chọn các phương thức này để giải quyết tranh chấp thương mại quốc tế của họ.

Tuy nhiên, lựa chọn được phương thức giải quyết tranh chấp không có nghĩa rằng tranh chấp đó sẽ được giải quyết theo cách mà các bên mong muốn. Quy trình và kết quả giải quyết tranh chấp còn phụ thuộc rất nhiều vào tính hiệu quả của quyền tài phán và luật áp dụng (bao gồm cả luật hình thức và luật nội dung). Trong tranh tụng trước toà án, luật điều chỉnh gần như chắc chắn là luật dựa trên quyền tài phán của toà án đó, mặc dù trong một số vụ việc, luật nước ngoài có thể được áp dụng, nếu toà án đó cho là cần thiết. Điều này có nghĩa là sự lựa chọn quyền tài phán của các bên tranh chấp đồng nghĩa với việc họ ngầm chọn luật áp dụng để giải quyết tranh chấp. Thực ra, trong trường hợp này, luật áp dụng được chọn là luật quốc gia, theo đó quy phạm xung đột của luật quốc gia này sẽ được viện dẫn để giải quyết vụ việc. Điều này chứng tỏ rằng quy trình giải quyết tranh chấp bằng phương thức tranh tụng tại toà án không dễ dự đoán và cũng không rõ ràng. Theo phương thức trọng tài, tình hình lại hơi khác một chút. Nguyên tắc tôn trọng quyền tự định đoạt của các bên được coi trọng hơn rất nhiều. Các bên tranh chấp có quyền tự do nhiều hơn trong việc xây dựng quy trình giải quyết tranh chấp của riêng họ. Các bên có thể chọn một tổ chức trọng tài 'thiết chế' (hay 'thường trực') với những quy tắc trọng tài đã được thiết lập, hoặc một trọng tài 'vụ việc' ('*ad hoc*') với những quy tắc linh hoạt. Họ cũng có thể chọn địa điểm trọng tài, với lưu ý rằng địa điểm này sẽ đóng vai trò quan trọng đối với việc thi hành phán quyết trọng tài. Ngoài ra, các bên tranh chấp được phép soạn thảo những quy chế riêng của họ để giải quyết tranh chấp trong hầu hết các trọng tài 'vụ việc' ('*ad hoc*'). Tuy nhiên, chúng ta cần lưu ý rằng luật áp dụng càng linh hoạt bao nhiêu, thì nó càng khó dự đoán bấy nhiêu. Đó là chưa nói đến

[1] Richard Garnett và các tác giả, *A Practical Guide to International Commercial Arbitration* (2000), tr. 1.

[2] Mỗi bên có thể chọn một tổ hợp bao gồm tổ chức trọng tài, ngôn ngữ xét xử và luật áp dụng; *xem*: Pierter Sanders, *Quo Vadis Arbitration?: Sixty Years of Arbitration Practice* (1999), tr. 7-9; Sự đơn giản, chi phí thấp, tính bảo mật, tốc độ giải quyết tranh chấp nhanh chóng là những lí do khiến phương thức trọng tài được ưa chuộng hơn phương thức tranh tụng trước toà án, *xem*: Stephen M. Ferguson, 'Interim Measures of Protection in International Arbitration: Problems, Proposed Solutions and Anticipated Results', trong tập 55 *International Trade Law Journal* (2003).

[3] Margaret L. Mosses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, 2008, tr. 1.

một số vụ việc, trong đó việc chọn luật áp dụng phải được hiểu ngầm, không khả thi hoặc xung đột với những quy định liên quan khác, dẫn đến những khó khăn nan giải cho trọng tài viên giải quyết vụ việc. Hoặc trong một số vụ việc khác, nếu không có bất kì thoả thuận nào giữa các bên tranh chấp về chọn luật áp dụng, thì việc giải quyết vụ việc còn phức tạp hơn nhiều.

Mục 3 của Chương này sẽ trình bày về sự lựa chọn luật áp dụng và quyền tài phán của các bên tranh chấp. Trong khi cố gắng đề cập đến những rắc rối chính của chủ đề, mục này cũng sẽ giới thiệu một vài công ước quốc tế giúp cho các bên tranh chấp thoát ra khỏi 'cánh rừng pháp luật' phức tạp. Cũng cần thừa nhận rằng, các quy định pháp luật quốc tế về chọn luật áp dụng và quyền tài phán được bắt nguồn chủ yếu từ hệ thống common law và civil law. Do vậy, mục này sẽ nêu một vài ví dụ điển hình về quy định của pháp luật Anh và pháp luật châu Âu để minh họa. Đồng thời, mục này cũng nhằm khuyến khích các bên tranh chấp, trước khi kí kết hợp đồng thương mại quốc tế, cần thoả thuận về luật áp dụng và quyền tài phán nhằm giải quyết tranh chấp, một khi chúng xảy ra. Điều này có thể là điểm quyết định trong một số vụ việc, mà các bên phải bỏ ra khoản chi phí khổng lồ chỉ để được phán xử luật nào sẽ được áp dụng cho hợp đồng của họ.

Tại giai đoạn cuối cùng của một quy trình giải quyết tranh chấp, một bản án của toà án hoặc một phán quyết của trọng tài thường sẽ được đưa ra. Điều tối quan trọng đối với bên thắng cuộc là phải đạt được sự công nhận và thi hành bản án hoặc phán quyết này. Sẽ không phải là vấn đề lớn, nếu việc công nhận và cho thi hành bản án của toà án hoặc phán quyết trọng tài được yêu cầu trong khu vực thuộc quyền tài phán của toà án hoặc trọng tài đã đưa ra bản án hoặc phán quyết đó. Tuy nhiên, câu chuyện sẽ khác rất nhiều, nếu bên thắng kiện muốn thực thi bản án của toà án hoặc phán quyết của trọng tài ở khu vực thuộc quyền tài phán của nước ngoài. Liên quan đến phán quyết của trọng tài, đã có quy định pháp luật quốc tế tạo thuận lợi cho việc công nhận và thi hành phán quyết của trọng tài nước ngoài tại gần 160 nước. Đó là Công ước New York 1958 về công nhận và thi hành phán quyết của trọng tài nước ngoài (sau đây gọi là 'Công ước New York'). Việc giới thiệu những quy định chủ yếu của Công ước New York sẽ là rất cần thiết, để hiểu lí do tại sao phương thức trọng tài chiếm ưu thế hơn so với phương thức tranh tụng trước toà án trong lĩnh vực giải quyết tranh chấp thương mại quốc tế vài thập kỉ trở lại đây. Theo Công ước New York, việc viện dẫn lí do từ chối thi hành phán quyết của trọng tài nước ngoài thường được xem xét rất ngặt nghèo. Tuy nhiên,

cũng không phải là lạ nếu một phán quyết của trọng tài nước ngoài bị từ chối thi hành dựa trên những cơ sở hạn hẹp như 'làm tổn hại chính sách công' của nước được yêu cầu thi hành. Tính chất của phán quyết trọng tài là không bị xét xử lại, nhưng để thi hành phán quyết này, đôi khi cần thực hiện thêm các hành vi khác nữa. Tuy vậy, khía cạnh gai góc nhất của việc thi hành phán quyết trọng tài nước ngoài lại là sự lựa chọn nơi thi hành và luật quốc gia của nơi thi hành. Những yếu tố khác cũng sẽ nảy sinh, trong trường hợp bên thắng kiện muốn thi hành phán quyết của trọng tài tại nước không phải là thành viên của Công ước New York. Và như vậy, số phận của phán quyết đó tùy thuộc hoàn toàn vào luật quốc gia điều chỉnh việc công nhận và thi hành phán quyết của trọng tài nước ngoài của nước này.

Mục 4 sẽ trình bày về việc thi hành phán quyết của trọng tài nước ngoài theo Công ước New York, và nghiên cứu việc thi hành phán quyết trong trường hợp Công ước New York không được viện dẫn.

Trong trường hợp cần cố gắng thi hành bản án của toà án tại khu vực thuộc quyền tài phán nước ngoài, thì điều này thậm chí còn phức tạp và khó khăn hơn nhiều, bởi vì quan điểm chủ đạo là bản án của toà án nước ngoài không có hiệu lực pháp lí ở nước khác. Mặc dù đã có một số quy định ở tầm khu vực nhằm tăng tính thi hành của bản án của toà án nước ngoài, tuy nhiên những quy định tương tự đã không thành công trên bình diện toàn cầu. Bản án của toà án nước ngoài thường vẫn phải trải qua một quy trình phức tạp để được xem xét thi hành, và đôi khi bị vướng mắc bởi những cái bẫy pháp luật. Cho đến nay, tất cả những nỗ lực quốc tế nhằm cải thiện vấn đề này trên bình diện toàn cầu đều đã thất bại, cùng với sự thất bại của Công ước La Haye về công nhận và thi hành bản án của toà án nước ngoài. Phía trước vẫn là chặng đường dài cho đến khi bản án của toà án nước ngoài có thể được đối xử như phán quyết của trọng tài, trong khía cạnh công nhận và cho thi hành ở nước ngoài.

Mục 5 sẽ đề cập vấn đề thi hành của bản án của toà án nước ngoài, tập trung vào một số quy định nổi bật ở tầm khu vực cũng như ở bình diện quốc gia. Tuy nhiên, chúng ta cần lưu ý rằng việc một quốc gia cho thi hành bản án của toà án nước ngoài thường phụ thuộc rất nhiều vào quan điểm về chủ quyền của quốc gia đó.

Tại cuối Chương này, Mục 6 sẽ giới thiệu những quy định hiện hành của Việt Nam về giải quyết tranh chấp thương mại quốc tế, nhằm đánh giá Việt Nam đã đi đến đâu trong chặng đường hội nhập pháp luật quốc tế trong lĩnh vực này. Mục đích của mục này là khuyến nghị Việt

Nam nên gia nhập những điều ước quốc tế đã được thiết lập và đã được hài hoà hoá, nhằm tạo thuận lợi cho việc giải quyết tranh chấp thương mại quốc tế, và qua đó nâng cao uy tín của Việt Nam như là một nước thiện chí với giải quyết tranh chấp thương mại quốc tế.

Mục 2. CÁC PHƯƠNG THỨC GIẢI QUYẾT TRANH CHẤP - SỰ LỰA CHỌN

1. Thương lượng

Thương lượng là bước tiếp cận đầu tiên mà các bên sử dụng nhằm giải quyết tranh chấp nảy sinh trong giao dịch thương mại quốc tế. Mặc dù các tranh chấp thường không được giải quyết dứt điểm bằng phương thức này, nhưng nó giúp các bên nắm bắt được vấn đề của tranh chấp và hiểu rõ hơn quan điểm của bên kia. Ngoài ra, các bên cũng có thể nối lại thương lượng vào bất kì giai đoạn nào thích hợp, không liên quan đến việc phương thức giải quyết khác đang được tiến hành để giải quyết tranh chấp giữa họ, nhằm mục đích sớm đạt được thoả thuận chấm dứt tranh chấp. Do vậy, mục này sẽ cố gắng trình bày một cách toàn diện nhất những chiến thuật và chiến lược đã và đang được áp dụng trong thương lượng.

A. *Tại sao phải thương lượng?*

Thương lượng có thể được định nghĩa là sự trao đổi qua lại nhằm đạt được thoả thuận giữa hai hoặc nhiều bên, chia sẻ một số lợi ích chung khi có xung đột, hoặc đơn giản là khi bất đồng về một số lợi ích khác.[4] Như vậy, thương lượng là một trong những phương pháp cơ bản nhất của sự tương tác, và nó tồn tại trong bất kì hành động nào, đồng thời, nó là một phương thức giải quyết vấn đề và giải quyết tranh chấp. Thương lượng có thể dưới dạng ngôn ngữ hoặc ngầm hiểu, công khai hoặc không công khai, trực tiếp hoặc thông qua các trung gian, bằng lời nói hoặc văn bản hoặc qua thư từ, email.

Khi các bên tham gia thương lượng, họ nên cân nhắc một mô hình khung gồm bảy yếu tố được tổng kết bởi Dự án thương lượng Ha-vớt để có thể đạt được hiệu quả tối đa. Mô hình này bao gồm: lợi ích,[5] sự công bằng, tính chính đáng,[6] quan hệ,[7] các lựa chọn,[8] những cam kết[9] và cách thức thực hiện.[10] Các chuyên gia thương lượng có toàn quyền lựa chọn những chiến thuật hoặc chiến lược về quy trình để điều hành cuộc thương lượng, tuy nhiên, những yếu tố này sẽ là cơ sở cho các bên xác định được nền tảng chung của quá trình thương lượng giữa họ.

B. *Quá trình thương lượng*

Rất dễ nắm bắt và ghi nhớ bảy yếu tố đạt đến thành công trong thương lượng, tuy nhiên, kết hợp bảy biến số này cùng một lúc trong cả quá trình thương lượng thì hoàn toàn là câu chuyện khác. Các nhà thương thuyết không có bất kì ràng buộc hoặc giới hạn nào trong việc họ nhấn mạnh hoặc coi nhẹ một số yếu tố nào đó, hoặc cách mà họ đưa những yếu tố đó vào quá trình thương lượng. Tuy nhiên, trong thực tiễn, có bốn cách tiếp cận cơ bản nhất, bao gồm:

1. Mặc cả quan điểm

Thể thức đơn giản nhất và thông dụng nhất là thoả hiệp hoặc mặc cả về lập trường của các bên. Một bên đưa ra một quan điểm cao (hoặc thấp) mở đầu (theo dạng yêu cầu hoặc là đề nghị) và bên kia đáp lại bằng một yêu cầu thấp (hoặc cao). Một loạt các thoả hiệp trên cơ sở có đi có lại được đưa ra cho đến khi đạt được một thoả thuận trong quá trình này, hoặc không đạt được thoả thuận nào, và các bên kết thúc thương lượng để tìm kiếm một phương thức giải quyết tranh chấp khác.

[4] R. Fisher và các tác giả khác, *Getting to YES: Negotiating Agreement without Giving in*, New York: Penguin, (1991).

[5] Nhu cầu, mong muốn, hoặc động cơ của một bên thường được hiểu là lợi ích của bên đó. Lợi ích là kim chỉ nam cho thương lượng. Người ta thương lượng bởi vì họ mong muốn rằng những lợi ích của họ sẽ được thoả mãn tốt hơn bằng một thoả thuận, hơn là bằng các phương thức khác. Thước đo của thành công trong thương lượng là những lợi ích của bạn đạt được đến đâu, đây cũng là điều kiện để xem xét, so sánh và lựa chọn giữa các kết quả có thể đạt được.

[6] Sự công bằng và chính đáng là một trong những mong muốn mãnh liệt nhất của con người, do vậy nó tạo ra một loại lợi ích đặc biệt. Thường thì chúng đóng vai trò rất lớn trong quá trình thương lượng, tuy nhiên, nhiều khi chúng lại chỉ được xem xét một cách hời hợt. Không thiếu các trường hợp thương lượng bị đổ vỡ, nhưng không phải bởi vì các lựa chọn được đưa ra không thể chấp nhận được, mà là vì nó không có vẻ công bằng đối với một bên hoặc thậm chí là cả hai bên. Quả thực, bạn trả tiền cũng chỉ để nhằm tránh việc phải chấp nhận một giải pháp không công bằng.

[7] Quan hệ giữa người thương lượng với đối tác và cả với bất cứ ai khác cũng gây tác động đến cuộc thương lượng. Đôi khi, đối với các đối tác kinh tế hoặc quan hệ làm ăn lâu dài, việc duy trì một dạng quan hệ nhất định có thể còn quan trọng hơn nhiều so với những vấn đề cụ thể trong tranh chấp.

[8] Lí do cơ bản của phương thức thương lượng là mong muốn đạt được một kết quả mang lại giá trị lớn nhất so với việc sử dụng các biện pháp giải quyết tranh chấp khác, và đủ để trang trải sự đầu tư về thời gian và công sức vào thương lượng. Các lựa chọn là các thoả thuận có thể đạt được, hoặc một phần của một thoả thuận khả thi mà quá trình thương thượng có thể đạt được. Một dạng cơ bản nhất của lựa chọn là sự đánh đổi - 'Tôi cho anh cái này, đổi lại anh cho tôi cái kia'.

[9] Một cam kết là một thoả thuận, một yêu cầu, một đề nghị hoặc một lời hứa được đưa ra bởi một hoặc nhiều bên và bất cứ hình thức nào của thoả thuận dạng này.

[10] Cách thức thực hiện ở đây hàm ý là cách thức mà các bên thương lượng với nhau và sử dụng 6 yếu tố trên của phương thức thương lượng. Cách thức này có thể là đối kháng, thân thiện, đe dọa, hoặc nhượng bộ, hoặc thăm dò nhưng không cam kết.

Ngoài tính đơn giản, phương thức 'mặc cả quan điểm' còn có ưu điểm là nó được hiểu và phổ biến trên toàn thế giới, dễ dự đoán và bền vững. Nhiều lợi ích chiến lược đạt được từ việc đưa ra một lời đề nghị dễ chịu đối với bên kia một cách hiệu quả. Tuy nhiên, tính đơn giản của cách tiếp cận này và tâm điểm của nó là những cam kết của các bên cũng có nhiều bất lợi. Có thể thấy rõ nhất là việc không chú trọng vào việc khai thác lợi ích của các bên, nên phương thức này khó tìm ra các lựa chọn sáng tạo nhằm tối đa hoá lợi ích. Vì không biết rõ lợi ích của các bên, nên khó có thể có cơ hội cho họ trở lại quá trình thương lượng. Hơn thế nữa, cách tiếp cận này nói chung chỉ tập trung vào những cam kết, nên không khuyến khích sự sáng tạo và động não. Hai nữa là cách tiếp cận này có vẻ chậm và không hiệu quả. Mỗi bên đều cố gắng đưa ra sự thoả hiệp càng nhỏ càng tốt, và thậm chí chỉ thoả hiệp khi thấy cần thiết để tránh thương lượng đổ vỡ. Điều thứ ba là cách tiếp cận này có xu hướng dẫn đến kết quả dựa trên sự chia sẻ thiệt hại mà không có cơ sở rõ ràng, nên thường khó đáp ứng được mong muốn của các bên về tính công bằng, và thường khó giải thích và không có tính tiền lệ nhằm giảm bớt nhu cầu thương lượng thêm (thường mất rất nhiều thời gian) giữa các bên trong tương lai. Cuối cùng, cách tiếp cận này có thể dẫn đến mối quan hệ đối kháng. Cách tiếp cận này chỉ tập trung vào lĩnh vực có xung đột giữa các bên và tạo ra một kết quả theo dạng 'thắng-thua' một cách tương đối.

2. Xin đặc ân trước và ghi nợ

Cách tiếp cận thứ hai cũng sử dụng sự trao đổi các cam kết, bằng cách tận dụng quan hệ sẵn có giữa các bên, để đạt được những kết quả sáng tạo hơn và mang lại nhiều lợi ích hơn. Căn bản là sự thoả thuận về một kết quả có lợi cho một bên trước, để đổi lại một sự đền đáp trong tương lai. Khi đó các nhà thương thuyết sẽ giữ một 'sổ ghi chép' ai nợ ai cái gì. Kết quả là một cách thức rất sáng tạo để làm tăng lợi ích, bằng cách giãn thời gian, cho các sự đánh đổi, điều này thường dẫn đến các thoả thuận và giải quyết tranh chấp mà các phương thức giải quyết tranh chấp khác không thể có được.

3. Cách tiếp cận theo kiểu 'con gà'

Dạng thứ ba của thương lượng tập trung vào những cách thức thay thế - những biện pháp thay thế của bên nào tốt hơn và bên nào có thể làm cho bên kia bất lợi nhiều hơn. 'Tôi không thương lượng thì anh mất nhiều hơn tôi và hơn thế nữa chúng ta sẽ càng bất lợi nếu….'. Cách này thường được gọi là trò chơi 'con gà' - 'một là anh chấp nhận đề nghị của tôi, hai là tôi sẽ kết liễu cả hai chúng ta'.

4. Vòng tuần hoàn của giá trị dựa trên cơ chế 'giải quyết vấn đề'

Khi các học giả sử dụng những thống kê hệ thống về quá trình thương lượng, kết quả cho thấy những nhược điểm rất rõ ràng của phương thức 'mặc cả quan điểm'. Một phương thức 'giải quyết vấn đề' thay thế đã được xây dựng dựa trên sự kết hợp giữa nghiên cứu lí thuyết, các vụ việc, và phép loại suy từ những dạng thương lượng. *Ví dụ*, có quan điểm cho rằng: (i) Những người thương lượng nên làm việc cùng nhau như đồng nghiệp để xác định liệu có thể đạt được thoả thuận tốt hơn so với việc chẳng có thoả thuận nào hay không; (ii) Bằng cách làm như vậy, họ nên hoãn các cam kết trong khi tìm hiểu làm cách nào để tối đa hoá giá trị và phân phối công bằng giá trị của bất cứ thoả thuận nào; và (iii) Điều này vẫn là hợp lí, nếu một bên tiếp cận tranh chấp theo cách này, bất chấp bên kia có tiếp cận theo cách này hay không. Cách tiếp cận dựa trên cơ chế 'giải quyết vấn đề' nhằm khắc phục những hạn chế của phương thức 'mặc cả quan điểm' truyền thống, bằng cách tập trung vào lợi ích của các bên, tìm cách tối đa hoá lợi ích chung và không đưa ra cam kết nào cho đến khi kết thúc thương lượng; khuyến khích những kết quả có thể lí giải được một cách hợp lí mà có thể tạo ra tiền lệ lâu dài; cho phép các bên duy trì và thiết lập quan hệ ngay cả khi họ bất đồng, bằng cách tách riêng mức độ thân thiện trong quan hệ của họ và mức độ của thoả thuận. Có quan điểm cho rằng cách tiếp cận dựa trên cơ chế 'giải quyết vấn đề' còn có thể giúp các bên kiểm soát được ba loại căng thẳng giữa họ. Loại căng thẳng thứ nhất, giữa việc tạo ra giá trị và phân phối giá trị, thường còn được gọi là 'sự tiến thoái lưỡng nan của người thương lượng', bởi vì muốn tạo ra giá trị thì cần các bên phải nói ra những lợi ích của họ, nhưng việc công khai những lợi ích này trước có thể đưa họ vào thế bất lợi chiến lược trong mục tiêu đạt được giá trị của kết quả. Cách tiếp cận này cũng giúp điều tiết sự căng thẳng giữa việc tạo ra giá trị và phân phối giá trị, bằng cách tăng cường quan hệ làm việc phối hợp mà nó cho phép sự công khai dần dần trên cơ sở có đi có lại về những lợi ích của mỗi bên trong quá trình đưa ra ý tưởng về các lựa chọn mà không đưa ra cam kết, và điều này còn giúp các nhà thương lượng cùng nhau giải đáp các thắc mắc về phân phối giá trị theo những tiêu chuẩn khách quan, hơn là bằng cách đưa ra những 'hạch sách' đối kháng và những sự định giá chủ quan.

Phương thức 'giải quyết vấn đề' trong thương lượng thường được gọi là cách tiếp cận theo kiểu 'vòng tuần hoàn của giá trị',[11] bởi vì tâm

[11] B. Patton, 'Building Relationship and the Bottom Line: The Circle of Value Approach to Negotiation', trong 7 *Negotiation* (2004), tr. 4 và 7.

điểm của quá trình này liên quan đến việc nhà thương thuyết cần tìm các lựa chọn để tạo ra giá trị và phân phối giá trị, thông qua sự phối hợp, cùng làm và cùng 'giải quyết vấn đề'. Cách thức làm việc cùng nhau này đòi hỏi phải được tạo ra và duy trì một cách cẩn thận, giống như một không gian đặc biệt hoặc một 'vòng tuần hoàn'.

2. Hoà giải/Trung gian

Trong thực tiễn, phương thức hoà giải/trung gian hiếm khi được vận dụng trong các tranh chấp thương mại quốc tế. Thông thường, phương thức này được áp dụng phù hợp hơn trong giải quyết các tranh chấp liên quan đến môi trường. Trong các tranh chấp thương mại, các phương thức này thường được kết hợp với các phương thức giải quyết tranh chấp khác, nhằm đáp ứng mong muốn của các bên. Điều này có thể được minh họa bởi cơ chế trọng tài-trung gian (mediation-arbitration mechanism). Mục này sẽ giới thiệu khái quát và không đi vào chi tiết về hai phương thức này. Hoà giải/Trung gian khác với trọng tài bởi vì đây không phải là những biện pháp mang tính ràng buộc. Một tổ chức trọng tài có thể có những quy định về hoà giả và trung gian. Người trung gian sẽ nỗ lực để làm cho bên này hiểu quan điểm của bên kia, sẽ tiếp xúc riêng rẽ với mỗi bên và lắng nghe quan điểm của mỗi bên, sẽ nhấn mạnh đến những lợi ích chung, và nỗ lực giúp cho các bên tìm kiếm giải pháp.

Hoà giải/Trung gian thường mang tính bí mật, và có thể diễn ra vào bất kỳ thời điểm nào trong quá trình tranh chấp. Nếu các bên đã sử dụng đến toà án hoặc trọng tài và đã đi đến một giai đoạn nhất định trong việc sử dụng các biện pháp này, nhưng nếu các bên vẫn muốn giải quyết và cần có sự trợ giúp nào đó, họ vẫn có thể sử dụng đến hoà giải /trung gian.

A. *Hoà giải (Conciliation)*

1. Khái niệm

Hoà giải là quá trình trong đó bên thứ ba, do các bên tranh chấp chỉ định, dàn xếp giữa các bên tranh chấp trước hoặc sau khi họ khởi kiện hoặc sử dụng phương thức trọng tài. Các nỗ lực hoà giải giúp cho các bên thấy được các mặt đối lập của tranh chấp, nhằm đưa các bên xích lại gần nhau và hướng tới một giải pháp thường đạt được trên cơ sở sự thoả hiệp của cả hai bên. Có rất nhiều hình thức hoà giải và trong một số hệ thống pháp luật, hoà giải được thể hiện dưới phương thức rất hiện đại.

Sự khác nhau giữa hoà giải và trung gian đó là, mặc dù đôi khi các thuật ngữ này được sử dụng thay thế cho nhau, tuy nhiên có sự khác biệt. Người hoà giải sẽ lắng nghe các bên, nghe họ trình bày quan điểm khác nhau của mình, và sau đó đưa ra một đề nghị để giải quyết tranh chấp mà người hoà giải tin rằng đó là một giải pháp thoả hiệp công bằng cho cả hai bên. Nếu giải pháp đưa ra không giải quyết được tranh chấp, người hoà giải có thể đề nghị một giải pháp khác. Mặc dù người trung gian sẽ nỗ lực để đưa các bên đi đến một giải pháp do các bên tự thu xếp, người trung gian cũng có thể, nếu được các bên đề nghị, đưa ra một đề xuất cụ thể, tương tự như người hoà giải có thể làm.

2. Áp dụng phương thức hoà giải

Phương thức hoà giải đã được đề cập trong các công ước gần đây nhất về trọng tài. Công ước Washington 1965 chỉ ra rằng, một ủy ban hoà giải nên được thiết lập, theo yêu cầu của một nước thành viên hoặc một cá nhân của nước thành viên đó, và quy định về thủ tục của ủy ban.[12] Hoà giải cũng được đề cập trong Quy tắc trọng tài quốc tế của Hiệp hội trọng tài Hoa Kỳ, và được điều chỉnh như đối với phương thức trọng tài thương mại trong nước bởi Quy tắc hoà giải thương mại.[13] Phương thức hoà giải cũng có thể được tham khảo tại Quy tắc trọng tài quốc tế của Hội đồng trọng tài Milano,[14] Ủy ban trọng tài thương mại liên Mỹ (IACAC).[15] Mặc dù không được nhắc đến tại Quy tắc trọng tài của Viện trọng tài thuộc Phòng thương mại Stockholm năm 1999, tuy nhiên cùng thời gian này, Phòng thương mại Stockholm đã thành lập Viện hoà giải của Phòng thương mại Stockholm và đã công khai bộ quy tắc của Viện. Phương thức hoà giải cũng được nhắc đến nhiều trong Quy tắc của Phòng thương mại châu Âu-Á rập.[16]

B. *Trung gian (Mediation)*

1. Giới thiệu chung

Phương thức trung gian là hình thức can thiệp của bên thứ ba, với sự chấp thuận của các bên liên quan trong tranh chấp. Chức năng của

[12] Công ước giải quyết tranh chấp đầu tư giữa chính phủ nước tiếp nhận đầu tư và nhà đầu tư nước ngoài, Washington, ngày 18/3/1965.

[13] Điều 10 Quy tắc trọng tài quốc tế của Hiệp hội trọng tài Hoa Kỳ (AAA).

[14] Quy tắc của Hội đồng trọng tài quốc gia và quốc tế Milano (Hội đồng đã dành cả Chương I viết về vấn đề này - Quy trình hoà giải), từ Điều 12 đến Điều 17.

[15] *Xem*: Giới thiệu khái quát tại http://www.sice.oas.org/dispute/comarb/iacac/iacac1e.asp

[16] Quy tắc hoà giải, trọng tài và chuyên gia của Phòng thương mại châu Âu-Á rập, Paris, 1983, từ Điều 12 đến Điều 18.

người trung gian là đưa ra giải pháp cho tranh chấp với mong muốn được các bên chấp thuận. Người trung gian sẽ là một cá nhân trung lập, với kiến thức chuyên sâu liên quan đến lĩnh vực tranh chấp.[17]

Người trung gian sẽ nỗ lực giúp các bên hiểu lập trường, quan điểm của nhau, sẽ gặp gỡ riêng với từng bên, lắng nghe quan điểm của mỗi bên, nhấn mạnh các lợi ích chung và nỗ lực giúp các bên tiến tới một giải pháp chung. Phương thức trung gian mang tính bí mật. Thông thường, có một điều khoản trong luật được chọn quy định rằng không được phép tiết lộ thông tin của quá trình trung gian ở giai đoạn tiếp theo của quá trình giải quyết tranh chấp, cho dù đó là giai đoạn sử dụng phương thức trọng tài hay tranh tụng tại toà án. Nếu luật được chọn không quy định nội dung này, thì nên soạn thảo một thoả thuận bằng văn bản trong đó cam kết rằng mọi thông tin của quá trình trung gian sẽ không được phép tiết lộ ở giai đoạn tiếp theo của quá trình giải quyết tranh chấp, trừ trường hợp các thông tin này được lấy từ các văn bản không được tạo ra để thực hiện phương thức trung gian.

Phương thức trung gian có thể được áp dụng tại bất cứ thời điểm nào trong quá trình giải quyết tranh chấp. Nếu các bên đạt được đồng thuận về phương thức giải quyết tranh chấp trong quá trình tranh tụng tại toà án hoặc trọng tài, và nếu cần sự giúp đỡ, họ có thể viện đến sự trợ giúp của người trung gian. Phương thức trung gian cũng có thể được áp dụng trong giai đoạn đàm phán kí kết hợp đồng, khi quá trình đàm phán rơi vào thế bế tắc nhưng các bên liên quan thực sự muốn đi đến thoả thuận cuối cùng. Bởi vì người trung gian có thể hiểu và dàn xếp lợi ích của các bên liên quan, nên phương thức trung gian đôi khi được xem như một thủ tục dựa trên 'lợi ích', trong khi trọng tài thường được xem như một thủ tục dựa trên các 'quyền' của các bên.

2. Áp dụng phương thức trung gian

Thông thường, đề xuất phương thức trung gian là vấn đề khó khăn nhất, bởi tại thời điểm đó, mối quan hệ giữa các bên liên quan đã trở nên căng thẳng, do vậy sự can thiệp của bên thứ ba nhằm đưa ra một giải pháp thân thiện là một nhiệm vụ hết sức khó khăn. Tuy nhiên, có thể cần đến một bên thứ ba trung lập nhằm đưa ra những gợi ý với đối phương mà không để lại ấn tượng rằng bên đề xuất phương thức trung gian có vẻ yếu thế. Vấn đề pháp lí ở đây là trong trường hợp một bên từ chối tham gia ADR để giải quyết tranh chấp liên quan, thì cũng không cần phải nêu ra sự vi phạm nghĩa vụ theo hợp đồng, bởi vì ADR không được quy định trong hợp đồng. Có bốn cách khác nhau để đề xuất phương thức

[17] Charles Chatterjee và Anna Lefcovitch, *Alternative Dispute Resolution: A Practical Guide* (2008), tr. 20.

trung gian: Các bên liên quan tiếp cận nhau, các luật sư tiếp cận nhau, sự thuyết phục của bên thứ ba; và đặc quyền của một bên được đề xuất phương thức trung gian. Trong trường hợp một tranh chấp đang được giải quyết trước toà hoặc liên quan đến những cáo buộc lớn hoặc những vấn đề pháp lí phức tạp, các bên có thể có các luật sư tư vấn và luật sư tranh tụng tham gia vào quá trình trung gian. Trong trường hợp đó, phương thức trung gian trở thành quá trình bị định hướng bởi pháp luật và có thể bị phụ thuộc vào vai trò của các luật sư, và các luật sư rất có thể đưa ra các ý tưởng pháp lí phức tạp, khó hiểu mà các bên liên quan rất khó nắm bắt. Trên thực tế, khi các luật sư được phép làm người đại diện pháp luật, người trung gian thường được yêu cầu nhắc nhở các luật sư về giới hạn quyền hạn của họ, nhằm đảm bảo rằng đây không phải là toà án để áp đặt các thể thức và quy trình như tranh tụng trước toà án.[18] Điều cần thiết là người trung gian phải xác định được vấn đề gì mà người đại diện pháp luật được phép trình bày (cần phải trình bày rõ ràng các luận điểm, nhưng không được phép lạm dụng).

3. Ưu điểm của phương thức trung gian

Phương thức trung gian là tiến trình hết sức linh hoạt so với tranh tụng trước toà án, theo đó các bên có thể thay đổi thái độ mà không bị 'mất mặt'. Một phương thức trung gian thành công thường tạo ra không khí thân thiện, cởi mở, bởi mỗi bên đều là người chiến thắng. Không giống như trường hợp đưa ra toà án, trung gian sẽ hạn chế các nguyên nhân gây thù địch giữa các bên. Đặc điểm này của phương thức trung gian là đặc biệt quan trọng, một khi các bên phải hợp tác hoặc mong muốn tiếp tục hợp tác, như trong các trường hợp liên quan đến quan hệ lao động, kinh doanh hoặc mâu thuẫn gia đình.[19]

Phương thức trung gian - một ADR với tiền đề nhằm cung cấp cho các bên liên quan một tiến trình bảo mật, tự nguyện, thích ứng với nhu cầu và lợi ích của các bên và luôn trong tầm kiểm soát của các bên, đã trở thành một giải pháp giải quyết tranh chấp hài hoà, bền vững và hiệu quả.[20] Phương thức trung gian khá độc đáo, bởi nó không ràng buộc, và người trung gian có chức năng thúc đẩy giao tiếp và đàm phán giữa các bên, và không áp đặt phương thức giải quyết tranh chấp đối với các bên.[21]

[18] Charles Chatterjee và Anna Lefcovitch, Sđd, tr. 70.

[19] Sam Kagel, Kathy Kelly, *The Anatomy of Mediation: What Makes It Work* (1989), tr. 192.

[20] Maureen A. Weston, 'Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good- Faith Participation, Autonomy, and Confidentiality', 76 *IND. L.J.* 591, 592, (2001).

[21] Maureen A. Weston, Sđd, tr. 598.

4. Nhược điểm của phương thức trung gian

Không nên áp dụng phương thức trung gian trong trường hợp tranh chấp chủ yếu xoay quanh vấn đề pháp lí hơn là các sự kiện,[22] hoặc trong trường hợp mà một hoặc cả hai bên sẽ không tham gia với tinh thần xây dựng.[23] Ngoài ra, nếu tranh chấp dựa trên cơ sở hợp đồng thì các bên phải lưu ý đến vấn đề thời hạn. Trong những hợp đồng đơn giản, thời hạn thường là 6 năm kể từ khi vi phạm hợp đồng xảy ra. Nếu bản hợp đồng đã được định sẵn thì thời hạn sẽ là 12 năm. Sẽ là không khôn ngoan nếu bắt đầu phương thức trung gian vào thời điểm mà thời hạn sắp kết thúc. Khi đó, các bên sẽ khó có được sự công bằng trong việc trao đổi quan điểm. Điều này không đến mức quá rõ ràng, tuy nhiên nó cũng thường là yếu tố quan trọng.

3. Sự khác nhau giữa phương thức trung gian và phương thức hoà giải

Vậy đâu là sự khác biệt giữa phương thức trung gian và phương thức hoà giải? Thường thì hai cụm từ này được dùng lẫn với nhau. Tuy nhiên, giữa hai phương thức này có sự khác biệt mang tính kĩ thuật. Một hoà giải viên lắng nghe từ cả hai bên, nắm được quan điểm khác nhau giữa họ và sau đó dự thảo một thoả thuận hoà giải nêu rõ những gì hoà giải viên cho là một thoả hiệp công bằng đối với tranh chấp đó. Nếu dự thảo thoả thuận không giải quyết được tranh chấp, hoà giải viên có thể soạn thảo một thoả thuận hoà giải khác.

Mặc dù người trung gian cố gắng khuyến khích các bên tự tìm ra một thoả thuận giải quyết tranh chấp, giống như hoà giải viên thường làm, nhưng họ cũng có thể soạn ra một yêu cầu riêng biệt theo yêu cầu của các bên.

Thượng nghị sĩ Donalson đưa ra cách giải thích khác về sự khác biệt giữa trung gian và hoà giải như sau:

> Trong quá trình hoà giải, bên trung lập lắng nghe những phản ánh của các bên tranh chấp và tìm cách thu hẹp sự tranh cãi giữa các bên. Người Trung Quốc ví hoà giải viên như người 'làm dâu trăm họ'. Trong khi đó, người trung gian cũng tiến hành những chức năng của hoà giải viên, nhưng lại có thể đưa ra quan điểm riêng của mình để giải quyết tranh chấp một cách hợp lí.[24]

Hoặc theo một nhận xét tương tự của thượng nghị sĩ Uyn-bơ-phót-xơ, bản thân là một thượng nghị sĩ về luật:

> Sự khác biệt giữa hai phương thức giải quyết tranh chấp này có thể là ở chỗ: mục đích của hoà giải viên là chỉ ra cho các bên nhận thức được điều gì có lợi mà họ có thể đạt được từ việc giải quyết không qua toà án theo bất kể cách thức nào mà họ cho là thuận tiện nhất. Trong khi đó phương thức trung gian có mục tiêu rõ ràng hơn, đó là tư vấn cho mỗi bên từ bỏ một phần đòi hỏi của họ, nhằm đạt được việc giải quyết tranh chấp thông qua 'aliquid datum' và 'aliquid retentum' (từ bỏ một phần đòi hỏi của mình để nhận lại toàn bộ phần còn lại).[25]

Sự phân biệt này có thể chỉ mang tính lí thuyết và có vẻ không thuyết phục. Sự khác biệt thực sự giữa hai phương thức này là ở sự trao quyền cho bên thứ ba, để bên thứ ba đưa ra một kết quả mang tính ràng buộc cuối cùng.

4. Trọng tài thương mại quốc tế ('ICA')

A. *Tại sao phải sử dụng trọng tài?*

Trọng tài là hệ thống giải quyết tranh chấp mang tính chất tư. Các bên sử dụng trọng tài đã quyết định giải quyết tranh chấp của họ bên ngoài bất kỳ hệ thống tư pháp nào. Trong đa số các trường hợp, trọng tài sẽ đưa đến một quyết định cuối cùng và ràng buộc, đưa ra một phán quyết có thể thi hành tại toà án quốc gia. Người đưa ra quyết định (trọng tài viên), nhìn chung là do các bên lựa chọn. Các bên cũng quyết định về việc nên để cho tiến trình trọng tài sẽ được điều hành bởi một tổ chức trọng tài quốc tế, hay là một toà trọng tài vụ việc (*ad hoc*), có nghĩa là sẽ không có sự tham gia của một tổ chức trọng tài định chế.

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[22] Nếu một tranh chấp liên quan đến việc giải thích một thuật ngữ trong hợp đồng, một sự vi phạm dẫn đến áp dụng chế tài, và nếu một tranh chấp liên quan đến việc giải thích một văn bản luật, thì không nên sử dụng các phương thức ADR, bởi vì vấn đề đó chỉ có thể được giải quyết bằng phương thức tranh tụng trước toà án; *Xem* Charles Chatterjee và Anna Lefcovitch, Sđd, tr. 11.

[23] *Ví dụ*: Một hoặc cả hai bên sẵn sàng nói phóng đại hoặc nói dối người trung gian và không đưa ra cam kết thực tế nào để giải quyết tranh chấp; một trong các bên mong muốn kéo dài quá trình trung gian càng lâu càng tốt.

[24] Donaldson, 'Alternative Disputes Resolutions', (1992), tr. 58, *JCI Arb*. 2, tr. 102.

[25] Donaldson, Sđd, tr. 104.

Tranh chấp trong giao dịch thương mại quốc tế, dù xảy ra ở bất cứ đâu, đều có thể được giải quyết theo các phương thức đa dạng, từ tham vấn thân thiện cho đến tranh tụng trước toà án. Đối với các nước châu Á, thì trước khi chuyển sang phương thức tranh tụng trước toà án, các bên thường tận dụng tối đa các phương thức không mang tính bắt buộc, bao gồm trung gian và hoà giải, để có thể đạt được sự thoả hiệp. Trong giai đoạn này, các bên cũng có thể tính đến khả năng sử dụng phương thức ICA. ICA đã và đang được ứng dụng hết sức mạnh mẽ trong nhiều thập niên gần đây, nhất là tại các nước Bắc Mỹ, Tây Âu, Trung Đông và Đông Á. Do đó, phương thức ICA sẽ là trọng tâm của Chương này. Các bên tham gia hợp đồng thương mại quốc tế có thể ghi điều khoản về cơ quan tài phán trong hợp đồng của họ.

Sự phát triển mạnh mẽ của ICA một phần là giải pháp nhằm tránh sự bất cập và không rõ ràng của phương thức tranh tụng trước toà án trong giao dịch kinh doanh quốc tế. Nói một cách tích cực hơn, thì ICA, với tính có thể dự đoán và trung lập, được coi như một cơ quan tài phán và là nơi mà các chuyên gia trong từng chuyên ngành có thể tham gia giải quyết tranh chấp (thay vì các thẩm phán - những người thường có kiến thức hạn chế về luật thương mại quốc tế). ICA cũng cho phép các bên lựa chọn và quy định về quy trình và chi phí của việc giải quyết tranh chấp. Tất nhiên là ICA có cả những ưu điểm và nhược điểm. Tuy nhiên, dù có so sánh như thế nào giữa ưu và nhược điểm của phương thức giải quyết tranh chấp này, thì thực tế là ICA đang ngày càng trở nên phổ biến.

Một trong những ưu điểm lớn nhất của phương thức ICA là khả năng thi hành phán quyết trọng tài tại toà án trong nước theo quy định của Công ước New York. Đến thời điểm cuối tháng 12/2017, đã có 157 nước tham gia Công ước này.[26] Trong khi đó, không có một công ước nào với nội dung tương tự liên quan đến việc thi hành bản án của toà án ở nước ngoài, mặc dù Công ước La Haye về quyền tài phán và thi hành bản án của toà án nước ngoài đang được soạn thảo.

Một ưu điểm lớn khác của phương thức ICA là phương thức này thậm chí nhận được sự ủng hộ của cả các hệ thống pháp luật không thiện chí lắm với thoả thuận trọng tài của các bên tranh chấp. *Ví dụ*: ở Hoa Kỳ, Luật trọng tài liên bang quy định mức độ kiểm soát pháp lí - quy định rất xa lạ với tranh tụng thương mại quốc tế. Rất nhiều nước khác cũng có những quy định kiểu này, do đó tránh được những vấn đề phát

[26] UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, truy cập ngày 25/12/2017.

sinh từ 'thẩm quyền xét xử dựa trên vấn đề' hay 'thẩm quyền xét xử đối với cá nhân' người tham gia tranh chấp, hay vấn đề 'toà án không thích hợp' ('forum non conveniens') (*xem* nội dung dưới đây), và những vấn đề tương tự. Trọng tài quốc tế đã trở thành một phương thức hữu hiệu để giải quyết tranh chấp thương mại quốc tế.[27] Các nước trên thế giới đều đang tích cực hiện đại hoá pháp luật quốc gia mình về trọng tài để bắt kịp xu thế này. Những trung tâm trọng tài mới cũng đang được thành lập và nhanh chóng tham gia vào giải quyết tranh chấp. Luật và thực tiễn về ICA cũng đã là môn học được giảng dạy tại nhiều trường đại học trên thế giới.

ICA thực chất là phương thức giải quyết tranh chấp riêng tư, được các bên tranh chấp lựa chọn như là cách thức để chấm dứt xung đột giữa họ mà không cần viện đến toà án. Phương thức trọng tài được thực hành tại nhiều nước với những đặc tính về pháp lí và văn hoá khác nhau, và dưới các hình thức vô cùng đa dạng, không theo quy chuẩn cụ thể nào. ICA mang lại cho các bên quyền tự định đoạt và sự kiểm soát đối với quá trình giải quyết tranh chấp, nhằm định đoạt tranh chấp của chính họ. Các bên có thể quyết định theo đó tố tụng trọng tài sẽ được điều hành bởi một trọng tài 'thiết chế', hoặc trọng tài 'vụ việc' ('*ad hoc*'). Luật áp dụng có thể là quy tắc của một tổ chức trọng tài thiết chế nào đó hoặc luật được các bên lựa chọn. Ngoài việc được quyền chỉ định trọng tài viên và luật áp dụng, các bên có thể lựa chọn địa điểm và ngôn ngữ sử dụng trong tố tụng trọng tài. Điều này có ý nghĩa rất quan trọng trong giải quyết tranh chấp thương mại quốc tế, vì mỗi bên đều không muốn mình sẽ là đối tượng của quyền tài phán của hệ thống toà án của nước bên kia. Mỗi bên đều lo ngại về nguy cơ có sự thiên vị của toà án dành cho công dân hoặc pháp nhân của nước có toà án đó. Trong khi đó, trọng tài đem đến cho các bên tranh chấp một cơ quan tài phán trung lập hơn, nơi mà mỗi bên có thể tin tưởng rằng họ sẽ được phán xử công bằng. Hơn thế nữa, tính linh hoạt của trọng tài trong việc tạo ra quy trình giải quyết tranh chấp phù hợp với yêu cầu của các bên tranh chấp, và cơ hội lựa chọn trọng tài viên là người có kiến thức về vấn đề đang tranh chấp, làm cho phương thức trọng tài trở nên đặc biệt hấp dẫn. Ngày nay, ICA đã trở thành phương thức giải quyết tranh chấp chủ đạo đối với hầu hết các giao dịch thương mại quốc tế.

Phán quyết trọng tài nói chung thường dễ được công nhận và cho thi hành trên bình diện quốc tế hơn là bản án của một toà án quốc

[27] Alan Redfern và các tác giả khác, *Law and Practice of International Commercial Arbitration*, Thomson, Sweet and Maxwell, 4th edn., (2004).

gia. Theo Công ước New York, các toà án có nghĩa vụ phải thi hành phán quyết trọng tài, trừ khi có những sai phạm nghiêm trọng về thủ tục giải quyết bằng phương thức trọng tài, hoặc những vấn đề liên quan đến tính trung thực của quá trình giải quyết tranh chấp bằng phương thức trọng tài. Công ước New York ủng hộ tối đa việc thi hành phán quyết trọng tài, do vậy hầu hết các toà án sẽ rất hạn chế giải thích theo hướng phủ nhận việc thi hành này, từ đó dẫn đến thực tế là hầu hết các phán quyết trọng tài đều được thi hành.

Những ưu thế khác của trọng tài bao gồm khả năng giữ bí mật về quy trình và kết quả giải quyết tranh chấp. Tính bí mật được quy định tại một số Quy tắc của các thiết chế và có thể mang tính ràng buộc (đối với cả những nhân chứng và các chuyên gia) theo thoả thuận của các bên, theo đó những cá nhân này bị ràng buộc bởi một thoả thuận về không tiết lộ thông tin. Rất nhiều doanh nghiệp muốn sử dụng các quy trình kín, bởi vì họ không muốn thông tin bị rò rỉ về doanh nghiệp và những hoạt động kinh doanh của mình, hoặc loại tranh chấp nào họ đang phải giải quyết, và họ cũng không muốn công khai một phán quyết bất lợi trong giải quyết tranh chấp.

Các bên còn muốn chọn trọng tài viên là những người có kiến thức chuyên môn về vấn đề đang tranh chấp. Thêm vào đó, họ hài lòng với thực tế rằng giải quyết tranh chấp bằng phương thức trọng tài sẽ thực hiện ít hoạt động điều tra hơn, do đó việc giải quyết tranh chấp sẽ nhanh hơn so với quy trình tranh tụng trước toà án. Chính việc ít cơ hội cho phúc thẩm trong phương thức trọng tài cũng là một điểm hấp dẫn của phương thức này. Đối với các doanh nhân, việc chấm dứt tranh chấp có ý nghĩa to lớn, vì như thế họ mới có thể tiếp tục công việc kinh doanh của mình bình thường.

Một vài nước Tây Âu từ lâu đã quy định trong pháp luật quốc gia của mình về phương thức trọng tài (*ví dụ*, Luật trọng tài của Anh Quốc năm 1889; Luật trọng tài của Anh Quốc năm 1950 sửa đổi bởi Luật trọng tài năm 1979); Toà án trọng tài London, một tổ chức trọng tài tư nhân, đã được thiết lập từ năm 1892. Các điều khoản về trọng tài trong hợp đồng thương mại quốc tế cũng đã được ưa chuộng tại Trung Quốc, thông qua Uỷ ban trọng tài kinh tế và thương mại quốc tế Trung Quốc ('CIETAC'), hoặc Uỷ ban trọng tài hàng hải Trung Quốc ('MAC'). Xét theo khía cạnh số lượng vụ việc, CIETAC hiện là trung tâm trọng tài lớn nhất thế giới. Ngoài ra, Uỷ ban trọng tài thương mại Nhật Bản cũng đã vận hành từ năm 1953. Hầu hết các nước châu Mỹ La tinh, châu Á và châu Phi đều có luật trọng tài và các trung tâm trọng tài thương mại quốc tế hoặc toà án thương mại quốc tế.

B. *Nhược điểm của phương thức trọng tài*

Những ưu thế của trọng tài, nếu nhìn theo một góc độ khác, thì cũng có thể bị coi là những nhược điểm ở mức độ nhất định. *Ví dụ*, thông thường, việc ít hoạt động điều tra có thể được coi như một lợi thế. Tuy nhiên, một số tranh chấp cụ thể đòi hỏi phải điều tra kĩ, như tranh chấp về chống độc quyền, loại tranh chấp đang được giải quyết ngày càng nhiều bằng phương thức trọng tài. Những tranh chấp loại này thường đòi hỏi bên khởi kiện phải chứng minh được vi phạm, mà vi phạm chỉ có thể được chứng minh, nếu bên đó được quyền tiếp cận mạnh mẽ những tài liệu thuộc sự kiểm soát của bên bị đơn. Do vậy, việc ít hoạt động điều tra đối với dạng tranh chấp này đồng nghĩa với ít cơ hội cho bên nguyên đơn đáp ứng yêu cầu về chứng cứ.

Hơn thế nữa, việc thiếu quyền phúc thẩm có thể là lợi thế theo tiêu chí mong muốn kết thúc sớm tranh chấp, nhưng nếu trọng tài viên ra phán quyết rõ ràng là sai, so với pháp luật hoặc theo thực tế, thì việc thiếu quyền phúc thẩm sẽ là một điều thất vọng đối với một bên tranh chấp. Một nhược điểm khác là: trên thực tế, trọng tài viên không có quyền cưỡng chế thi hành phán quyết trọng tài. Họ không có quyền cưỡng chế ai đó phải làm một việc, cũng không có quyền trừng phạt người đó nếu người đó không làm. *Ví dụ*, toà án có thể áp đặt một lệnh phạt vì tội vi phạm nội quy của toà án, nếu ai đó không chấp hành lệnh của toà. Ngược lại, trọng tài viên không thể áp đặt lệnh phạt, mặc dù họ có thể đưa ra suy luận bất lợi, nếu một bên không tuân thủ lệnh của trọng tài. Hơn nữa, đối với những đối tượng không phải là một bên tranh chấp, trọng tài viên thường không có bất cứ quyền gì để cưỡng chế họ. Do vậy, nhiều khi trọng tài, hoặc các bên, phải cố gắng đạt được sự hỗ trợ từ toà án (*ví dụ*: trong trường hợp cố gắng đạt được việc thi hành một biện pháp khẩn cấp tạm thời),[28] khi mà sự cưỡng chế là cần thiết để đảm bảo sự tuân thủ các mệnh lệnh của toà án.

Trong các tranh chấp có nhiều bên tham gia, một tổ chức trọng tài thường không có quyền triệu tập tất cả các bên, mặc dù tất cả các bên đều liên quan đến một nội dung nào đó của cùng một vụ tranh chấp. Bởi vì quyền hạn của trọng tài chỉ xuất phát từ sự thoả thuận giữa các bên, nếu một bên không đồng ý tham gia quá trình trọng tài thì thông thường họ không bị bắt buộc phải tham gia vào quá trình này. Một tổ chức trọng tài thường không có quyền gộp những đơn kiện tương tự

[28] Các biện pháp khẩn cấp tạm thời nói chung có thể được hiểu là các 'phán quyết' hoặc 'lệnh' của toà án mà các bên cố gắng đạt được, nhằm bảo vệ quyền của họ không bị xâm hại trong quá trình giải quyết tranh chấp bằng phương thức trọng tài; *xem*: Gary B. Born, *International Commercial Arbitration* (2009), tr. 194.

nhau của những bên khác nhau, mặc dù điều đó có thể là thuận tiện hơn cho tất cả các bên liên quan.

Cuối cùng, có thể coi là một nhược điểm của phương thức trọng tài, đó là việc giới trọng tài viên quốc tế hiện nay không đa dạng về giới và dân tộc. Mặc dù một vài thiết chế và một số thành viên đơn lẻ trong giới trọng tài đã cố gắng mở rộng sự đa dạng này, nhưng về tổng thể thì vẫn chưa có nhiều thay đổi tích cực.

C. *Các hình thức trọng tài thương mại quốc tế*

Có hai hình thức: ICA thiết chế và ICA 'vụ việc' ('*ad hoc*'). Trong trọng tài '*ad hoc*', các bên lựa chọn trọng tài viên và quy chế trọng tài. Cách thức thông thường là các bên liên quan lựa chọn một trọng tài viên, tiếp đó, các trọng tài viên này sẽ chọn ra một trọng tài viên thứ ba. Hội đồng trọng tài 'vụ việc' sẽ tự lựa chọn quy tắc thủ tục trọng tài (*ví dụ*, Quy tắc trọng tài UNCITRAL). Trọng tài 'vụ việc' có thể được thoả thuận trước, hoặc sau khi tranh chấp phát sinh. Trọng tài 'vụ việc' giả định trước về sự thiện chí và tính linh hoạt của các bên. Nó có thể giúp giải quyết tranh chấp nhanh hơn và giảm chi phí trọng tài hơn so với trọng tài thiết chế.

Một trong những sự lựa chọn mà các bên cần phaỉ thực hiện khi họ quyết định sử dụng trọng tài, đó là họ muốn sử dụng trọng tài thiết chế hay trọng tài vụ việc.[29] Sự lựa chọn này có những điểm lợi và bất lợi. Đối với trọng tài thiết chế, điểm lợi đó là tổ chức trọng tài thực hiện các chức năng hành chính quan trọng. Đó là rõ ràng việc chỉ định các trọng tài viên sẽ được thực hiện đúng theo lộ trình thời gian, tiến trình trọng tài sẽ diễn ra một cách hợp lý, phí trọng tài viên và chi phí trọng tài sẽ được thanh toán trước. Đối với các trọng tài viên, điểm lợi là họ sẽ không phải giải quyết vấn đề phí trọng tài viên, bởi vì vấn đề này sẽ do tổ chức trọng tài giải quyết. Hơn nữa, các quy tắc trọng tài của một tổ chức trọng tài thiết chế là những quy định đã được kiểm nghiệm trong thực tiễn và thường là tỏ ra có hiệu quả khi áp dụng đối với đa số các trường hợp phát sinh. Một lợi thế khác nữa đó là phán quyết được tuyên dưới danh nghĩa của một tổ chức trọng tài thiết chế có uy tín sẽ có tính thuyết phục hơn đối với cộng đồng quốc tế và các toà án. Điều này có thể thuyết phục bên thua không thách thức phán quyết.

Đối với trọng tài vụ việc, thì không có một tổ chức nào để quản lý tiến trình trọng tài. Một lợi thế đó là các bên không phải trả phí và chi phí như trường hợp sử dụng trọng tài thiết chế. Các bên cũng sẽ có cơ hội tự soạn thảo quy tắc trọng tài cho phù hợp với tính chất đặc thù của tranh chấp. Họ có thể soạn thảo quy tắc riêng, hoặc có thể sử dụng Quy tắc Trọng tài UNCITRAL, vốn dĩ thường được sử dụng trong các vụ trọng tài vụ việc. (UNCITRAL không phải là một tổ chức quản lý tiến trình trọng tài và cũng không phải là một thiết chế trọng tài). Trọng tài vụ việc đôi khi rất hữu ích khi một bên là quốc gia, bởi vì những trường hợp này đòi hỏi một sự linh hoạt nhiều hơn trong tiến trình tố tụng. Trọng tài vụ việc cũng có thể quyết định rằng không có bên nào là bị đơn, bởi vì cả ha bên đều có đệ trình kiện chống lại bên kia. Khi đó mỗi bên đơn giản chỉ có nghĩa vụ đưa ra chứng cứ để bảo vệ cho đệ trình kiện của mình chống lại bên kia. Trọng tài vụ việc tuy nhiên sẽ có bất lợi khi có một bên cố tình ngăn cản tiến trình trọng tài. Trong tình huống này, do không có tổ chức trọng tài quản lý, các bên có thể tìm kiếm sự trợ giúp của toà án để thúc đẩy tiến trình trọng tài.

Trong trọng tài thiết chế, cần phải lựa chọn một trung tâm trọng tài cụ thể và quy tắc tố tụng trọng tài của trung tâm đó. Trọng tài thiết chế là trọng tài chuyên nghiệp, chất lượng cao mà đôi khi trọng tài 'vụ việc' không thể có. Phán quyết trọng tài được đưa ra bởi trung tâm trọng tài (bao gồm cả phán quyết có tính mặc định) dường như là có nhiều khả năng được công nhận tại toà án hơn, nếu việc thực thi phán quyết đó là cần thiết. Rất nhiều trung tâm trọng tài hiện nay cung cấp dịch vụ 'giải quyết nhanh' hoặc 'rút gọn' cho cộng đồng kinh doanh quốc tế. Một trong những việc các bên phải làm, khi họ lựa chọn phương thức giải quyết tranh chấp bằng trọng tài, là lựa chọn hình thức giải quyết vụ việc của mình bằng trọng tài thiết chế hay trọng tài '*ad hoc*'.[30]

1. Trọng tài thiết chế

Đối với trọng tài thiết chế, ưu điểm của nó là thực hiện các chức năng hành chính quan trọng. Những chức năng này đảm bảo cho các trọng tài viên được chỉ định một cách kịp thời, đảm bảo cho hoạt động trọng tài diễn biến hợp lí và đảm bảo các khoản lệ phí và chi phí trọng tài được chi trả trước. Xét từ quan điểm của trọng tài viên, đây là điểm thuận lợi vì họ không phải làm việc với các bên về các khoản tiền thù lao, vì vấn đề này đã được trung tâm trọng tài giải quyết. Hơn nữa, quy tắc trọng tài của trung tâm trọng tài đã được thời gian thử thách và khá hiệu quả trong

[29] Trọng tài vụ việc không phải là sự lựa chọn tại Trung Quốc. *Xem* Jingzhou Tao and Clarisse von Wunschheim, 'Articles 16 and 18 of the PRC Arbitration Law - The Great Wall of China for Foreign Arbitration Institutions', *23 Arb. Int.* 309, 324 (2007).

[30] Chú ý là trọng tài '*ad hoc*' không được coi là một lựa chọn ở Trung Quốc, *xem*: Jingzhou Tao và Clarisse von Wunschheim, 'Articles 16 and 18 of the PRC Arbitration Law - The Great Wall of China for Foreign Arbitration Institutions,' 23 *Arb. Int. 309* (2007), tr. 324.

việc giải quyết các trường hợp phát sinh. Một lợi thế nữa là nếu phán quyết trọng tài được đưa ra bởi một trung tâm trọng tài nổi tiếng, thì sẽ có uy tín đối với cộng đồng quốc tế và toà án. Điều này có thể khuyến khích bên thua kiện thừa nhận phán quyết của trọng tài.

(a) Toà trọng tài quốc tế của ICC

Toà trọng tài quốc tế của ICC là một tổ chức trọng tài nổi tiếng và uy tín nhất. Toà trọng tài quốc tế của ICC không phải là toà án theo nghĩa thông thường của thuật ngữ, cũng không phải là một phần của hệ thống tư pháp. Toà trọng tài chính xác là cơ quan hành chính chịu trách nhiệm giám sát quy trình tố tụng trọng tài. Các thành viên của Toà trọng tài bao gồm các chuyên gia pháp luật từ khắp nơi trên thế giới. Ngoài ra, Toà trọng tài có một Ban thư kí với đội ngũ nhân sự hành chính chuyên nghiệp và thường trực. Toà trọng tài của ICC khác với các tổ chức trọng tài khác là các phán quyết đều được xem xét kĩ lưỡng, theo đó các phán quyết đó sẽ không được đưa ra cho các bên cho đến khi được Toà trọng tài xem xét lại.

Có một số đặc điểm khác biệt của ICC với tư cách là một tổ chức trọng tài. *Thứ nhất*, mọi phán quyết trọng tài của ICC sẽ được xem xét kỹ lưỡng bởi Toà trọng tài của ICC, có nghĩa là phán quyết sẽ chưa được chuyển cho các bên khi mà nó chưa được Toà trọng tài này xem xét. Trong khi Toà trọng tài này không có quyền thay đổi nội dung phán quyết, nhưng nếu Toà thấy có bất kỳ điều gì đó không ổn, Toà sẽ chuyển nhận xét của mình cho các trọng tài viên. *Thứ hai*, một trong những yêu cầu của ICC trước khi bắt đầu tiến trình trọng tài, đó là các bên được yêu cầu và điền và ký vào một tài liệu có tên gọi là 'Điều khoản tham chiếu' ('Terms of Reference'), trong đó sẽ liệt kê tất cả các vấn đề của tranh chấp, tất cả các bên, địa điểm trọng tài, quy tắc, và đôi khi là các thông tin khác liên quan đến việc thu thập chứng cứ hay tiến trình tố tụng. Điều này sẽ bảo đảm rằng tất cả các bên sẽ biết ngay từ khi khởi đầu về các thành tố của trọng tài sẽ như thế nào. Ngoài ra, những người tranh tụng tại ICC cũng thích rằng những người quản lý vụ kiện của họ, thành viên của Ban thư ký của ICC, là các luật sư. Mặc dù trụ sở của Toà trọng tài quốc tế ICC là Paris, nhưng tổ chức này quản lý các vụ kiện trọng tài trên toàn thế giới.

(b) Trung tâm giải quyết tranh chấp quốc tế ('ICDR') của AAA

Số lượng vụ việc giải quyết tranh chấp bằng trọng tài tại ICDR tăng hàng năm. Số liệu về giải quyết tranh chấp trong 10 năm, từ 1993 đến 2003, tăng ba lần, từ 206 lên 646 vụ việc. Hơn nữa, ICDR đã mở văn phòng ở nhiều nước khác.

(c) Toà trọng tài quốc tế London ('LCIA')

Đây cũng không phải là cơ quan toà án theo nghĩa pháp lí, mà đúng hơn là cơ quan chịu trách nhiệm giám sát tổ chức trọng tài. Toà LCIA là cơ quan có thẩm quyền áp dụng các Quy tắc của LCIA. Nó cũng chịu trách nhiệm chỉ định hội đồng trọng tài, giải quyết các yêu cầu phản đối trọng tài viên và kiểm soát chi phí trọng tài. LCIA là tổ chức trọng tài quốc tế lâu đời nhất được thành lập từ cuối thế kỉ XIX. Người đứng đầu Ban thư kí của LCIA là một trợ lí hành chính và chịu trách nhiệm về các công việc hành chính, phục vụ cho hoạt động giải quyết tranh chấp của LCIA. Mặc dù LCIA có trụ sở chính ở London, nhưng tổ chức trọng tài sẽ chịu trách nhiệm giải quyết các vụ việc và áp dụng quy chế trọng tài của mình tại bất kì địa điểm giải quyết tranh chấp nào do các bên lựa chọn.

(d) Các tổ chức trọng tài khác

Tổ chức trọng tài của Phòng thương mại Stockholm ('SCC') đã trở nên đặc biệt nổi tiếng về giải quyết tranh chấp bằng phương thức trọng tài tại Đông Âu và Tây Âu; Uỷ ban trọng tài kinh tế và thương mại quốc tế Trung Quốc ('CIETAC') đã thông qua Bản quy tắc tố tụng trọng tài mới năm 2005; Trung tâm trọng tài và trung gian/hoà giải của WIPO có Quy tắc trung gian/hoà giải và trọng tài rất thích hợp trong lĩnh vực công nghệ, giải trí và các tranh chấp khác liên quan đến IPRs. Trọng tài quốc tế được đảm nhận bởi các cơ quan trọng tài tại Hong Kong, Thụy Sỹ, Viên, Cairo, Đức, Venezuela, Mexico và rất nhiều nước khác. Ngoài ra, còn có một số tổ chức trọng tài chuyên ngành như Hiệp hội thương mại ngũ cốc và thức ăn gia súc ('GAFTA'), Hiệp hội trọng tài hàng hải London ('LMAA'), Hiệp hội về dầu, hạt giống và chất béo liên bang ('FIOFA'), và Tổ chức trao đổi kim loại London ('LME'). Tất cả các trung tâm trọng tài này đều có các quy tắc hoạt động và thủ tục tố tụng trọng tài dựa trên cơ sở hoạt động của ngành kinh tế đó để giải quyết tranh chấp cho các thành viên của mình.[31]

2. Quy tắc trọng tài UNCITRAL

Quy tắc trọng tài UNCITRAL được phát hành năm 1976 sau 10 năm nghiên cứu. Quy tắc trọng tài UNCITRAL dự kiến sẽ được chấp nhận tại tất cả hệ thống pháp luật của tất cả các nước trên thế giới. Các DCs

[31] Margret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, (2008), tr. 13-14.

nhanh chóng ủng hộ Quy tắc trọng tài UNCITRAL, vì các nước này đang sử dụng nó trong quá trình soạn thảo quy tắc trọng tài, và cũng bởi vì UNCITRAL là diễn đàn để phát triển các quy tắc trọng tài mà trong đó các mối quan tâm của họ được lắng nghe. Viện trọng tài của Phòng thương mại Stockholm đã và đang sẵn sàng hoạt động theo các quy tắc UNCITRAL, giống như Toà trọng tài London. Toà trọng tài giải quyết yêu cầu bồi thường Iran - Hoa Kỳ đã và đang sử dụng Quy tắc UNCITRAL.

Quy tắc UNCITRAL quy định rằng việc chỉ định trọng tài viên do các bên lựa chọn, hoặc nếu các bên không đi đến thoả thuận nào về nội dung này, thì việc lựa chọn sẽ được trao cho Tổng thư kí của Toà trọng tài thường trực La Haye (bao gồm các cá nhân luôn sẵn sàng làm trọng tài viên, nếu được yêu cầu). Quy tắc UNCITRAL cũng bao gồm quy định về yêu cầu thông báo, đại diện của các bên, phản đối trọng tài viên, chứng cứ, các phiên xét xử, địa điểm giải quyết tranh chấp, ngôn ngữ, các tuyên bố về yêu sách và biện hộ, các yêu cầu giải quyết về thẩm quyền của trọng tài viên, các biện pháp khẩn cấp tạm thời, các biện pháp khắc phục vi phạm, chuyên gia, các quy định về vắng mặt trong tố tụng, quy tắc về miễn trừ, hình thức và tác động của phán quyết trọng tài, luật áp dụng, giải quyết tranh chấp, việc giải thích các phán quyết và chi phí trọng tài.

Cùng với Quy tắc trọng tài mẫu 1976, UNCITRAL đã ban hành Luật mẫu về Trọng tài thương mại quốc tế 1985. Luật mẫu đã được áp dụng tại Australia, Hong Kong và Scotland. Nó cũng được thông qua và trở thành luật nội địa của một số bang của Hoa Kỳ, bao gồm California, Florida, Bắc Carolina, Connecticut, Georgia, Ohio, Oregon và Texas.

Theo Luật mẫu của UNCITRAL, các bên có thể đệ trình giải quyết tranh chấp và yêu cầu một trọng tài 'vụ việc' để giải quyết một tranh chấp cụ thể, nhưng điều đó gần như đã được xác định từ trước khi xảy ra tranh chấp, theo điều khoản trọng tài trong hợp đồng. Theo Điều 8 của Luật mẫu, một thoả thuận trọng tài phải có tính thực thi cụ thể. UNCITRAL giới thiệu điều khoản trọng tài mẫu sau đây: 'Bất kì tranh chấp, tranh cãi hoặc khiếu nại nào phát sinh từ hoặc liên quan tới hợp đồng này, hoặc vi phạm hợp đồng hoặc chấm dứt hợp đồng hoặc hợp đồng vô hiệu, sẽ phải được giải quyết bằng trọng tài theo các Quy tắc trọng tài UNCITRAL còn hiệu lực thi hành'.

3. Quy tắc và điều khoản trọng tài ICC và LCIA

Rất nhiều các điều khoản trọng tài sử dụng Quy tắc của Toà trọng tài ICC tại Pa-ri. ICC giới thiệu điều khoản mẫu như sau: 'Tất cả các tranh chấp phát sinh có liên quan đến hợp đồng này sẽ được giải quyết theo Quy tắc về hoà giải và trọng tài của Phòng thương mại quốc tế bởi một hoặc nhiều trọng tài viên được chỉ định theo Quy tắc nói trên.'

Các bên mong muốn giải quyết bất kì tranh chấp nào ở Toà trọng tài London đều có thể sử dụng điều khoản mẫu sau:

> Giá trị, giao kết, và thực hiện hợp đồng (thoả thuận) này sẽ được điều chỉnh bởi pháp luật của Anh; và bất kì tranh chấp nào phát sinh từ hoặc có liên quan đến hợp đồng (thoả thuận) này, bao gồm cả giá trị, giao kết và thực hiện hợp đồng (thoả thuận) này, sẽ được giải quyết bằng phương thức trọng tài theo Quy tắc của Toà trọng tài London, từ ngày mà theo Quy tắc này, nếu các vấn đề không được Quy tắc này điều chỉnh, thì sẽ được kết hợp áp dụng Quy tắc trọng tài UNCITRAL. Các bên đồng ý rằng bất kì thông báo nào có liên quan tới trọng tài sẽ được tới địa chỉ của các bên đã nêu trong hợp đồng (thoả thuận) này (hoặc sau đó thay đổi bằng văn bản giữa các bên) sẽ được coi là hợp lệ và đầy đủ.

D. *Thi hành các phán quyết của trọng tài theo quy định của Công ước New York*

Công ước New York đã tạo thuận lợi cho việc thi hành các phán quyết của trọng tài nước ngoài ở gần 160 nước. Công ước New York yêu cầu toà án ở nước thành viên có nghĩa vụ công nhận và cho thi hành các điều khoản trọng tài và thoả thuận trọng tài như là giải pháp cho tranh chấp thương mại quốc tế. Trong trường hợp toà án thừa nhận rằng các bên có điều khoản hoặc thoả thuận trọng tài, thì toà án 'phải… [đ]ưa vụ việc giải quyết tại trọng tài, trừ trường hợp thoả thuận trọng tài đó vô hiệu, thoả thuận trọng tài không hoặc không thể thực hiện được'. Công ước New York cũng cam kết rằng toà án của các nước thành viên phải công nhận và cho thi hành (theo luật tố tụng của nước đó) phán quyết của trọng tài nước ngoài theo điều khoản hoặc thoả thuận trọng tài, cũng như quy định các căn cứ nhất định cho việc từ chối công nhận và cho thi hành các phán quyết của trọng tài nước ngoài. Theo Công ước New York, các căn cứ không công nhận phán quyết của trọng tài nước ngoài bao gồm:

- 'Chiếu theo luật áp dụng' của một bên, thì thoả thuận về trọng tài là vô hiệu hoặc không có thoả thuận trọng tài;

- Thiếu thông báo kịp thời về quá trình tố tụng trọng tài, chỉ định trọng tài viên và các lí do hợp lí khác để từ chối cơ hội thoả đáng trình bày lời biện hộ;

- Phán quyết trọng tài không nằm trong điều khoản mà các bên đưa ra giải quyết bằng phương thức trọng tài; hoặc quyết định về những vấn đề ngoài phạm vi của nội dung đề nghị trọng tài giải quyết;

- Thành phần hội đồng trọng tài không phù hợp với thoả thuận trọng tài của các bên hoặc luật áp dụng; và

- Theo luật áp dụng, phán quyết của trọng tài không phải là chung thẩm.

Ngoài những căn cứ nêu trên, việc công nhận và cho thi hành phán quyết của trọng tài nước ngoài cũng có thể bị từ chối, nếu phán quyết đó trái với chính sách công tại nước được yêu cầu thi hành phán quyết; hoặc nếu nội dung vụ tranh chấp không thể giải quyết được bằng phương thức trọng tài theo luật của nước đó. Toà án ở Hoa Kỳ đưa ra quan điểm theo đó 'sự giới hạn về chính sách công theo Công ước New York được giải thích theo nghĩa hẹp [và] chỉ được áp dụng khi việc thi hành phán quyết trọng tài đó vi phạm khái niệm gần như cơ bản của pháp luật của bang có toà án về đạo đức và công lí'. Trong trường hợp không có sự vi phạm nêu trên, thì sự viện dẫn những giới hạn khác của Công ước New York để không áp dụng các quy định đó, sẽ bị soi xét theo đúng luật tố tụng. Việc Công ước New York có được áp dụng hay không là tùy thuộc vào nơi mà phán quyết trọng tài đã hoặc sẽ được đưa ra, chứ không phụ thuộc vào quốc tịch của các bên tranh chấp.

Thoả thuận trọng tài, theo truyền thống được gọi là thoả hiệp, tồn tại dưới rất nhiều hình thức khác nhau. Nhiều trung tâm trọng tài thường đưa ra điều khoản mẫu để đưa vào các thỏa thuận kinh doanh. Sự tồn tại và giá trị pháp lí của một thoả thuận trọng tài phải được chứng minh hoặc quyết định theo phương thức tranh tụng trước toà án, trước khi diễn ra tố tụng trọng tài. Điều II Công ước New York yêu cầu các nước phải công nhận thoả thuận trọng tài bằng văn bản có chữ kí của các bên, 'hoặc được xác lập qua trao đổi giữa các bên bằng thư từ hoặc điện tín'. Hầu hết các cơ quan tài phán đều chấp nhận nội dung trao đổi của các bên bằng fax, thư điện tử hoặc các hình thức tương tự khác có chứa đựng thoả thuận trọng tài. Tuy nhiên, điều khoản trọng tài trong các đơn mua hàng không có chữ kí sẽ không được coi là thoả thuận

trọng tài bằng văn bản. Việc trì hoãn tiến hành các thủ tục bắt đầu tố tụng trọng tài hoặc sự viện dẫn các quyền tố tụng tại toà án có thể dẫn đến việc mất quyền giải quyết tranh chấp bằng phương thức trọng tài.

Trong trường hợp các phán quyết trọng tài vô hiệu, toà án tại nơi được đề nghị thi hành phán quyết trọng tài đó thường có quan điểm khác nhau về việc thi hành phán quyết này. Toà án của Pháp đã cho thi hành một phán quyết trọng tài, mà trước đó đã bị vô hiệu, một cách vô lí và gây thiệt hại cho nguyên đơn - người đã thắng trong vụ giải quyết tranh chấp tại trọng tài lần thứ hai (vụ *Hilmarton v. OTV*, [1997], Rev. Arb. 376). Một toà án cấp liên bang ở Hoa Kỳ đã từ chối chấp nhận việc tuyên bố vô hiệu một cách hợp pháp của một toà án Hy Lạp đối với phán quyết trọng tài, bởi vì các bên tranh chấp đã thoả thuận không phúc thẩm phán quyết trọng tài (vụ *Chromalloy Aeroservices v. Egypt,* 939 F. Supp. 907 (DDC [1996]). Toà án tối cao Hoa Kỳ đã tái khẳng định rằng trọng tài viên có thẩm quyền quyết định thẩm quyền xét xử của mình. Sự im lặng hoặc không rõ ràng về sự tham gia của trọng tài viên cần phải được xem xét theo quy tắc tố tụng toà án. Các toà án Hoa Kỳ cũng có ý kiến khác nhau về việc các bên tranh chấp có thể thay đổi phạm vi xem xét lại của toà án đối với các phán quyết của trọng tài hay không.[32]

5. Tranh tụng thương mại quốc tế trước toà án

A. *Giới thiệu chung*

Trọng tài thường được sử dụng trong các hợp đồng thương mại. Các hiệp định thương mại đã xây dựng những quy trình riêng cho giải quyết tranh chấp, đặc biệt là quy trình thành lập hội đồng giải quyết tranh chấp thường được kết hợp với các phương thức tranh tụng trước toà án và trọng tài. Tuy nhiên, nhiều tranh chấp thương mại quốc tế được giải quyết bằng phương thức tranh tụng truyền thống.

Nếu so sánh với thương lượng, hoà giải và thậm chí với trọng tài, thì tranh tụng trước toà án là quy trình giải quyết tranh chấp có tính thể thức và tính tổ chức cao. Với các quy định và thủ tục đã được thiết lập rất chặt chẽ, toà án giải quyết hầu hết mọi chi tiết nhỏ của quá trình tranh tụng, từ thời điểm bắt đầu vụ kiện cho đến khi có bản án cuối cùng và thi hành án. Điều này có ưu điểm là làm cho các khía cạnh về thủ tục tố tụng của vụ việc có thể được dự đoán một cách hợp lí. Các bên tham gia đều

[32] Vụ *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F. 3d 987 (9th Cir. [2003]).

ý thức được các giai đoạn cơ bản của quy trình tố tụng, các bước trong từng giai đoạn tố tụng và thời hạn tương ứng, kể từ khi vụ kiện được đưa ra toà hoặc ngay sau đó.

Tranh tụng từ trước đến nay nhấn mạnh vào thủ tục và quy trình, yêu cầu tuân thủ nghiêm ngặt các quy định về chứng cứ, cơ hội để kháng cáo đối với các bản án không có lợi và các đặc điểm khác mà thường làm cho các vụ kiện bị kéo dài và thêm phức tạp. Những người ủng hộ ADR thường phàn nàn rằng tranh tụng trước toà án sẽ mất nhiều thời gian, gây tốn kém chi phí hơn các phương thức giải quyết tranh chấp khác. Tuy vậy, do trọng tài có thể được coi là có tính tổ chức và thể thức tương đương với phương thức tranh tụng trước toà án, nên không chắc chắn rằng giải quyết tranh chấp bằng trọng tài sẽ nhanh hơn với chi phí thấp hơn.[33] Trên thực tế, một số bên tranh chấp lại mong muốn một quá trình giải quyết tranh chấp tốn kém và mất thời gian hơn, bởi vì họ có nguồn lực tài chính tốt hơn, do đó ít nhu cầu cần giải quyết vụ việc nhanh chóng hơn so với bên tranh chấp còn lại.

Có thể nói một cách chính xác là phương thức tranh tụng trước toà án thường bao gồm nhiều thủ tục phức tạp, các bên tranh tụng thường bị lôi kéo vào các trò chơi chiến thuật để trì hoãn các hoạt động tố tụng, buộc đối thủ của họ phải trả những chi phí không cần thiết hoặc chỉ đạt được các lợi ích không liên quan đến vụ án. Một thẩm phán có thể áp đặt mức phạt đối với bên lạm dụng quy trình tố tụng, tuy nhiên, toà án đang quá tải và không thể kiểm soát tất cả các ứng xử đáng nghi ngờ.[34]

B. *Các lợi thế của phương thức tranh tụng trước toà án*

Một trong những lợi thế của phương thức tranh tụng trước toà án là: khi người tham gia tranh chấp không còn muốn thoả thuận hoặc hợp tác với bên kia, thì họ không cần phải cố gắng thỏa thuận hoặc hợp tác nữa. Một toà án độc lập sẽ xem xét các tranh chấp và đưa ra quyết định có giá trị pháp lí bắt buộc với các bên, cho dù một hoặc các bên có liên quan trong tranh chấp không hợp tác. Nếu một bên không sẵn sàng hợp tác giải quyết tranh chấp với bên kia, thì phương thức tranh tụng sẽ đảm bảo cơ hội để đền bù các quyền lợi đã được công nhận một cách hợp pháp. Tất nhiên, có nhiều trường hợp theo đó các bên, sau khi đệ trình vụ việc lên toà án để giải quyết, có thể phải thất vọng về kết quả giải quyết vụ việc.

Thẩm phán có thẩm quyền quyết định các nội dung quan trọng trong quy trình tố tụng. Toà án có thể buộc một bên tiết lộ thông tin mặc dù bên này không muốn cung cấp, ấn định ngày xét xử và ngày điều tra trước xét xử không theo mong muốn của các bên, cũng như áp đặt các trách nhiệm khác mà một hoặc nhiều bên tranh tụng phản đối. Cần nhấn mạnh thêm rằng một trong những lợi thế của việc bắt buộc bên thứ ba tham gia và quyền ra quyết định mang tính ràng buộc đối với tất cả các bên khiến cho quá trình giải quyết này sẽ vẫn tiến triển, bất chấp việc các bên tranh tụng không muốn hoặc không sẵn sàng hợp tác. Một bên có khả năng làm cho bên kia phải tuân theo ý chí của mình, nếu họ có thể thuyết phục toà án theo quan điểm của họ đối với các vấn đề về quy trình thủ tục mà hai bên có ý kiến khác biệt. Ngược lại, đối thủ của một bên tranh chấp có thể thuyết phục toà án áp đặt các yêu cầu mà bên kia không mong muốn.

Một trong những ưu điểm rõ ràng của tranh tụng trước toà án là khả năng bắt buộc bên kia phải đáp lại khiếu nại của bên khiếu kiện. Không giống như hoà giải, trọng tài và các phương thức ADR khác, hoạt động tranh tụng trước toà án vẫn được tiếp tục, dù có hay không có sự đồng thuận của tất cả các bên. Bên nào chủ định phớt lờ những cáo buộc chống lại mình, thì sẽ phải tự bảo vệ mình trước toà, nếu không thì sẽ phải chịu hậu quả vì đã không làm như vậy. Theo đó, tố tụng tại toà án đảm bảo việc đưa ra giải pháp giải quyết tranh chấp, đảm bảo rằng các yêu cầu của nguyên đơn được giải quyết tại toà án và khiếu kiện đó sẽ được gửi đến toà án đúng thẩm quyền để giải quyết. Tuy nhiên, khi vụ việc được đệ trình đến toà án, thì vụ kiện sẽ mặc nhiên được thúc đẩy theo một hành trình định sẵn của riêng nó. Người bị kiện ban đầu có thể thuyết phục toà án rằng phía bên kia có khả năng phải chịu trách nhiệm pháp lí, hoặc một người không phải là các bên trong tranh chấp có thể thuyết phục toà án rằng họ có lợi ích liên quan tới phán quyết của toà, và do vậy phải được tham gia quá trình tố tụng. Các vụ kiện khác nhau phát sinh từ một sự kiện hoặc một giao dịch không thành công có thể được gộp lại với nhau để cùng xem xét, nhằm hạn chế khả năng đưa ra những quyết định không thống nhất. Nếu xảy ra trường hợp đó, những mệnh lệnh trong vụ kiện không luôn luôn bị coi là gây tác động tiêu cực; tuy nhiên, nó sẽ tác động tới một bên trong vụ kiện. Trong khi đó, nếu tham gia quy trình giải quyết tranh chấp theo phương thức khác, thì những người tham gia thường có quyền kiểm soát lớn hơn (so với

[33] Public Citizen, *The Costs of Arbitration*, http://www.oubliccitizen.org/publications/release.cfm? ID=7173

[34] *Ví dụ: Xem* vụ kiện *Chambers v. NASCO, Inc, 501 U.S. 32,* [1991], tr. 44.

tranh tụng trước toà án) về sự tham gia của các thành viên mới, và bên tranh chấp cùng với luật sư của họ coi đó là một đặc điểm hấp dẫn của các phương thức ADR.

Do quy trình tố tụng có tính thể thức rất nghiêm ngặt và luật áp dụng đối với vụ việc có thể mang nặng tính kĩ thuật, nên rất khó hiểu và khó diễn giải đối với người không phải là luật sư. Các đương sự thường phải thuê luật sư làm đại diện cho họ trong suốt quá trình tố tụng. Những ví dụ về việc luật sư làm phức tạp hoá các vụ kiện và các vấn đề khác là nhiều vô kể. Nguyên tắc điều tra sẽ được các toà án áp dụng cưỡng bức đối với các bên tranh tụng không tự nguyện thi hành, để đảm bảo lượng thông tin pháp lí có liên quan đến vụ tranh chấp sẽ được các bên trao đổi là lớn nhất. Các thông tin hữu ích đối với một bên mà phía bên kia nắm giữ có thể hoặc không thể được trao đổi trong quy trình giải quyết tranh chấp theo phương thức khác. Mặc dù trong quy trình tố tụng trọng tài có quy định về vấn đề tiết lộ thông tin, tuy nhiên việc tiết lộ thông tin có thể bị hạn chế bằng một điều khoản trọng tài mà các bên đã cam kết trước khi phát sinh tranh chấp hoặc bị hạn chế bởi các quy tắc hoạt động của tổ chức trọng tài.

Với các đặc điểm của quy trình tố tụng tại toà án nêu trên, đã làm cho thủ tục tố tụng này trở nên không khoan nhượng đối với các bên tranh tụng, và có thể gia tăng xung đột dẫn đến tranh chấp leo thang trước khi nó được giải quyết. Tố tụng tại toà án, với tư cách là một thiết chế xã hội, đôi khi dẫn đến 'cơ chế đối kháng', trong đó rất nhiều thủ tục thực sự khuyến khích cách ứng xử cạnh tranh hơn là hợp tác. Trong giai đoạn tiền tranh tụng, các bên và luật sư của họ chủ yếu trao đổi về văn bản để trình lên toà án và chuyển giao văn bản cho bên kia bằng thư tín. Với những văn bản này, những hoạt động thu thập chứng cứ, thường là rất phức tạp và tốn kém, sẽ được thu xếp nhằm củng cố quan điểm của bên đó và làm suy yếu lập luận của bên kia. Hầu hết các vụ kiện đều theo thể thức các cuộc tranh luận, trong đó bên tranh tụng nghe phía bên kia trình bày, chủ yếu để thu thập thông tin và nhằm chống lại lập luận của bên kia. Trường hợp các bên tranh chấp không còn mong muốn hợp tác nữa hoặc không kì vọng vào việc hợp tác sau kiện tụng, họ có thể nhất trí với việc quy trình tố tụng cho phép họ đối kháng trực tiếp với nhau. Tuy nhiên, trong trường hợp các bên mong muốn tiếp tục duy trì mối quan hệ hoặc hợp tác kinh doanh, họ sẽ bỏ lỡ cơ hội quan trọng để bắt đầu hướng quan hệ giữa họ theo cách mang tính xây dựng hơn, một khi họ chọn tố tụng trước toà như là phương pháp để tránh mặt nhau. Thậm chí, trong trường hợp các bên dù không mong muốn duy trì mối quan hệ sau khi tranh chấp được giải quyết, thì các mối lo về việc tố tụng có

khả năng tiếp diễn còn lớn hơn nhiều so với mối lo đến từ việc phải giải quyết tranh chấp với một bên khác bằng phương thức thương lượng hoặc hoà giải - quy trình mà tranh chấp thường được giải quyết nhanh hơn nhiều.

Sự công khai tương đối của tố tụng tại toà án là một ưu điểm cho các bên trong việc nâng cao sự quan tâm của dư luận đối với các cáo buộc và quan điểm của họ. Tuy nhiên, một hoặc các bên tranh chấp có thể mong muốn giải quyết vụ việc kín đáo hơn, đặc biệt là trong các tranh chấp thương mại.

C. *Thẩm quyền của toà án*

1. Khái niệm về thẩm quyền của toà án

Thẩm quyền của toà án có thể được xem xét theo những cách khác nhau. Nhiều quy định về thẩm quyền xét xử hoàn toàn mang tính địa phương (trong nước). Cái gọi là 'thẩm quyền xét xử dựa trên vấn đề' ('subject-matter jurisdiction') là một ví dụ. Khái niệm này sẽ trả lời câu hỏi: liệu một toà án có thẩm quyền giải quyết một vấn đề cụ thể nào đó không? Toà chuyên ngành chỉ có thẩm quyền xét xử đối với một số vấn đề nhất định, nghĩa là toà không có thẩm quyền xét xử các vấn đề khác. *Ví dụ*, toà chuyên ngành về thuế không thể giải quyết vụ việc về li hôn. Tại Hoa Kỳ, 'thẩm quyền xét xử dựa trên vấn đề' được hiểu theo các cách khác nhau. Vấn đề này liên quan đến câu hỏi: liệu toà liên bang có thể thụ lí một vụ việc cụ thể hay không, hay vụ việc đó phải được giải quyết ở toà cấp bang?

2. Các loại thẩm quyền của toà án: Thẩm quyền của toà án đối với cá nhân ('in personam') hoặc thẩm quyền của toà án đối với tài sản ('in rem')

Thẩm quyền của toà án có thể được phân tích trên kết quả mà bản án nhằm đạt được. Hiện nay, việc phân loại hình thức thẩm quyền xét xử của toà án phổ biến nhất là việc phân loại giữa 'thẩm quyền của toà án đối với cá nhân' ('*in personam*'), và 'thẩm quyền của toà án đối với tài sản' ('*in rem*'). Ngoài ra còn có các thủ tục tố tụng nhất định khác, *ví dụ*, thủ tục về li hôn và giám hộ - không phù hợp với cả hai loại trên, nhưng cũng không thuộc phạm vi phân tích của Giáo trình.

(a) Thẩm quyền của toà án đối với cá nhân

Một số lĩnh vực trong pháp luật Hoa Kỳ hoặc pháp luật Anh Quốc rất khó có thể giải thích được cho các luật gia thuộc hệ thống civil law, *ví dụ*, vấn

đề 'thẩm quyền của toà án đối với cá nhân'. Lịch sử về thẩm quyền của toà án Hoa Kỳ đối với cá nhân gắn liền với những khái niệm rất khó và phức tạp về 'mối quan hệ tối thiểu' ('minimum contacts') và 'tuân thủ đúng các thủ tục' ('due process') theo Hiến pháp Hoa Kỳ. Khi một vụ kiện được khởi xướng tại Hoa Kỳ và nếu bên bị đơn cho rằng phải áp dụng nguyên tắc 'toà án thích hợp' ('forum conveniens') để giải quyết tranh chấp, thì những sai sót có thể xảy ra về quyền tài phán sẽ được xem xét, hoặc bị hoãn để chờ được quyết định theo nguyên tắc 'toà án không thích hợp' ('forum non conveniens') (*xem* nội dung dưới đây). Lí do của việc này có thể do việc dự đoán kết quả cho câu hỏi về thẩm quyền xét xử là khó khăn hơn so với việc dự đoán câu trả lời về 'toà án không thích hợp' ('forum non conveniens'). Việc yêu cầu phải có những 'mối quan hệ tối thiểu' là cần thiết để đáp ứng đòi hỏi về 'tuân thủ đúng các thủ tục' ('due process') theo bản sửa đổi Hiến pháp Hoa Kỳ lần thứ XIV. Nếu tiêu chí 'mối quan hệ tối thiểu' được chứng minh, thì toà án sẽ cân nhắc những điều kiện khác về tính hợp lí, *ví dụ*, liệu thẩm quyền đang được thực hiện có đáp ứng khái niệm về tính công bằng và công lí thực sự hay không?

Việc xác định thẩm quyền của toà án đối với cá nhân sẽ dẫn đến bản án có tính ràng buộc đối với bị đơn, theo đó cưỡng chế bị đơn phải trả tiền, chuyển giao tài sản, hoặc phải thực hiện hoặc không thực hiện một hành vi khác nào đó. Một bản án trên cơ sở 'thẩm quyền của toà án đối với cá nhân' là bản án mang tính cưỡng chế chỉ đối với một hoặc một vài cá nhân cụ thể, và bắt buộc cá nhân đó làm hoặc không làm một việc gì đó (thường là bồi thường thiệt hại bằng tiền). Đây là hình thức phổ biến nhất của bản án.

Ở Anh Quốc, có ba loại quy tắc điều chỉnh thẩm quyền của toà án đối với cá nhân. Loại quy tắc *thứ nhất* có nguồn gốc châu Âu, đó là Quy định Bruselles I (có nguồn gốc từ Công ước Brussels về thẩm quyền và thực thi các bản án về dân sự và thương mại). Mô hình *thứ hai* là phiên bản có sửa đổi các quy tắc của châu Âu về thẩm quyền xét xử, theo đó, trong một số trường hợp nhất định sẽ trao thẩm quyền xét xử trong phạm vi Anh Quốc. *Thứ ba*, các quy tắc mang tính truyền thống sẽ được áp dụng trong trường hợp không thể áp dụng các quy tắc của châu Âu và/hoặc phiên bản sửa đổi trong đó quy định về thẩm quyền xét xử trong phạm vi Anh Quốc.

Theo common law, thẩm quyền của toà án Anh Quốc đối với cá nhân dựa trên cơ sở theo đó bị đơn phải thuộc thẩm quyền xét xử của toà án đó. Nếu bị đơn có mặt ở Anh Quốc, quy trình tố tụng đó sẽ được áp dụng đối với người này tại Anh Quốc. Nếu bị đơn không ở Anh Quốc tại thời điểm bắt đầu của hoạt động tố tụng, nhưng anh ta đã chấp nhận việc đang bị kiện ở Anh Quốc, thì toà án Anh Quốc có thẩm quyền xét xử. Nếu bị đơn không thể thực hiện hoạt động tố tụng tại Anh và không chấp nhận thẩm quyền xét xử đó, thì toà án có thể vẫn có quyền tài phán theo Quy tắc 6.20 của Bản quy tắc tố tụng dân sự (viết tắt là 'Quy tắc 6.20 CPR') bằng cách cho phép quy trình tố tụng áp dụng đối với bị đơn đang ở ngoài phạm vi tài phán của toà án. Tuy nhiên, thẩm quyền này chỉ phát sinh trong trường hợp bị đơn là người nước ngoài và những sự kiện hoặc vấn đề tranh chấp có liên quan đến nước Anh Quốc. Toà án sẽ không được trao thẩm quyền, trừ trường hợp chứng minh được rằng Anh Quốc 'là nơi thích hợp để khiếu kiện'. Trong vụ kiện *Seaconsar Far East Ltd v. Bank Markazi Jomhouri Islami Iran*, Tòa tối cao đã khẳng định rằng có ba vấn đề cần phải cân nhắc: *thứ nhất*, nguyên đơn bắt buộc phải chứng minh rằng vấn đề sẽ xét xử là nghiêm trọng; *thứ hai*, nguyên đơn phải chứng minh rằng khiếu kiện của mình thuộc trường hợp được quy định trong Quy tắc 6.20 CPR; và *thứ ba*, toà án phải được thuyết phục rằng nước Anh là 'forum conveniens' - nơi thích hợp cho việc xét xử, và là nơi mà vụ việc có thể được xét xử tốt nhất cho lợi ích của các bên cũng như mục đích cuối cùng của công lí.

(b) Thẩm quyền của toà án đối với tài sản

Thẩm quyền của toà án đối với tài sản dẫn đến một bản án về tài sản, và có tính ràng buộc đối với bất cứ ai trên thế giới, nếu người đó có lợi ích liên quan đến tài sản trong vụ kiện. Theo pháp luật của Anh Quốc, các vụ kiện này liên quan trực tiếp tài sản, thường là một con tàu. Chẳng có gì là lạ nếu một con tàu bị coi là 'bị đơn' trong vụ kiện về tài sản, nhưng trên thực tế thì hành động khiếu kiện lại nhằm vào chủ sở hữu của con tàu.[35] Điển hình là trường hợp người khởi kiện gửi đơn kiện chống lại một chủ tàu liên quan đến hoạt động của con tàu đó. *Ví dụ*, trường hợp hàng hoá của nguyên đơn bị hư hại do những sai phạm về hàng hải của con tàu. Nguyên đơn thường sẽ tìm cách bắt giữ con tàu, do đó con tàu có thể được bán để đáp ứng bất kì bản án nào của toà án sao cho có lợi cho nguyên đơn. Chỉ có một số loại khiếu kiện nhất định liên quan đến tình huống nêu trên. *Ví dụ*, khiếu kiện của chủ sở hữu hàng hoá đối với hàng hoá bị hư hỏng, khiếu kiện của thủy thủ về tiền lương, và khiếu kiện của người sửa chữa tàu về chi phí sửa chữa. Nếu khiếu kiện chỉ liên quan đến tài sản, thì việc thi hành bản án của toà án cũng chỉ có tính cưỡng chế đối với tài sản đó mà thôi - bằng cách tịch thu hoặc bán tài

[35] Vụ *Republic of India v. India Steamship Co* (N2) [1998] AC 878.

sản đó theo lệnh của toà án. Vì vậy, không thể đạt được một giá trị cao hơn giá trị của tài sản đó (con tàu). Khi các khiếu kiện chỉ đơn thuần về tài sản, nguyên đơn bị giới hạn về giá trị của bản án chỉ bằng khoản tiền có thể thu được sau khi bán tài sản đó, nhưng đối với các khiếu kiện cả về tài sản và cá nhân bị đơn, thì nguyên đơn không bị giới hạn như vậy.

D. *Tống đạt giấy tờ trong quá trình tố tụng*

Tống đạt giấy tờ trong quá trình tố tụng ở nước ngoài được quy định tại Công ước La Haye về tống đạt ra nước ngoài văn bản tố tụng và ngoài tố tụng trong lĩnh vực dân sự và thương mại 1965. Tống đạt giấy tờ theo Công ước La Haye đang được thực hiện ở hơn 40 nước. Tống đạt giấy tờ được thực hiện bởi một 'cơ quan trung ương' của một quốc gia nước ngoài và cơ quan này sẽ chuyển hồ sơ tống đạt tới một cơ quan thích hợp. Mặc dù việc gửi hồ sơ tống đạt bằng thư tín thường bị hạn chế, nhưng việc này liệu có được coi là một hình thức tống đạt hay không thì vẫn còn nhiều ý kiến khác nhau. Nếu việc tống đạt giấy tờ không tuân thủ một công ước, thì gần như chắc chắn dẫn đến việc bản án đó bị từ chối thi hành ở nước ngoài. Chính phủ Đức đã quy định rất rõ trong vụ kiện *Schlunk* rằng: toà án Đức sẽ không cho thi hành bản án, trừ trường hợp việc tống đạt giấy tờ đã được thực hiện theo Công ước La Haye.

E. *Toà án không thích hợp ('forum non conveniens')*

Học thuyết 'toà án không thích hợp' thể hiện sự công bằng. Nó cho phép toà án bác bỏ vụ kiện, nếu toà án tin rằng vụ kiện đó nên được giải quyết ở một nơi khác. Không phải tất cả các nước đều công nhận học thuyết này, nhưng cũng đưa ra kết luận tương tự với những tên gọi khác. Học thuyết này ở Hoa Kỳ có nguồn gốc từ vụ kiện *Gulf Oil Corp. v. Gilbert*, một vụ kiện liên quan đến toà án ở Hoa Kỳ. Trong vụ này, Toà án tối cao cho phép các toà án từ chối thẩm quyền xét xử của mình, nếu những yếu tố công và tư đều ủng hộ việc đưa vụ kiện giải quyết ở một toà án khác.

Tuyên bố 'toà án không thích hợp' sẽ được bị đơn đề xuất như là một phần của chiến lược tranh tụng. Nếu họ thành công, vụ kiện có thể bị chuyển tới một toà án ở một nơi rất xa và vụ kiện sẽ chìm xuống. Vụ kiện chìm xuống vì lúc đó các luật sư Hoa Kỳ không còn hy vọng vào việc đạt được một bản án bồi thường thiệt hại nhiều hơn. Thực tế là họ không còn cơ hội để tham gia vào vụ kiện với tư cách là luật sư, một khi vụ kiện này được giải quyết ở một toà án nước ngoài.

Một vấn đề đặt ra đối với bị đơn sau khi có được tuyên bố 'toà án không thích hợp' là việc bị mất hoặc giảm quyền kiểm soát đối với vụ việc. Nếu vụ kiện được đưa ra nước ngoài, thì luật sư của họ sẽ không thể đại diện cho họ trước toà án nước ngoài, và như vậy họ phải thuê luật sư nước ngoài. Bị đơn sẽ phải tìm hiểu về luật và hệ thống pháp luật nước ngoài. Sự lựa chọn tốt hơn cho các bị đơn là tiếp tục giữ vụ việc giải quyết tại toà án Hoa Kỳ, nhưng có thể áp dụng luật nước ngoài trong quá trình xét xử. Trong nhiều trường hợp như vậy, luật nước ngoài đã được viện dẫn, tuy nhiên, khi toà án gặp khó khăn trong xét xử bằng luật nước ngoài, thì gánh nặng không thể gánh vác này có thể sẽ đặt lên vai nguyên đơn. Luật là một sản phẩm của sự công bằng, và giống như sự công bằng, nó là một thứ gì đó trừu tượng và khó lường trước được.

Mục 3. CHỌN LUẬT ÁP DỤNG VÀ CƠ QUAN TÀI PHÁN TRONG GIẢI QUYẾT TRANH CHẤP

1. Giải quyết tranh chấp bằng phương thức trọng tài

A. *Chọn địa điểm trọng tài và hệ quả của nó*

Địa điểm trọng tài là nơi mà các thủ tục trọng tài được tiến hành. Xét dưới khía cạnh này, có thể so sánh địa điểm trọng tài với trụ sở của toà án. Trong tố tụng tại toà án, địa điểm mà thẩm phán kí vào bản án không phải là vấn đề quan trọng, vì bản án này luôn được coi là bản án của toà án, không phụ thuộc vào địa điểm mà thẩm phán kí vào bản án. Ngược lại, trong tố tụng trọng tài, việc chọn địa điểm trọng tài sẽ làm phát sinh một số hệ quả dưới nhiều khía cạnh khác nhau. *Thứ nhất*, các quy phạm mệnh lệnh của '*lex fori*' (pháp luật của nước nơi địa điểm trọng tài được chọn) sẽ được áp dụng. *Thứ hai*, ở một số nước, các trọng tài viên, cũng giống như các thẩm phán, sẽ áp dụng luật nội dung của nước đó trong quá trình tố tụng. *Thứ ba*, việc chọn địa điểm trọng tài có thể tác động đến hiệu lực pháp lí của thoả thuận trọng tài. Tuỳ thuộc vào nước được lựa chọn, việc chọn địa điểm trọng tài có thể dẫn đến việc cho phép hoặc ngăn cản toà án của nước đó can thiệp vào quá trình tố tụng trọng tài, hoặc can thiệp để hỗ trợ thủ tục tố tụng trọng tài. *Thứ tư*, việc chọn địa điểm trọng tài có thể sẽ đem lại lợi thế cho một bên tranh chấp về khía cạnh khoảng cách địa lí, chi phí đi lại[36] và nhu cầu cần thiết trong việc chỉ đạo phối hợp với luật sư sở tại. Một bên có thể tạo cho mình một

[36] *Ví dụ*: việc đi lại gặp gỡ của các bên, luật sư và nhân chứng.

vị thế có lợi hơn bên đối phương, và việc lựa chọn này có thể tác động đến khả năng cho một bên bảo vệ vụ kiện của mình dễ dàng hơn,[37] hoặc bảo đảm việc có mặt của các nhân chứng của họ tại phiên toà.[38] Việc công nhận phán quyết trọng tài ở một số nước, nơi các bên cư trú, cũng phụ thuộc vào địa điểm trọng tài, mà vụ *Keban* là một ví dụ.[39]

Việc chọn địa điểm trọng tài cũng dẫn đến một số hệ quả khác. Trong trường hợp các bên không chọn luật tố tụng, cơ quan chỉ định được lựa chọn sẽ có cơ hội tốt để tác động đến việc chọn luật tố tụng. Thậm chí ngay cả khi không thể tác động đến việc này, luật tố tụng được áp dụng cũng phải tuân thủ các nguyên tắc cơ bản của pháp luật tố tụng của nước nơi địa điểm trọng tài được chọn.[40] Vì tất cả những lí do này, địa điểm trọng tài là một yếu tố có ý nghĩa quan trọng nhất trong tố tụng trọng tài, và việc lựa chọn nó cần phải được quan tâm đặc biệt.

B. *Chọn luật*

1. Luật điều chỉnh thoả thuận trọng tài

Trọng tài là một quá trình tố tụng theo thoả thuận và nó phụ thuộc vào thoả thuận trọng tài, với tư cách là một thoả thuận có hiệu lực pháp lí ràng buộc các bên. Các thoả thuận trọng tài không thuộc phạm vi điều chỉnh của Công ước Rome về các nghĩa vụ theo hợp đồng (khoản 2(d) Điều 1). Như vậy, hiệu lực và nội dung của thoả thuận trọng tài được điều chỉnh bằng luật riêng của nó, được xác định bằng nguyên tắc chung của pháp luật. Luật riêng về hiệu lực của thoả thuận trọng tài có thể khác với luật điều chỉnh tranh chấp thực chất giữa các bên. Nếu hợp đồng có quy định rõ ràng về việc chọn luật, thì luật được chọn cũng điều chỉnh điều khoản trọng tài. Nếu hợp đồng không quy định việc chọn luật, thì luật điều chỉnh hợp đồng (và thoả thuận trọng tài) thông thường được hiểu ngầm là luật của nước là nơi có địa điểm trọng tài. *Ví dụ*, nếu các bên thoả thuận địa điểm trọng tài là Anh Quốc nhưng không quy định rõ ràng về luật điều chỉnh hợp đồng, thì luật riêng để điều chỉnh thoả thuận trọng tài thông thường sẽ được xác định là luật của Anh Quốc.[41] Nếu các bên không quy định rõ ràng về việc chọn luật và không chỉ định địa điểm trọng tài, thì luật riêng điều chỉnh thoả thuận trọng tài, theo nguyên tắc chung của pháp luật, là luật của nước có mối liên hệ chặt chẽ nhất với hợp đồng. Chỉ trong những trường hợp ngoại lệ, thì luật điều chỉnh thoả thuận trọng tài có thể khác với luật điều chỉnh thực chất hợp đồng.[42]

Trong bối cảnh thi hành phán quyết trọng tài theo Công ước New York, có thể phản đối phán quyết trọng tài dựa trên căn cứ theo đó thoả thuận trọng tài không có hiệu lực (khoản 2(a) Điều V Công ước New York).

2. Luật điều chỉnh tố tụng trọng tài

Luật điều chỉnh tố tụng trọng tài (*'lex arbitri'*), thông thường là luật của nước nơi địa điểm trọng tài được chọn. Trên thực tế, *'lex arbitri'* chủ yếu là luật tố tụng nhưng đôi lúc cũng có những yếu tố thuộc luật nội dung. Tuy nhiên, không phải lúc nào ranh giới giữa các yếu tố luật nội dung và luật tố tụng cũng thực sự rõ ràng. Quan trọng là phải hiểu được loại vấn đề nào được điều chỉnh bởi 'lex arbitri', và luật này tương tác như thế nào với các quy phạm do các bên lựa chọn và luật nội dung điều chỉnh hợp đồng chính.

Tố tụng trọng tài bao gồm hai yếu tố: *Thứ nhất*, trọng tài phải tuân thủ thủ tục tố tụng và quyền hạn của trọng tài được quy định trong thủ tục này (thủ tục nội bộ); và *thứ hai*, quyền hạn của toà án trong việc hỗ trợ và giám sát hoạt động trọng tài (thủ tục bên ngoài). Quyền hạn hỗ trợ của toà án bao gồm: *ví dụ*, quyền chỉ định trọng tài viên và ban hành lệnh tạm thời (*ví dụ*: phong toả tài sản của bị đơn). Quyền hạn giám sát quan trọng nhất của toà án là quyền không cho thi hành phán quyết trọng tài, trong trường hợp trọng tài viên đã vượt quá thẩm quyền xét xử của mình, hoặc đã có những vi phạm nghiêm trọng ảnh hưởng đến hoạt động trọng tài hoặc phán quyết trọng tài. Phạm vi mà toà án thực hiện quyền giám sát đối với trọng tài không giống nhau ở mỗi nước.

Các quy phạm xác định luật điều chỉnh tố tụng trọng tài cố gắng đáp ứng hai mục tiêu mà bản thân chúng có thể mâu thuẫn nhau. *Một mặt*, nước mà địa điểm trọng tài được lựa chọn có lợi ích chính đáng

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[37] Đây là một trong những nguồn của việc biện hộ dựa trên học thuyết 'toà án không thích hợp' ('forum non conveniens').

[38] *Ví dụ*: trong trường hợp tố tụng trọng tài diễn ra tại các nước Ả rập, việc có mặt của các nhân chứng quốc tịch Israel sẽ trở nên khó khăn.

[39] Vụ kiện trọng tài giữa một bên là các nhà thầu Italia và Pháp, và một bên là Bộ Giao thông Công chính Thổ Nhĩ Kỳ với địa điểm trọng tài là Thuỵ Sĩ. Giữa Thổ Nhĩ Kỳ và Thuỵ Sĩ không có hiệp định song phương về công nhận phán quyết trọng tài. Khi các nhà thầu là bên thắng kiện muốn thi hành phán quyết trọng tài tại Thổ Nhĩ Kỳ, phía Thổ Nhĩ Kỳ đã từ chối công nhận phán quyết trọng tài dựa trên lí do này và một số lí do khác. *Xem Compagnie de Constructions Internationales, Compagnie Francaise d'Entreprise et Societe Impregilo v. DSI, Court of Cassation* (Thổ Nhĩ Kỳ), Nghị định số 76/1052, ngày 10/3/1976, Arbitration, Vol. 46, No. 4, December 1980, tr. 241.

[40] Cho dù *'lex loci arbitri'* không điều chỉnh tố tụng trọng tài, nhưng nó cũng đưa ra các chỉ dẫn cho ứng xử của trọng tài viên.

[41] Vụ *Hamlyn Co v. Talisker Distillery* [1894] AC 202, trích dẫn trong C. M. V. Clarkson và Jonathan Hill, *The Conflict of Laws*, 3rd edn., Oxford, (2006), tr. 252.

[42] Dicey và Morris, *The Conflict of Laws*, 13th edn., (2000), tr. 598.

trong việc thực hiện biện pháp kiểm soát đối với quá trình trọng tài, nhằm bảo đảm rằng quá trình tố tụng trọng tài đáp ứng các tiêu chí tối thiểu về tính công bằng. *Mặt khác*, trọng tài là một quá trình thoả thuận, và như một nguyên tắc chung của pháp luật, các bên có quyền tự do xác định việc giải quyết tranh chấp của họ theo cách nào.

Luật trọng tài năm 1996 của Anh Quốc có những điều khoản nhằm dung hoà hai mục tiêu mâu thuẫn nêu trên. Theo nguyên tắc chung của pháp luật, các quy định của Luật này sẽ mặc nhiên được ưu tiên áp dụng, nếu Anh Quốc là địa điểm trọng tài. Như vậy, nếu hai công ty nước ngoài thoả thuận giải quyết tranh chấp bằng trọng tài tại Anh Quốc, thì toà án Anh Quốc sẽ có quyền loại bỏ trọng tài viên trên cơ sở nghi ngờ về tính khách quan của người này, hoặc không cho thi hành phán quyết trọng tài, nếu một bên đã lừa dối để có được phán quyết này. Phần lớn các quyền hạn của toà án mà Luật này quy định có tính chất tuỳ thuộc vào sự xem xét của toà án, và toà án sẽ căn cứ vào mối liên hệ của các bên với Anh Quốc khi xem xét liệu có phải thực hiện hay không thực hiện các quyền hạn của toà án theo quy định của Luật nêu trên? Trong trường hợp địa điểm trọng tài ở bên ngoài Anh Quốc, thì luật của Anh Quốc sẽ không phù hợp để áp dụng đối với phần lớn các vấn đề về tố tụng. Tuy nhiên, một vài điều khoản của Luật nêu trên vẫn được áp dụng mà không phụ thuộc vào địa điểm trọng tài. *Ví dụ*, các quy định liên quan đến việc tạm hoãn xét xử do vi phạm điều khoản trọng tài. Nhưng sẽ không có chuyện không công nhận phán quyết trọng tài nếu địa điểm trọng tài ở ngoài Anh Quốc, ngay cả khi các bên thoả thuận rõ ràng là luật Anh Quốc sẽ áp dụng đối với tố tụng trọng tài.

Quy trình pháp luật theo Luật trọng tài năm 1996 của Anh Quốc được điều chỉnh bởi Bộ quy tắc tố tụng dân sự ('CPR'). Để toà án có quyền tài phán, đơn kiện trọng tài phải được tống đạt cho bị đơn phù hợp với các thủ tục tố tụng có liên quan. Trong trường hợp thích hợp, toà án sẽ cho phép việc tống đạt được thực hiện bên ngoài phạm vi tài phán của Anh Quốc.

3. Luật điều chỉnh các nội dung thực chất của tranh chấp (luật nội dung)

Các tranh chấp được đưa ra giải quyết bằng trọng tài thường là các tranh chấp phát sinh từ hợp đồng. Hội đồng trọng tài sẽ áp dụng các quy định nào để giải quyết tranh chấp? Hội đồng trọng tài sẽ phải áp dụng các quy phạm về chọn luật theo luật của nước nơi đặt địa điểm trọng tài. Trong common law, các trọng tài viên của Anh Quốc được giả định là phải áp dụng các quy phạm về chọn luật của các toà án Anh Quốc. Quy tắc này là hệ quả của cách tiếp cận truyền thống của Anh Quốc, theo đó phán quyết trọng tài có thể bị toà án xem xét lại về mặt pháp lí, bao gồm cả các vấn đề chọn luật. Một số nước khác có cách tiếp cận khác và luật về trọng tài nước ngoài quy định các nguyên tắc đặc biệt điều chỉnh vấn đề chọn luật áp dụng cho trọng tài. Luật trọng tài năm 1996 của Anh Quốc nêu trên đã từ bỏ cách tiếp cận truyền thống của Anh Quốc, bằng cách đưa vào luật Anh Quốc các quy định mới. Các quy định về chọn luật ở Mục 46 đề cập đến tình huống: *Thứ nhất*, các bên đưa ra lựa chọn; *thứ hai*, các bên lựa chọn 'các căn cứ khác'; và *thứ ba*, các bên không đưa ra lựa chọn.

Theo nguyên tắc thứ nhất, hội đồng trọng tài sẽ giải quyết tranh chấp 'phù hợp với luật được các bên lựa chọn, với tư cách là luật áp dụng cho nội dung của tranh chấp'. Học thuyết 'dẫn chiếu ngược' ('renvoi') bị loại bỏ.[43]

Đôi khi, trọng tài được xem như là cơ chế để tránh những chuẩn mực riêng của pháp luật quốc gia. Vậy thì tại sao các bên không cho phép hội đồng trọng tài giải quyết tranh chấp trên cơ sở tham chiếu các chuẩn mực khác? Có nhiều lựa chọn khác nhau để các bên có thể xem xét. *Thứ nhất*, nếu một bên thuộc Anh Quốc và một bên thuộc Pháp, các bên có thể thoả thuận rằng hợp đồng sẽ được điều chỉnh bởi các nguyên tắc chung áp dụng cho cả pháp luật của Anh Quốc và của Pháp,[44] hoặc các bên có thể thoả thuận áp dụng các nguyên tắc chung áp dụng cho cả pháp luật nước X nào đó và công pháp quốc tế. *Thứ hai*, các bên có thể chọn các quy định không gắn với một hệ thống pháp luật riêng biệt nào. Điều khoản chọn luật có thể quy định, *ví dụ*: 'các nguyên tắc pháp luật điều chỉnh các quan hệ hợp đồng được chấp nhận ở phạm vi quốc tế' (*ví dụ*: *lex mercatoria*), hoặc một bộ phận các quy tắc phi quốc gia (*ví dụ*: PICC của UNIDROIT - *xem* Mục 3 - Chương 5 của Giáo trình), hoặc luật tôn giáo (*ví dụ*, luật Do thái hoặc luật Sharia Hồi giáo). *Thứ ba*, các bên có thể mong muốn hội đồng trọng tài giải quyết tranh chấp trên cơ sở tham chiếu các nguyên tắc công bằng hoặc 'lẽ phải', hơn là các quy phạm pháp luật nghiêm ngặt. Điều khoản cho phép hội đồng trọng tài giải quyết tranh chấp trên cơ sở 'công bằng' được thể hiện bằng thuật ngữ La-tinh là '*arbitration ex aequo et bono*', hoặc trong tiếng Pháp là '*amiable composition*'. Luật năm 1996 của Anh Quốc nêu trên cho phép các bên được lựa chọn bất kì phương án nào. Ngoài ra, Luật này cũng quy định

[43] Vụ *Orion Compani Espanola de Seguros v. Belfort Maatschappij voor Algemene Verzekgringeen* [1962] 2 Lloyd's Rep 27.

[44] Đây là sự lựa chọn của các bên trong một số hợp đồng liên quan đến dự án đường hầm qua eo biển Manche giữa Anh Quốc và Pháp. *Xem* Redfern và Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn., (2004), tr. 125-127.

rằng nếu các bên đồng ý, hội đồng trọng tài sẽ giải quyết tranh chấp 'phù hợp với các căn cứ khác, theo thoả thuận của các bên, hoặc theo sự ấn định của hội đồng trọng tài'.

Nếu các bên không chọn luật áp dụng, Luật trọng tài năm 1996 của Anh Quốc quy định rằng 'hội đồng trọng tài sẽ áp dụng luật được xác định trên cơ sở các quy phạm xung đột mà toà cho rằng có thể áp dụng'. Không có gì không bình thường khi các bên, dù không có hoặc có ít liên hệ với Anh Quốc, nhưng lại chọn Anh Quốc làm địa điểm trọng tài. Trên thực tế, các bên có thể chọn London làm địa điểm trọng tài, vì đây là địa điểm trung lập. Trong trường hợp này, các trọng tài viên có thể sẽ chọn các quy phạm xung đột được áp dụng chung trong luật quốc gia của các bên. *Ví dụ*, khi nguyên đơn Singapore và bị đơn New Zealand chọn Anh Quốc làm địa điểm trọng tài, hội đồng trọng tài có thể quyết định rằng luật điều chỉnh sẽ được xác định bởi học thuyết 'luật thích hợp' ('proper law') trong common law, chứ không áp dụng các quy định về chọn luật trong Công ước Roma, bởi vì học thuyết 'luật thích hợp' là học thuyết được áp dụng chung ở cả Singapore và New Zealand. Ưu điểm của cách tiếp cận này là: nó sẽ giúp giảm thiểu khả năng theo đó kết quả giải quyết tranh chấp sẽ đơn giản chỉ phụ thuộc vào địa điểm nơi diễn ra quá trình trọng tài. Khi không được sự cho phép của các bên, hội đồng trọng tài không có quyền bỏ qua các quy định về chọn luật và giải quyết tranh chấp phù hợp với *lex mercatoria* hoặc dẫn chiếu đến quan điểm riêng của các trọng tài viên về sự công bằng; hội đồng trọng tài phải áp dụng 'luật', một phạm trù không thích hợp để diễn tả các nguyên tắc công bằng hay *lex mercatoria*.

Nếu các bên không lựa chọn luật áp dụng, và các trọng tài viên có quyền tự do lựa chọn các quy phạm xung đột để xác định luật áp dụng theo ý của họ, thì sẽ có nguy cơ là các bên sẽ được phép lẩn tránh các quy phạm mệnh lệnh được áp đặt vì lợi ích công cộng. Trong khi đó, nếu các bên lựa chọn toà án để giải quyết tranh chấp, thì toà án chắc chắn sẽ áp dụng quy phạm mệnh lệnh. Giới hạn mà các trọng tài viên phải tuân thủ các quy phạm mệnh lệnh là vấn đề gây tranh cãi. Thực tế là: nếu các trọng tài viên bỏ qua các quy phạm mệnh lệnh trong luật quốc gia của nước có mối liên hệ chặt chẽ với trọng tài (nước là địa điểm trọng tài, hoặc nước nơi thi hành phán quyết trọng tài), thì sẽ có nhiều khả năng là phán quyết trọng tài sẽ không có hiệu lực pháp luật. Nếu Anh Quốc là địa điểm trọng tài, thì một bên có thể phản đối hiệu lực của phán quyết trọng tài trên cơ sở có vi phạm nghiêm trọng. *Ví dụ*, toà án có thể không thừa nhận hiệu lực của phán quyết trọng tài, nếu phán quyết này đi ngược lại trật tự công cộng. Một phán quyết trọng tài không được thừa nhận hiệu lực, bởi quyết định của toà án của nước nơi phán quyết trọng tài được tuyên, sẽ vô hiệu, và việc thi hành phán quyết trọng tài này có thể bị từ chối ở bất kì nước nào là thành viên Công ước New York. Công ước New York cũng quy định rằng việc thi hành phán quyết trọng tài có thể bị từ chối, nếu phán quyết này vi phạm trật tự công cộng của nước nơi phán quyết này được yêu cầu thi hành.

Ví dụ sau đây sẽ minh hoạ về tác động có thể xảy ra của bảo lưu trật tự công cộng. Hình dung là có hai công ty của Hoa Kỳ kí thoả thuận hạn chế cạnh tranh để thực hiện hợp đồng đặc quyền ở châu Âu. Thoả thuận này vô hiệu theo Điều 81 Hiệp định EC (TEC) (Điều 101 TFEU) (xem Mục 2 - Chương 3 Giáo trình), nhưng lại có hiệu lực theo luật của bang New York, là luật áp dụng theo sự lựa chọn của các bên. Khi xảy ra tranh chấp, các bên đưa ra giải quyết tại trọng tài ở Anh Quốc. Kết quả trọng tài sẽ như thế nào, nếu trọng tài Anh Quốc công nhận hiệu lực của thoả thuận này dựa trên cơ sở rằng thoả thuận này có hiệu lực theo luật của bang New York? Câu trả lời sẽ là: bên thua kiện được phép hi vọng rằng hiệu lực của phán quyết trọng tài sẽ không được thừa nhận, vì thoả thuận hạn chế cạnh tranh này vi phạm trật tự công cộng của Anh Quốc (bao gồm cả trật tự công cộng của châu Âu). Trên cơ sở phân tích này, các trọng tài viên sẽ phải cân nhắc các quy phạm mệnh lệnh mà các bên có thể phải áp dụng, nếu không muốn toàn bộ quá trình tố tụng trọng tài trở lên vô ích về thời gian và tiền bạc, khi mà cuối cùng, phán quyết trọng tài lại không được thi hành (vì phán quyết này vi phạm trật tự công cộng của nước là địa điểm trọng tài).

Khi các bên không chọn luật áp dụng, thì việc chọn luật áp dụng trong trọng tài quốc tế thường xuyên là một trong những vấn đề khó khăn nhất mà các trọng tài viên phải quyết định.[45] Thay thế cho pháp luật quốc gia, các trọng tài viên có thể áp dụng các nguyên tắc của luật quốc tế, các nguyên tắc chung của pháp luật quốc gia ('*in foro domestico*'), hoặc *lex mercatoria*.

4. Các nguyên tắc của luật quốc tế và các nguyên tắc chung của pháp luật

Cần phải đề cập đến những trường hợp, mặc dù không thường xuyên xảy ra, khi các bên dẫn chiếu đến các nguyên tắc của luật quốc tế hoặc các nguyên tắc chung của pháp luật. Các nguồn luật này được sử dụng nhằm giới hạn phạm vi áp dụng hệ thống pháp luật quốc gia, hoặc để bổ sung những nội dung chưa được pháp luật quốc gia điều chỉnh.

[45] O. Lando, *The Law Applicable to the Merits of the Dispute, Arbitration International* (1986), tr. 104.

5. Lex mercatoria ('Thương nhân luật')

Lex mercatoria có thể hiểu là hệ thống các nguyên tắc, quy phạm và chuẩn mực của pháp luật xuyên quốc gia, được hình thành từ tập quán và thực tiễn thương mại quốc tế,[46] hoặc nói cách khác, từ luật tập quán thương mại.[47] *Lex mercatoria* không dựa trên bất kì hệ thống pháp luật nào, mà là tập hợp các quy định thương mại quốc tế, các nguyên tắc chung của pháp luật, các chuẩn mực và tập quán thương mại. Một *ví dụ* về *lex mercatoria* hiện đại là PICC của UNIDROIT (*xem* Mục 3 - Chương 5 Giáo trình).[48] Các nguyên tắc này không phải là 'luật' theo đúng nghĩa của nó, bởi vì chúng không được bất kì nước nào thông qua như là luật. Nhưng trên thực tế, những nguyên tắc này là quy tắc điều chỉnh hợp đồng thương mại quốc tế. *Lex mercatoria* cũng bao gồm các quy tắc khác, *ví dụ*, UCP 600 của ICC (*xem* Mục 4 - Chương 5 của Giáo trình), là những quy tắc điều chỉnh gần như toàn bộ tín dụng thư; và INCOTERMS của ICC là những điều kiện giao hàng cơ sở trong hợp đồng mua bán hàng hoá quốc tế, *ví dụ*, điều kiện FOB và điều kiện CIF (*xem* Mục 2 - Chương 5 của Giáo trình). Một số nhà bình luận còn đưa vào phạm vi của *lex mercatoria* các phán quyết trọng tài quốc tế cũng như các nguyên tắc phái sinh từ các công ước quốc tế hoặc công pháp quốc tế. Mặc dù *lex mercatoria* không phải là 'luật', nhưng nó sẽ được chấp nhận để điều chỉnh tố tụng trọng tài nếu các bên thoả thuận lựa chọn nó. Tuy nhiên, cũng cần phải ghi nhận rằng nhiều luật sư kiên quyết chống lại việc dẫn chiếu *lex mercatoria* khi họ soạn thảo các hợp đồng thương mại quốc tế giữa các bên tư nhân, bởi vì thông thường, các bên muốn luật áp dụng phải là luật có thể tiếp cận được, rõ ràng và xác định được, để có thể cung cấp cho các bên một khuôn khổ pháp luật chắc chắn. Chính các trọng tài viên, khi sử dụng một số quy định xuyên quốc gia, cũng ngần ngại khi dựa trên *lex mercatoria*. Tuy nhiên, cũng có những tình huống,[49] mà *lex mercatoria* được thể hiện là rất hữu ích.

6. Pháp luật quốc gia của nước không có liên quan đến các bên

Nếu các bên không thoả thuận được về việc chọn luật quốc gia của một trong các bên, và nếu họ không muốn chọn các nguyên tắc chung của pháp luật, thì có thể có một sự lựa chọn khác - đó là chọn pháp luật của một nước trung lập, là nước không có mối liên hệ đặc biệt nào với bất kì bên nào. Các bên có thể muốn chọn luật của nước nào đó rất phát triển ở lĩnh vực nhất định, hoặc đơn giản là muốn chọn luật của nước mà ở đó có nhiều giao dịch quốc tế diễn ra. Một số công ước quốc tế ủng hộ quyền tự do của các bên trong việc lựa chọn luật áp dụng đối với trọng tài. Tuy nhiên, quyền tự do của các bên bị giới hạn bởi các quy phạm mệnh lệnh (các quy phạm mà các bên không thể không tuân thủ) và chính sách công cộng của một quốc gia.

Ở Hoa Kỳ, các bên không có quyền tự do lựa chọn luật áp dụng bất kì. Cần thiết phải có mối quan hệ thực chất giữa một bên hoặc giao dịch với luật được chọn, hoặc cần phải có cơ sở hợp lí cho sự lựa chọn của các bên (*xem* The Restatements (Second) of Conflict of Laws). Như vậy, toà án sẽ không công nhận luật của bang Florida là luật áp dụng để điều chỉnh giao dịch giữa một công ty Đức và một công ty Nhật, nếu giao dịch này không có liên hệ nào với bang Florida. Nhưng luật của bang New York lại là trường hợp đặc biệt. Toà án bang New York sẽ chấp nhận sự lựa chọn luật New York bởi các bên trong những điều kiện nhất định, ngay cả khi không có mối liên hệ hợp lí nào với bang này. Hợp đồng (mà toà án bang New York xem xét) không được liên quan đến nhân sự hoặc dịch vụ tại nhà, hoặc lao động, và trị giá hợp đồng phải ít nhất là 250.000 USD. Hơn nữa, nếu luật bang New York là luật điều chỉnh hợp đồng, thì toà án bang New York sẽ có thẩm quyền xét xử đối với cá nhân, và không thể từ chối thụ lí vì lí do 'toà án không thích hợp' ('forum non conveniens'), nếu trị giá hợp đồng ít nhất là 1.000.000 USD. Bằng việc tạo thuận lợi cho các bên có những giao dịch hợp đồng trị giá lớn có thể tiếp cận hệ thống pháp luật và toà án của mình, New York rõ ràng là muốn cố gắng bảo toàn và tăng cường uy tín của mình như là một trung tâm kinh doanh toàn cầu.

2. Giải quyết tranh chấp bằng phương thức tranh tụng trước toà án

'Quyền tài phán' (thẩm quyền xét xử) ở nghĩa rộng nhất, đó là vấn đề liệu một toà án có thể có thẩm quyền xét xử và quyết định một vấn đề tranh chấp trong bản án/quyết định của mình hay không.

[46] L. Yves Fortier, 'The New *Lex mercatoria*, or, Back to the Future', 17 *Arb. Int. 121*, (2001), tr. 128.

[47] Roy Goode, 'The Role of the *lex loci arbitri* in International Commercial Arbitration', 17 *Arb. Int*, (2001), tr. 21.

[48] UNIDROIT (the International Institute for the Unification of Private Law) là tổ chức liên chính phủ độc lập có trụ sở ở Rome, Italia. Mục đích của tổ chức này là soạn thảo các công ước, luật mẫu và những hướng dẫn pháp lí khác nhằm giúp hài hoà hoá luật thương mại quốc tế, *xem* tại: http://www.unidroit.org.

[49] *Ví dụ*: hợp đồng thương mại giữa các quốc gia hoặc giữa các pháp nhân nhà nước; hợp đồng thương mại giữa một nước và một công ty tư nhân; *lex mercatoria* thường được sử dụng, vì thực tế không một quốc gia có chủ quyền nào muốn mình là đối tượng điều chỉnh của luật của bất cứ quốc gia có chủ quyền nào khác.

A. Lựa chọn quyền tài phán

Ban đầu, quyền lựa chọn toà án có quyền tài phán thuộc về nguyên đơn. Nguyên đơn sẽ bắt đầu vụ kiện tại toà án của nước mà nguyên đơn tin rằng có thẩm quyền xét xử vụ kiện. Tuy nhiên, cũng có công ty, khi được thông báo là sẽ phải đối mặt với vụ kiện quan trọng, đã quyết định khởi xướng trước vụ kiện (ví dụ: để đạt được bản án/quyết định của toà án tuyên rằng công ty không có liên quan trong vụ này). Hệ quả của việc này là: công ty sẽ cố gắng bảo đảm sao cho các bước tố tụng tại toà án (có quyền tài phán) mang lại lợi ích tốt nhất cho mình.

Cơ sở pháp lí quốc tế cho việc lựa chọn quyền tài phán

Vấn đề liệu toà án của một nước có quyền tài phán đối với vụ kiện hay không, sẽ được xác định phù hợp với các điều ước quốc tế mà nước này tham gia, hoặc quy tắc tư pháp quốc tế của nước đó (nói cách khác là các quy phạm xung đột).

Lựa chọn toà án có quyền tài phán theo Quy định Brussels

Trong khuôn khổ EU, có nhiều điều ước có liên quan đến vấn đề này. Quy định Brussels số 44/2001 về công nhận và thi hành các bản án dân sự và thương mại đã được ban hành ngày 22/12/2000. Quy định này áp dụng đối với các vụ kiện chống lại các bị đơn cư trú trên lãnh thổ EU, hoặc đối với các vụ kiện được tiến hành tại các nước thành viên EU. Quy định Brussels có những quy định chi tiết về quyền tài phán trong khuôn khổ EU và xác định nước nào có quyền tài phán đối với vụ kiện cụ thể. Quy định này giúp làm giảm thiểu khả năng theo đó nguyên đơn có thể lựa chọn một hoặc nhiều toà án để tiến hành vụ kiện.

Lựa chọn toà án có quyền tài phán theo Công ước Lugano

Ngày 16/9/1988, tại Lugano, các nước thành viên EFTA (Hiệp hội thương mại tự do châu Âu), bao gồm Áo, Phần Lan, Iceland, Na Uy, Thuỵ Điển và Thuỵ Sĩ đã kí kết Công ước Lugano về quyền tài phán và thi hành các bản án dân sự và thương mại với các nước thành viên EC. Công ước Lugano cũng có những quy định tương tự như Quy định Brussels và phần lớn đã bị Quy định này thay thế. Công ước Lugano hiện nay vẫn có hiệu lực ở Na Uy và Thuỵ Sĩ, với tư cách là thành viên còn lại của EFTA, cùng với Pháp, Italia, Luxembourg, Hà Lan, Bồ Đào Nha và Anh Quốc với tư cách là thành viên EU.

Ngoài EU, trên thế giới, hầu như hiện nay không có điều ước quốc tế quan trọng nào về vấn đề này. Điều đó có nghĩa là không có một sự hài hoà pháp luật nào. Các quy định của mỗi nước và sự tương tác giữa chúng là điều cần phải được xem xét khi lựa chọn toà án của nước nào có quyền tài phán. Hiện nay đề xuất về Công ước La Haye về quyền tài phán quốc tế và các bản án dân sự và thương mại có thể sẽ đem lại mức độ hài hoà hoá pháp luật ở tầm toàn cầu.

B. Chọn luật áp dụng

Vấn đề toà án sẽ áp dụng luật nào để giải quyết tranh chấp phát sinh từ một hợp đồng quốc tế được điều chỉnh bởi các điều ước quốc tế có liên quan (ví dụ: các quy định và chỉ thị của EU), và/hoặc các quy định pháp luật quốc gia có liên quan (ví dụ như các quy định tư pháp quốc tế của các nước có liên quan). Câu hỏi theo đó luật nào sẽ được áp dụng để giải quyết tranh chấp không phải lúc nào cũng có những câu trả lời giống nhau.

1. Chọn luật theo CISG

Không có công ước toàn cầu nào đề cập đến vấn đề chọn luật áp dụng cho các hợp đồng thương mại quốc tế. Công ước quan trọng nhất ngoài khuôn khổ EU và đề cập thực chất đến vấn đề chọn luật trong các hợp đồng mua bán hàng hoá quốc tế là CISG (xem Mục 3 - Chương 5 của Giáo trình).

2. Chọn luật theo Quy định Rome I

Ở Anh Quốc, theo các quy định truyền thống, 'luật thích hợp' ('luật riêng') của hợp đồng được xác định trước hết trên cơ sở tham chiếu đến thoả thuận rõ ràng về lựa chọn luật trong hợp đồng kí kết giữa các bên. Chỉ trong trường hợp không có sự lựa chọn rõ ràng hoặc có lựa chọn nhưng sự lựa chọn không có giá trị, khi đó sẽ dựa trên khái niệm 'luật được lựa chọn ngầm' hoặc 'luật có mối liên hệ chặt chẽ nhất'. *Ví dụ*, Quy định Rome I[50] quy định rằng hợp đồng được điều chỉnh bởi luật do các bên lựa chọn và việc lựa chọn này có thể được thể hiện rõ ràng trong các điều khoản của hợp đồng.[51] Nếu các bên không đặt điều kiện theo đó việc lựa chọn rõ ràng luật áp dụng phải được thực hiện bằng văn bản hay bằng một hình thức khác, thì một thoả thuận miệng về luật áp dụng, đạt được trong khuôn khổ đàm phán để đi đến kí kết một hợp đồng bằng văn bản, cũng được công nhận là có hiệu lực.[52] Bất kì sự lựa

[50] *Xem* văn bản [2008] OJ L177/6, http://eur-lex, europa.eu/LexUriServ

[51] Khoản 1 Điều 3 Quy định Rome I.

[52] Vụ *Oakley v. Ultra Vehicle Design Ltd* [2005] EWHC 872 (Ch) (Lloyd LJ), hoặc ghi chú 27 trong Indira Carr, *supra*, tr. 567.

chọn luật rõ ràng nào, thông thường, cũng sẽ được ghi nhận trong một điều khoản của hợp đồng. Khoản 2 Điều 3 của bản Quy định này cho phép thỏa thuận một sự lựa chọn rõ ràng giữa các bên sau khi đã kí kết hợp đồng. Có thể một sự lựa chọn sau khi đã kí kết hợp đồng, thông thường, sẽ có hiệu lực hồi tố, trừ khi các bên thể hiện ý định khác.

Trong trường hợp các bên không có sự lựa chọn rõ ràng, Điều 3 Quy định Rome I quy định theo đó toà án sẽ xem xét khả năng có thể chấp nhận một sự lựa chọn ngầm giữa các bên hay không? Theo Điều 3, sự lựa chọn ngầm của các bên chỉ cần 'được thể hiện rõ ràng trong các điều khoản của hợp đồng hoặc bối cảnh đi đến kí kết hợp đồng' là đủ. Quy định Rome I phù hợp với các quy định truyền thống của pháp luật Anh Quốc sau Chiến tranh thế giới thứ II, và đưa ra cách tiếp cận hạn chế khi xác định có hay không có một sự lựa chọn ngầm giữa các bên về luật điều chỉnh hợp đồng. Trong trường hợp không có sự lựa chọn rõ ràng hay lựa chọn ngầm có hiệu lực giữa các bên, 'luật thích hợp' để điều chỉnh hợp đồng sẽ được xác định phù hợp với các quy định dự kiến tại Điều 4 và Điều 5 Quy định Rome I. Những quy định này ưu tiên áp dụng luật của 'nước có mối liên hệ chặt chẽ nhất' với việc thực hiện hợp đồng.

Luật áp dụng trong trường hợp các bên không lựa chọn

Phù hợp với khoản 1 Điều 4 Quy định Rome I, trong trường hợp các bên không lựa chọn rõ ràng hay lựa chọn ngầm, hợp đồng sẽ được điều chỉnh bởi luật của 'nước có mối liên hệ chặt chẽ nhất' với hợp đồng. Với điều kiện không trái với quy định tại khoản 5 Điều này, hợp đồng được suy đoán là có mối liên hệ chặt chẽ nhất với nước mà vào thời điểm kí kết hợp đồng, bên thụ hưởng việc thực hiện hợp đồng có nơi thường trú (nếu là thể nhân), hoặc nơi mà bên đó có trụ sở chính (nếu là pháp nhân). Tuy nhiên, nếu hợp đồng được kí kết trong quá trình hoạt động thương mại hoặc nghề nghiệp của bên đó, thì 'nước có mối liên hệ chặt chẽ nhất' là nước mà ở đó bên thụ hưởng từ việc thực hiện hợp đồng có hoạt động kinh doanh chính, hoặc nơi mà bên đó có hoạt động kinh doanh mà việc thực hiện hợp đồng được thực hiện thông qua nơi có hoạt động kinh doanh này, chứ không phải nơi có địa điểm kinh doanh chính. Các quy định có phần mập mờ này được đưa ra để điều chỉnh một số tình huống đặc thù. Ví dụ, trong tranh chấp liên quan đến bất động sản, thông thường luật của nước nơi có bất động sản sẽ được áp dụng. Nếu một bên ở vị thế yếu hơn, luật áp dụng sẽ là luật nào có khả năng bảo vệ bên đó nhiều nhất. Tương tự trong trường hợp người tiêu dùng, luật của nước mà người tiêu dùng có nơi thường trú sẽ là luật áp dụng.

Suy đoán chung tại khoản 2 Điều 4 không áp dụng đối với các hợp đồng liên quan đến quyền về bất động sản, cũng không áp dụng đối với các hợp đồng vận chuyển hàng hoá. Các suy đoán đặc biệt được quy định tại các khoản 3 và 4:

Hợp đồng liên quan đến các quyền về bất động sản. Khoản 3 Điều 4 quy định: Trong phạm vi theo đó đối tượng điều chỉnh của hợp đồng là quyền về bất động sản hoặc quyền sử dụng bất động sản, thì 'nước có mối liên hệ chặt chẽ nhất' được suy đoán là nước nơi có bất động sản.

Hợp đồng vận chuyển hàng hoá: Hợp đồng vận chuyển hàng hoá được suy đoán là có mối liên hệ chặt chẽ nhất với nước mà bên vận chuyển có trụ sở kinh doanh chính vào thời điểm kí kết hợp đồng, nếu nước đó cũng là nơi có địa điểm bốc hàng hoặc dỡ hàng, hoặc nơi có trụ sở kinh doanh chính của bên thuê vận chuyển. Nếu nước mà bên vận chuyển có trụ sở kinh doanh chính không phải là một trong những nước có một trong ba yếu tố này, thì suy đoán theo khoản 4 sẽ không được áp dụng.

C. Đề xuất

1. Đề xuất về tống đạt tài liệu tố tụng

Nếu bị đơn không thường trú trên lãnh thổ của nước thực hiện quyền tài phán, thì trát hầu toà (giấy triệu tập tham gia phiên toà) có thể được tống đạt bên ngoài lãnh thổ nước đó. Nếu công ty kí kết hợp đồng thương mại với một bên nước ngoài, thì cần thiết phải có điều khoản về 'đại diện tiếp nhận tài liệu tố tụng' ('agent for service'). Điều khoản này có nghĩa là bên kia sẽ chỉ định bên thứ ba, thường trú trên lãnh thổ bên kia, thay mặt mình tiếp nhận các tài liệu tố tụng. Sự chỉ định này sẽ loại bỏ sự cần thiết phải tống đạt lệnh triệu tập của toà án bên ngoài lãnh thổ. Điều khoản mẫu về 'đại diện tố tụng' có nội dung như sau: 'X chỉ định không huỷ ngang Y làm đại diện tố tụng cho mình, vì mục đích thay mặt mình tiếp nhận tất cả các giấy tờ và tài liệu tố tụng'. Điều khoản này có lợi cho các công ty Việt Nam khi kí kết hợp đồng thương mại quốc tế với các đối tác nước ngoài. Điều khoản này cũng giúp các doanh nghiệp Việt Nam tránh được những phức tạp và yếu kém trong nhiều vụ việc.[53]

[53] Vụ tàu Cần Giờ bị bắt giữ tại Tanzania theo lệnh của toà án nước này, để bảo đảm việc bồi thường thiệt hại cho một công ty Tanzania là bên thắng kiện trong vụ kiện với doanh nghiệp nhà nước của Việt Nam.

2. Điều khoản về quyền tài phán54

Trong các hợp đồng thương mại quốc tế, thường sẽ có tình trạng toà án của nhiều nước đều có quyền tài phán. Để tránh những tranh cãi về việc toà án nào có quyền tài phán đối với vụ kiện, các bên tốt nhất là nên đưa vào hợp đồng điều khoản về toà án có quyền tài phán. Ví dụ: 'Các bên đồng ý không huỷ ngang rằng toà án Việt Nam có thẩm quyền riêng biệt đối với tất cả các tranh chấp liên quan đến hợp đồng này'. Điều khoản về quyền tài phán sẽ bảo đảm rằng toà án được các bên lựa chọn sẽ giải quyết vụ kiện. Tuy nhiên, cũng cần phải lưu ý rằng có những nước đặt ra những quy phạm mệnh lệnh về quyền tài phán của toà án nước này.

Nếu một bên bắt đầu khởi kiện ở một nước và bên kia không cho rằng nước đó là sự lựa chọn thích hợp để thực hiện quyền tài phán, thì thông thường, bên đó sẽ phải phản bác quyền tài phán trước khi đi vào biện hộ về nội dung. Bên phản bác cần thiết phải chứng minh tại toà án đầu tiên rằng toà án của nước khác mới là toà án thích hợp nhất để giải quyết vụ kiện. Chỉ khi toà án đầu tiên quyết định rằng toà án của nước khác là thích hợp hơn, thì đơn khởi kiện ban đầu sẽ bị huỷ bỏ và trình tự tố tụng sẽ được khuyến nghị thực hiện ở toà án nước thứ hai. Nếu bên phản bác muốn tiến hành các hành vi tố tụng ở toà án nước thứ hai, trong khi chờ toà án thứ nhất ra quyết định, thì các hành vi này sẽ bị tạm hoãn. Bên tranh chấp kia sẽ có khả năng thành công trong việc yêu cầu tạm hoãn các hành vi tố tụng tại toà án thứ hai, với lập luận rằng có vụ kiện khác đang được giải quyết tại toà án nước khác.

Mục 4. CÔNG NHẬN VÀ THI HÀNH PHÁN QUYẾT CỦA TRỌNG TÀI NƯỚC NGOÀI

Như đã trình bày ở trên, một trong những lí do hàng đầu của việc đưa điều khoản trọng tài vào hợp đồng quốc tế, đó là mức độ có thể dự đoán chắc chắn về khả năng thi hành phán quyết trọng tài. Việc thi hành các phán quyết trọng tài có tính khả thi cao là do có rất nhiều nước đã gia nhập các điều ước quốc tế tạo thuận lợi cho việc thi hành các phán quyết trọng tài nước ngoài, và các nước này chỉ quy định một số ít lí do từ chối việc thi hành. Mục này sẽ đề cập đến một số vấn đề và thủ tục liên quan đến việc công nhận và thi hành các phán quyết trọng tài theo các điều ước quốc tế và pháp luật quốc gia, cũng như các lí do từ chối việc thi hành chúng.

[54] Trong các thoả thuận ICA.

1. Việc áp dụng các điều ước quốc tế

A. *Công ước New York*

Sẽ không thể có sự phát triển có tính chất bùng nổ trong lĩnh vực trọng tài thương mại quốc tế[55] nếu như cộng đồng quốc tế thất bại trong việc giải quyết một vấn đề then chốt nhất đó là: làm sao có thể thực thi được phán quyết ?. Do các trọng tài viên không thể cưỡng chế thi hành phán quyết trọng tài giống như các toà án quốc gia - với sự trợ giúp của cơ quan thực thi quyền lực quốc gia - vấn đề làm thế nào có thể bảo đảm được tính 'có thể thi hành được' của phán quyết trọng tài luôn là mối quan tâm hàng đầu. Giải pháp này đòi hỏi phải có sự tham gia của cơ quan thực thi quyền lực quốc gia. Theo sáng kiến riêng của mình, ICC đã dự thảo một văn kiện mà sau đó đã trở thành Công ước New York về Công nhận và Thi hành các Phán quyết trọng tài nước ngoài năm 1958, và ICC cũng đã tham gia giám sát chặt chẽ quá trình để Công ước này có hiệu lực.

Công ước New York yêu cầu toà án của các nước thành viên phải thi hành các thoả thuận và phán quyết trọng tài. Ở thời điểm cuối tháng 12/2017, có 157 nước tham gia Công ước này.[56] Công ước này đã góp phần vào sự phát triển của chế định trọng tài quốc tế, vì các bên tin tưởng rằng nếu họ thắng kiện tại tố tụng trọng tài, họ sẽ được bồi thường. Một nghiên cứu gần đây cho thấy, đối với luật sư của doanh nghiệp, lí do quan trọng nhất để lựa chọn hình thức trọng tài thay cho toà án để giải quyết tranh chấp, chính là khả năng thi hành cao của phán quyết trọng tài.[57] Bởi vì Công ước New York là công ước quan trọng nhất về công nhận và thi hành phán quyết trọng tài, mục này sẽ tập trung chủ yếu vào việc phân tích các chức năng, điều kiện và hiệu lực của Công ước này.

B. *Nguyên tắc điều chỉnh việc công nhận và thi hành*

Điều III Công ước New York yêu cầu toà án các nước thành viên công

[55] Một báo cáo đánh giá xu hướng trọng tài năm 2014 cho thấy rằng: 12 trung tâm trọng tài quốc tế quan trọng nhất hiện nay xử lý hơn 3.000 khiếu nại mỗi năm, trị giá hơn 1,7 nghìn tỉ USD. Mark Bezant, James Nicholson, and Howard Rosen, 'Trends on International Arbitration: A New World Order' (FTI Consulting, February 2015).

[56] UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, truy cập ngày 25/12/2017.

[57] Loukas Mistelis, *International Arbitration-Corporate Attitudes and Practices - 12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 *American Review of International Arbitration* 525, 545, mô tả kết quả các cuộc điều tra thực hiện trong năm 2005.

nhận các phán quyết trọng tài có giá trị ràng buộc và thi hành chúng phù hợp với pháp luật quốc gia và các quy định của Công ước này. Mặc dù thuật ngữ 'công nhận' và 'thi hành' thường đi cùng với nhau, nhưng chúng có ý nghĩa khác nhau. Khi toà án 'công nhận' một phán quyết trọng tài, điều đó có nghĩa là toà án công nhận phán quyết này có hiệu lực và mang tính ràng buộc, và như vậy toà án sẽ công nhận phán quyết trọng tài có hiệu lực pháp luật như bản án của toà án. Như vậy, một phán quyết trọng tài được công nhận có thể được dùng làm cơ sở để biện hộ trong một vụ kiện tại toà án hoặc trọng tài. Do phán quyết trọng tài được chính thức công nhận có hiệu lực pháp luật, nên các vấn đề đã được giải quyết trong phán quyết trọng tài thông thường sẽ không thể bị xem xét lại tại toà án hoặc trọng tài.[58]

Ví dụ: bị đơn là bên thắng kiện tại tố tụng trọng tài và phán quyết trọng tài chỉ đơn giản nói rằng bị đơn không phải chịu trách nhiệm gì. Bị đơn có thể sẽ muốn phán quyết này được công nhận vì mục đích ngăn chặn các vụ kiện dựa trên cùng các sự kiện và có thể được tiến hành trước một toà án hoặc hội đồng trọng tài khác. Việc 'thi hành' phán quyết trọng tài có nghĩa là sử dụng bất kì biện pháp chính thức nào để thu hồi tiền hoặc thực thi bất kì một sự uỷ quyền nào trong phán quyết trọng tài.

Khi phán quyết trọng tài nói rằng bị đơn phải bồi thường thiệt hại bằng tiền cho nguyên đơn, và bị đơn lại không tỏ ra sốt sắng thực hiện trách nhiệm trả tiền, khi đó nguyên đơn có thể tìm cách trước hết là công nhận và sau đó là sử dụng cơ chế thực thi pháp luật của toà án để thi hành phán quyết trọng tài. Khi phán quyết được công nhận, nguyên đơn có thể sử dụng bất kì biện pháp nào được pháp luật cho phép để thi hành phán quyết này, *ví dụ*: sai áp tài sản của bị đơn phù hợp với các thủ tục pháp luật ở nước mà nguyên đơn muốn thi hành phán quyết trọng tài. Ở một số nước, hầu như không có sự khác nhau trên thực tế giữa thủ tục công nhận và thi hành phán quyết trọng tài. Khi một phán quyết được thi hành, điều đó có nghĩa là nó đã được công nhận từ trước đó.

C. *Việc lựa chọn cơ chế tài phán có lợi nhất để thi hành phán quyết của trọng tài nước ngoài*

'Forum shopping' là việc một bên trong thoả thuận trọng tài tìm kiếm cơ chế tài phán có lợi nhất để tiến hành các hành vi tố tụng, hoặc nơi thuận lợi nhất để thi hành hoặc huỷ phán quyết trọng tài. Căn cứ của việc lựa chọn này là việc xác định tài sản của bên thua kiện tại các nước khác nhau. Nếu tài sản chỉ có ở một nước, sẽ không có sự lựa chọn nào khác để thay thế.

Nếu tồn tại những căn cứ thực tế cho việc lựa chọn, khi đó bên quan tâm đến việc này sẽ so sánh các ưu điểm và nhược điểm ở mỗi nước. Những yếu tố cơ bản cần phải xem xét bao gồm: Mức độ tự do ở nước đó trong việc công nhận các phán quyết trọng tài nước ngoài, mức độ nước đó tham gia và thực hiện Công ước New York, điều khoản bảo lưu trật tự công cộng trong pháp luật của nước đó có ngặt nghèo không? và nó tác động như thế nào đến việc thi hành phán quyết trọng tài? liệu các thủ tục thi hành có thể bị tạm đình chỉ thực hiện không và trong thời gian bao lâu? liệu các cơ quan chính phủ có được hưởng quyền miễn trừ thi hành không và trong trường hợp nào? cơ sở nào để huỷ phán quyết trọng tài? và thời hạn thực hiện các thủ tục có liên quan ra sao?

C. *Công nhận và thi hành phán quyết trọng tài nước ngoài theo Công ước New York*

Công ước New York là một trong những điều ước quốc tế đa phương thành công nhất. Cùng với các điều ước quốc tế khác ủng hộ việc thi hành các phán quyết trọng tài quốc tế, Công ước này đã đóng góp vào việc phát triển trọng tài quốc tế như là một phương thức ưu tiên trong việc giải quyết các tranh chấp thương mại. Các bên mong muốn sử dụng trọng tài quốc tế bởi vì họ tin rằng nếu họ đạt được phán quyết trọng tài, thì phán quyết này sẽ dễ dàng được thực hiện ở hầu như tất cả các nước trên thế giới, nơi có thể tìm thấy tài sản của bên thua kiện.

1. Các yêu cầu đối với việc thi hành phán quyết trọng tài

(a) Phạm vi

Công ước có phạm vi áp dụng là các phán quyết trọng tài quốc tế và nói rõ là Công ước này điều chỉnh các phán quyết trọng tài được tuyên ở nước khác với nước mà phán quyết đó được thi hành.[59] Công ước này cũng cho phép thi hành các phán quyết trọng tài được toà án của nước nơi thi hành coi như 'không phải phán quyết trọng tài nội địa'.[60]

[58] Ở Hoa Kỳ, quyết định trọng tài có hiệu lực pháp luật ('*res judicata*') thậm chí ngay cả khi chưa được khẳng định hoặc công nhận. *Xem:* Gary Born, *International Commercial Arbitration* (2001), tr. 916.

[59] Điều I Công ước New York.

[60] Như trên.

(b) Quyền tài phán và vấn đề 'toà án không thích hợp' ('forum non conveniens')

Trong trường hợp bên thắng kiện muốn thi hành phán quyết trọng tài ở một nước thành viên Công ước, thì việc bên thua kiện có tài sản ở nước đó đã đủ để toà án nước đó có quyền tài phán và cho phép thi hành phán quyết trọng tài theo Công ước. Tuy nhiên, ở Hoa Kỳ, một số toà án đã từ chối cho thi hành phán quyết trọng tài dựa trên cơ sở rằng toà án Hoa Kỳ không có quyền tài phán đối với bên thua kiện, hoặc toà án được yêu cầu thi hành phán quyết trọng tài không phải là toà án thích hợp theo học thuyết 'toà án không thích hợp'.[61] Mặc dù học thuyết này bị chỉ trích ở phạm vi quốc tế khi áp dụng đối với việc thi hành các phán quyết trọng tài theo Công ước New York, nhưng thực tế là một số toà án ở Hoa Kỳ đã từ chối cho thi hành phán quyết trọng tài dựa trên học thuyết này. Điều này cần phải được các bên cân nhắc trong điều khoản trọng tài, khi có ý định thi hành phán quyết trọng tài ở Hoa Kỳ.

2. Thủ tục thi hành

Thủ tục thi hành phán quyết trọng tài thay đổi theo từng nước, vì các nước kí kết Công ước cho thi hành phán quyết trọng tài phù hợp với pháp luật và thực tiễn của nước mình.[62] Tuy nhiên, nước nơi phán quyết được yêu cầu thi hành không thể áp đặt mức án phí cao hơn hoặc đặt ra những điều kiện tốn kém hơn so với những điều kiện áp dụng đối với việc thi hành phán quyết trọng tài nội địa.[63] Điều kiện duy nhất mà Công ước quy định, đó là bên đề nghị công nhận và thi hành phải cung cấp cho toà án bản gốc hoặc bản sao có chứng thực phán quyết trọng tài, và bản chính hoặc bản sao có chứng thực thoả thuận trọng tài. Nếu ngôn ngữ của phán quyết hoặc thoả thuận trọng tài không cùng ngôn ngữ được toà án chính thức sử dụng, thì bên đề nghị phải cung cấp bản dịch có chứng thực các tài liệu này.[64] Thủ tục công nhận và thi hành phán quyết trọng tài do mỗi nước tự quy định, tuy nhiên, thường là giống với thủ tục được sử dụng ở nước đó trong việc công nhận và thi hành các bản án của toà án nước ngoài.[65]

[61] *Xem*: phán quyết nổi tiếng của Toà phúc thẩm trong vụ *Base Metal Trading, Ltd. v. OJSC 283 F3d 208*, [2002]; Cũng *xem*: vụ *Monegasque de Reassurances v. Nak Naftogaz of Ukraine and State of Ukraine 311 F.3d 488 498*, [2002] được trình bày trong Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge, (2008), tr. 20.

[62] Điều III Công ước New York.

[63] Như trên.

[64] Điều IV Công ước New York.

[65] Margaret L. Moses, Sđd, tr. 207.

Tuy nhiên, Công ước quy định một số lí do để bác việc thi hành phán quyết trọng tài, bao gồm: Phán quyết không có khả năng thi hành và không có hiệu lực; không được thông báo hoặc không công bằng; trọng tài viên hành động vượt quá thẩm quyền của mình; hội đồng trọng tài hoặc thủ tục không phù hợp với thoả thuận của các bên; phán quyết trọng tài chưa có hiệu lực hoặc đã bị huỷ.[66] Lí do khác để bác việc thi hành phán quyết trọng tài là: vụ tranh chấp không thích hợp để giải quyết bằng trọng tài hoặc có sự vi phạm điều khoản bảo lưu trật tự công cộng ở nước được yêu cầu thi hành.[67] Đặc điểm quan trọng nhất của các lí do biện hộ cho việc không thi hành phán quyết trọng tài, đó là các lập luận này không dựa trên lí lẽ phải trái của phán quyết trọng tài. Trên thực tế, ước tính có khoảng 98% các phán quyết trọng tài được thi hành trên cơ sở các bên tự nguyện thi hành, cộng với việc đề nghị toà án cho thi hành phán quyết trọng tài.[68]

2. *Trật tự pháp lý trọng tài và hệ thống tư pháp quốc gia*

Trong trường hợp không có điều ước quốc tế, mỗi nước sẽ áp dụng quy định tố tụng của nước mình để thi hành phán quyết trọng tài nước ngoài trên lãnh thổ nước mình, bằng việc cho thi hành hoặc đơn giản chỉ là công nhận phán quyết này. Dưới đây là khảo sát ngắn gọn về thực tiễn của một số nước.

Có ba yếu tố - sự bành trướng ở tầm vóc toàn cầu thương mại xuyên quốc gia và trọng tài; các hoạt động mang tính 'tư pháp chung' của các Trung tâm trọng tài thương mại quốc tế (IAC) và các tổ chức nghề nghiệp; và các yêu cầu của Công ước New York 1958 - phối hợp với nhau để tạo ra một sức ép to lớn đến các hệ thống luật pháp quốc gia trong việc công nhận tính chất tự chủ và quyền lực của trật tự pháp lý trọng tài.

Tình huống mang tính chiến lược này mà các quốc gia đang phải đối mặt có thể được mô tả một cách đơn giản. Sự bùng nổ của thương mại, sự phát triển cả trọng tài như là một thiết chế thay thế cho toà án, và việc thực thi phán quyết trọng tài theo Công ước New York phối hợp với nhau đã tạo ra hai xung lực dẫn đến việc củng cố lãnh địa của trọng tài và sự phát triển của nó. Xung lực thứ nhất đó là sự cạnh tranh về mặt thiết chế giữa các hệ thống pháp luật quốc gia. Các quốc gia cạnh tranh với nhau để cho thế giới thấy rằng họ ủng hộ hoạt động kinh doanh

[66] Khoản 1 Điều V Công ước New York.

[67] Khoản 2 Điều V Công ước New York.

[68] Michael Kerr, 'Concord and Conflict in International Arbitration', 121 Arb. Int., (1997), tr. 128.

xuyên quốc gia, tự do hợp đồng, và tự chủ trọng tài. Điều cực kỳ quan trọng đó là các quốc gia cạnh tranh giữ vị thế thống trị cũng là các quốc gia quan trọng nhất về mặt chiến lược: Hoa Kỳ, Anh Quốc, Pháp - và với mức độ đang tăng lên - Hong Kong và Singapore. Mỗi một quốc gia này đều là những cường quốc thương mại hàng đầu, với hạ tầng rất phát triển về pháp luật, ngân hàng, tài chính, bảo hiểm; và mỗi nước này đều là nước chủ nhà của những trung tâm trọng tài toàn cầu. Một yếu tố cũng rất quan trọng nữa, đó là sự phát triển của pháp luật Hoa Kỳ, Anh Quốc và Pháp có ảnh hưởng rất lớn đến sự phát triển của đa số các hệ thống pháp luật quốc gia quan trọng nhất.[69] Hầu như không có bất kỳ toà án nào tại Hoa Kỳ, Anh Quốc hay Pháp đã từ chối việc cho thi hành các phán quyết trọng tài tính từ những năm 70. Hơn thế nữa, tất cả ba hệ thống pháp luật này còn đi xa hơn những yêu cầu của Công ước theo các cách khác nhau. *Ví dụ*: Luật của Pháp đã chính thức công nhận cơ sở xuyên quốc gia của phán quyết trọng tài, có nghĩa là cơ sở này không bắt nguồn từ luật pháp của bất kỳ quốc gia nào; các toà án của Pháp thậm chí còn cho thi hành cả những phán quyết đã bị tuyên huỷ bởi toà án của quốc gia địa điểm trọng tài.

Trọng tài đã trở thành một hoạt động kinh doanh có tính lợi nhuận cao. Các tổ chức tư nhân quyền lực, bao gồm các đoàn luật sư địa phương và quốc gia, các phòng thương mại, các công ty, tập đoàn thương mại, giờ đây đã xây dựng mối quan hệ đối tác với các định chế công để thúc đẩy các lợi thế tương đối của luật về hợp đồng của nước họ, các chính sách ủng hộ trọng tài, và toà án với tư cách là công cụ thi hành. Khi hành động như vậy, các tác nhân này đã giúp thể chế hoá thị trường trọng tài, trong khi cũng tạo ra một mô hình rõ ràng và dựa trên thực tiễn tốt về cái gọi là 'quốc gia ủng hộ trọng tài'. Đức, Hong Kong, Singapore, Thuỵ Điển, và Thuỵ Sĩ là những nước áp dụng triệt để mô hình quốc gia ủng hộ trọng tài, với những kết quả ngoạn mục.

Quốc gia càng hội nhập sâu rộng vào nền kinh tế toàn cầu, thì càng chịu sức ép phải tự do hoá chính sách về trọng tài thông qua việc áp ụng mô hình nói trên. Các quốc gia có thể làm điều này thông qua việc sao chép cách tiếp cận của các 'quốc gia ủng hộ trọng tài' khi đi đến việc công nhận và thi hành, và thông qua các đạo luật dựa trên Luật Mẫu của UNCITRAL.

[69] Alec Stone Sweet & Florian Grisel, *The Evolution of International Arbitration*, Oxford, 2017, tr. 64

Mục 5. CÔNG NHẬN VÀ THI HÀNH BẢN ÁN/QUYẾT ĐỊNH CỦA TOÀ ÁN NƯỚC NGOÀI

1. Các cách tiếp cận chung về công nhận và thi hành bản án/quyết định của toà án nước ngoài

Nguyên tắc cơ bản nhất của việc công nhận bản án/quyết định của toà án nước ngoài, là: về nguyên tắc, bản án/quyết định của toà án nước ngoài không có hiệu lực trên lãnh thổ nước khác.70 Nếu bên thắng kiện muốn sử dụng bản án/quyết định này để yêu cầu bên thua kiện thi hành, thì phải tuân theo một thủ tục pháp lí chính thức tại toà án nước sở tại để công nhận bản án/quyết định của toà án nước ngoài có hiệu lực pháp luật trên lãnh thổ nước sở tại. Một thủ tục chính thức về công nhận bản án/quyết định của toà án nước ngoài sẽ kéo theo việc toà án nước sở tại phải xem xét một số vấn đề tố tụng khác, ví dụ, quyền tài phán của toà án nước ngoài; hiệu lực chung thẩm của bản án/quyết định của toà án nước ngoài; việc tuân thủ các nguyên tắc của công lí và nguyên tắc tuân thủ đúng các thủ tục ('due process'); không có mâu thuẫn giữa bản án/quyết định của toà án nước ngoài và điều khoản bảo lưu trật tự công cộng của nước sở tại. Việc xem xét các vấn đề này không bao hàm việc xem xét lại các lí lẽ và lập luận nêu trong bản án/quyết định, vì tranh chấp đã được giải quyết tại toà án nước ngoài.

Mỗi nước, trên cơ sở chủ quyền của mình, sẽ đơn phương xác định liệu toà án nước mình có sử dụng hay không và sử dụng như thế nào bản án/quyết định của toà án nước ngoài? Thông thường, các nước chỉ công nhận hiệu lực pháp luật của bản án/quyết định của toà án nước ngoài, nếu việc công nhận này là vì lợi ích tốt nhất của nước đó. Trường hợp của Trung Quốc là một ví dụ thú vị. Pháp luật Trung Quốc chính thức cho phép khả năng công nhận các bản án/quyết định của toà án nước ngoài, tuy nhiên, trên thực tế, các bản án/quyết định của toà án nước ngoài rất hiếm khi được toà án của Trung Quốc công nhận.[71]

[70] *Ví dụ*, vụ *Hilton v. Guyot*, 159 US 113, 163 [1895]. Trong vụ này 'không có luật nào có hiệu lực vượt ra ngoài giới hạn của chủ quyền quốc gia. Mức độ mà quy định pháp luật của một quốc gia, cho dù là do cơ quan lập pháp, hành pháp hay tư pháp ban hành, có hiệu lực trên lãnh thổ quốc gia khác, phụ thuộc vào khái niệm mà các đại luật gia gọi là 'lễ nhượng quốc tế', *xem*: Lawrence Collins và các tác giả khác, (chủ biên), *Dicey, Morris and Collins on the Conflict of Laws*, Sweet & Marwell, 14th edn., (2006), tr. 567.

[71] Lu Song, 'The EOS Engineering Corporation Case and the Nemo Debet Bis Vexari Pro Una et Eadern Causa Principle in China', 7 *Chinese Journal of Intenational Law*, (2008), tr. 143 và 156.

Về vấn đề này có hai giả thuyết. Giả thuyết thứ nhất dựa trên lí thuyết 'trò chơi' trong luật quốc tế.[72] Mỗi một nước đều có mong muốn là các bản án/quyết định của toà án nước mình được càng nhiều nước công nhận càng tốt, vì việc được công nhận rộng rãi sẽ khuyến khích các bên tranh chấp lựa chọn nước đó để giải quyết tranh chấp và bảo đảm rằng bản án/quyết định mà toà án nước đó tuyên là có ý nghĩa và có hiệu lực thực thi trên thực tế.[73] Đối với hệ thống pháp luật quốc tế, việc kí kết một điều ước đa phương về công nhận các bản án/quyết định của toà án nước ngoài sẽ là một giải pháp lí tưởng. Sự hợp tác quốc tế trong lĩnh vực này sẽ giúp làm giảm thiểu các chi phí giải quyết tranh chấp tại toà án. Tuy nhiên, thực tế cho thấy là không có nước nào tỏ ra sốt sắng trong việc công nhận các bản án/quyết định của toà án nước ngoài.74 Việc các nước không nhiệt tình trong việc công nhận các bản án/quyết định của toà án nước ngoài được giải thích là để bảo vệ các bị đơn của nước sở tại, khuyến khích việc chuyển giao tài sản và vốn vào nước mình, tạo điều kiện để nhiều tranh chấp được giải quyết tại toà án nước mình và tăng thu nhập cho các nhóm lợi ích có ảnh hưởng. Là một chủ thể có chủ quyền, không nước nào có thể bị bắt buộc phải công nhận bản án/quyết định của toà án nước khác.

Giả thuyết *thứ hai* lập luận rằng các nước ít nhất cũng nên công nhận một số bản án/quyết định của toà án nước ngoài, bởi vì điều này có lợi cho chính họ thông qua việc tiết kiệm chi phí và khuyến khích các nước khác có ứng xử tương tự. Việc công nhận bản án/quyết định của toà án nước ngoài sẽ giúp giảm thiểu chi phí tranh tụng cho các bên và giúp giảm thiểu tình trạng quá tải về số lượng các vụ kiện mà toà án sở tại phải giải quyết. Giả thuyết phù hợp nhất là: việc công nhận bản án/quyết định của toà án nước ngoài sẽ là một quá trình tố tụng đỡ tốn kém hơn việc bắt đầu một vụ kiện thứ hai. Hiệu lực của việc công nhận tại các nước khác là quan trọng nhưng chỉ đứng hàng thứ hai. Công nhận là một chiến lược bao trùm và hữu ích như các chiến lược giải quyết tranh chấp khác, thậm chí có thể hữu ích hơn các chiến lược khác, tuỳ thuộc vào việc các đối tác sẽ ứng xử như thế nào. Như vậy, ngay cả khi một nước khác không hợp tác, việc toà án nước này công nhận một vài bản án/quyết định của toà án nước khác cũng là một điều tốt.

[72] Về việc giải thích về lí thuyết 'trò chơi' trong các bối cảnh khác nhau trong luật quốc tế, *xem* Andrew T. Guzman, *How International Law Works: A Rational Choice Theory*, Oxford, (2008), tr. 30-32.

[73] Như trên, tr. 421-423.

[74] Như trên, tr. 421-422.

Không có giả thuyết nào chiếm ưu thế cho đến hiện nay. Các bằng chứng thực tế đều ủng hộ cả hai giả thuyết nêu trên.[75]

2. Công nhận và thi hành các bản án/quyết định của toà án nước ngoài theo các điều ước quốc tế

Việc theo đuổi các điều ước về công nhận và thi hành các bản án/quyết định của toà án nước ngoài được một số nước cho là có kết quả. Tuy nhiên, có rất ít các điều ước như vậy được thực hiện. Ví dụ, Hoa Kỳ không kí kết bất kì điều ước nào như vậy,[76] và nhiều nỗ lực để kí kết các thoả thuận như vậy với Hoa Kỳ đã không thành công.[77] Chỉ có rất ít nước tham gia vào rất ít những điều ước như vậy.78 Cũng chỉ có rất ít các điều ước đa phương về công nhận bản án/quyết định của toà án nước ngoài. Đó là hai công ước của EU;[79] Công ước liên Mỹ về quyền tài phán ở phạm vi quốc tế đối với hiệu lực trị ngoại lãnh thổ của bản án/quyết định của toà án nước ngoài;[80] và ba công ước về thu hồi tiền trợ cấp nuôi con ở nước ngoài.[81] Nỗ lực được nói đến gần đây của Hội nghị La Hay về tư pháp quốc tế nhằm thông qua một công ước đa phương về công nhận lẫn nhau đối với các bản án/quyết định cũng đã thất bại.[82] Tuy nhiên, cũng cần thiết phải đề cập đến một số nội dung của Công ước này để hiểu được những nỗ lực quốc tế trong vấn đề này.

[75] Yaad Rotem, 'The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments', 10 *Chicago Journal of International Law* (2010) 2, tr. 510.

[76] Brian R. Paige, 'Comment, Foreign Judgments in American and English Courts: A Comparative Analysis', 26 *Seatle U L Rev 591*, (2003), tr. 621-622.

[77] *Ví dụ*: việc đàm phán với Anh Quốc trong những năm 70 đã kết thúc mà không đem lại kết quả gì vào năm 1981. *Xem*: Brian R. Paige, Sđd, tr. 622.

[78] Một số nước như Anh Quốc, Australia, Canada thiết lập hệ thống đăng kí các bản án của toà án các nước khác trên cơ sở có đi có lại; tuy nhiên, không phải nước nào có bản án được phép đăng kí để công nhận cũng có thoả thuận về công nhận với nước kia.

[79] Quy định số 44/2001 của Hội đồng châu Âu (Council Regulation 44/2001), OJ 2001 (L 12) 1 (Quy định Brussels I); và Quy định số 1347/2000 (Council Regulation 1347/2000), OJ 2000 (L 160) 19, (Quy định Brussels II).

[80] 'Inter-American Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments', *24 ILM* 468 (1985).

[81] 1956 UN Convention on the Recovery Abroad of Maintenance; The 1958 Hague Convention Concerning the Recognition and Enforcement of Decisions Concerning Maintenance Toward Children; và 1973 The Hague Convention on the Recognition and Enforcement of Decisions Relative to Maintenance Obligations. *Xem*: David F. Cavers, 'International Enforcement of Family Support', 81 *Colum L Rev 994*, (1981).

[82] Eckart Gottschalk và các tác giả khác, *Conflict of Laws in A Globalized World*, (2007), tr. 29-31.

A. Công ước La Haye về thoả thuận chọn toà án

Công ước này được coi là đối tác về giải quyết tranh chấp thông qua toà án với Công ước New York,[83] được ban hành vào ngày 30/6/2005. Hội nghị đã công bố báo cáo giải thích về Công ước này vào tháng 9/2007.[84] Sẽ không bao giờ có thể đạt được một hiệp định đa phương toàn cầu, do có sự khác biệt về luật nội dung và luật tố tụng và văn hoá pháp lí giữa các nước. Khác với trọng tài thương mại, toà án được coi như là sự thể hiện chủ quyền quốc gia và các chính phủ rất khó có thể thoả hiệp, ngay cả khi các chính phủ có nhu cầu hợp tác nhằm thúc đẩy tăng trưởng kinh tế.

B. Công ước Brussels và Công ước Lugano

Hiện nay, có hai loại thủ tục về công nhận và thi hành bản án/quyết định của toà án nước ngoài, tùy thuộc vào việc bản án/quyết định được tuyên ở nước nào. Nếu bản án/quyết định được tuyên bởi toà án một nước thành viên EC/EFTA về dân sự hoặc thương mại, khi đó vấn đề này ở Anh Quốc sẽ hoàn toàn do Luật về quyền tài phán và bản án dân sự năm 1982 và năm 1991 điều chỉnh ('CJJA'). Tuy nhiên, nếu phán quyết được tuyên ở nước không phải thành viên EC/EFTA, thì các quy định truyền thống sẽ được áp dụng. Vấn đề trở nên phức tạp hơn, khi có đến ba loại quy định truyền thống điều chỉnh vấn đề này. Loại quy định *thứ nhất* điều chỉnh việc công nhận bản án/quyết định của toà án các nước thành viên Khối thịnh vượng chung ('Commonwealth') trên cơ sở áp dụng Luật về quản lí tư pháp 1920 (The Administration of Justice Act 1920) (viết tắt là Luật AJA 1920). Loại quy định *thứ hai* áp dụng đối với bản án/quyết định của toà án các nước có thoả thuận áp dụng nguyên tắc có đi có lại với Anh Quốc trên cơ sở Luật về bản án của toà án nước ngoài (thi hành có đi có lại) 1933 (Foreign Judgments (Reciprocal Enforcement) Act 1933) (viết tắt là Luật FJA 1933). Và loại thủ tục *thứ ba* là các quy định common law áp dụng đối với bản án của toà án các nước còn lại.

3. Việc công nhận và thi hành bản án/quyết định của toà án nước ngoài trong common law của Anh Quốc

Trong lịch sử common law, các bản án/quyết định của toà án nước ngoài đã từng được công nhận và thi hành bởi các toà án ở Anh Quốc từ thế kỉ XVII. Việc này được bắt đầu trên cơ sở 'xã giao' ('comity'). Tuy nhiên, học thuyết này đã được thay thế bằng 'học thuyết về nghĩa vụ' được phát triển trong án lệ *Schibsby v. Westenholz* [1870].[85]

Các điều kiện cần đáp ứng để một bản án/quyết định của toà án nước ngoài có thể được công nhận và thi hành: Trong common law, nếu bên thắng kiện muốn thi hành bản án/quyết định của toà án nước ngoài ở Anh Quốc, thì cần phải tiến hành một thủ tục pháp lí mới dựa trên nghĩa vụ mà bên thua kiện phải thực hiện theo bản án của toà án nước ngoài. Một giải pháp thay thế là bên thắng kiện có thể biện hộ trong bất kì vụ kiện nào về vấn đề tương tự dựa trên cơ sở bản án của toà án nước ngoài là '*res judicata*' ('vụ việc đã được giải quyết xong tại toà án'). Nếu một đơn kiện lần đầu được đệ trình tại toà án Anh Quốc, thì bên nguyên đơn có thể yêu cầu toà án thực hiện thủ tục xét xử rút gọn theo quy tắc tố tụng dân sự, chừng nào mà bị đơn không đưa ra các lập luận biện hộ, như đã được xác định trong án lệ *Grant v. Easton* [1883], với điều kiện là đơn kiện nộp tại toà án Anh Quốc đã tuân thủ các quy định về quyền tài phán, và thủ tục tống đạt lệnh hầu toà đã được thực hiện với bị đơn ở nước ngoài.

Điều kiện quan trọng nhất để một bản án của toà án nước ngoài được công nhận và thi hành ở Anh Quốc, cho dù là theo common law hay theo Luật AJA 1920 và Luật FJA 1933 - đó là: 'toà án nước ngoài đã tuyên bản án đó phải có quyền tài phán theo nghĩa quốc tế để giải quyết vụ kiện đó. Nói cách khác, toà án Anh Quốc sẽ không công nhận hiệu lực của bản án của toà án nước ngoài, nếu toà án nước ngoài không có quyền tài phán phù hợp với quy phạm xung đột theo luật của Anh Quốc'.

Mục 6. PHÁP LUẬT VIỆT NAM VỀ GIẢI QUYẾT TRANH CHẤP THƯƠNG MẠI QUỐC TẾ GIỮA CÁC THƯƠNG NHÂN

Khi các bên trong hợp đồng thương mại quốc tế quyết định chọn Việt Nam là nơi giải quyết tranh chấp hợp đồng, pháp luật Việt Nam sẽ điều chỉnh quá trình giải quyết tranh chấp này.

[83] Spigelman J. J., 'International Commercial Litigation: An Asian Perspective', 37(2007) *Hong Kong LJ*, tr. 859.

[84] Hatley T. và Dogauchi M., *Explanatory Report on The 2005 Hague Choice of Court Convention*, http://www.hcch.net/index_en.php?act=publications.details&pid=3959.

[85] Nguyên tắc theo đó các bản án của toà án nước ngoài được thi hành ở Anh Quốc là bản án của một toà án có quyền tài phán, đã tạo ra cho bị đơn nghĩa vụ phải trả một khoản tiền được xác định trong bản án đó, mà toà án của nước đó có trách nhiệm cho thi hành; như vậy bất kì hành vi nào phủ nhận nghĩa vụ này, hoặc để biện luận cho việc không thực hiện nghĩa vụ này, sẽ bị coi là hành vi biện hộ. *Xem*: Abla Mayss, *Principles of Conflict of Laws*, Cavendish Publishing Limitted (1999).

1. Nguồn luật

Pháp luật Việt Nam điều chỉnh việc giải quyết tranh chấp thương mại quốc tế bao gồm các quy định trong Bộ luật Tố tụng dân sự 2015 (sau đây gọi là 'Bộ luật Tố tụng dân sự'), Luật Trọng tài thương mại 2010 (sau đây gọi là 'Luật Trọng tài thương mại'), Luật Thương mại, Luật Đầu tư 2014 (sau đây gọi là 'Luật Đầu tư') và các văn bản dưới luật có liên quan.

2. Định nghĩa tranh chấp thương mại

Hiện nay, không có định nghĩa chính thức về tranh chấp thương mại trong pháp luật Việt Nam. Có thể hiểu khái niệm tranh chấp thương mại một cách gián tiếp là tranh chấp phát sinh giữa các bên trong hoạt động thương mại, hoặc phát sinh giữa các bên trong đó ít nhất một bên có hoạt động thương mại như quy định tại các khoản 1 và 2 Điều 2 Luật Trọng tài thương mại. Đồng thời, khoản 1 Điều 3 Luật Thương mại mô tả hoạt động thương mại là hoạt động nhằm mục đích sinh lợi, bao gồm mua bán hàng hoá, cung ứng dịch vụ, đầu tư, xúc tiến thương mại và các hoạt động nhằm mục đích sinh lợi khác. Như vậy, tranh chấp phát sinh giữa các bên liên quan đến hoạt động mà ít nhất một trong các bên vì mục đích lợi nhuận là tranh chấp thương mại. Những tranh chấp này có thể được giải quyết tại toà án hoặc trọng tài, tùy thuộc vào điều khoản chọn nơi giải quyết tranh chấp trong hợp đồng thương mại quốc tế.

3. Giải quyết tranh chấp thương mại quốc tế theo phương thức tranh tụng trước toà án

A. *Hệ thống toà án Việt Nam và thẩm quyền*

Trước năm 2015, hệ thống toà án Việt Nam gồm ba cấp. Cấp thấp nhất là toà án nhân dân cấp quận, huyện trực thuộc tỉnh, cao hơn là toà án nhân dân cấp tỉnh, thành phố trực thuộc trung ương. Toà án cấp cao nhất ở Việt Nam là Toà án nhân dân tối cao. Toà án nhân dân cấp tỉnh, Toà án nhân dân tối cao có các toà chuyên trách. Toà án nhân dân cấp quận, huyện trực thuộc tỉnh không phân chia các toà chuyên trách. Các toà chuyên trách bao gồm toà dân sự, toà hình sự, toà lao động, toà hành chính, toà kinh tế. Các tranh chấp thương mại sẽ do toà kinh tế thuộc toà án nhân dân cấp tỉnh, thành phố trực thuộc trung ương và Toà án nhân dân tối cao giải quyết.

Điều 33 Bộ luật tố tụng dân sự 2011 quy định:

1. Toà án nhân dân huyện, quận, thị xã, thành phố thuộc tỉnh (sau đây gọi chung là toà án nhân dân cấp huyện) có thẩm quyền giải quyết theo thủ tục sơ thẩm những tranh chấp sau đây:

…

b) [T]ranh chấp về kinh doanh, thương mại …

…

2. [N]hững tranh chấp, yêu cầu theo quy định tại khoản 1 và khoản 2 Điều này mà có đương sự hoặc tài sản ở nước ngoài hoặc cần phải ủy thác tư pháp cho cơ quan lãnh sự của Việt Nam ở nước ngoài, cho toà án nước ngoài không thuộc thẩm quyền giải quyết của toà án nhân dân cấp huyện.

Điều 33 đã loại bỏ thẩm quyền của toà án nhân dân cấp huyện giải quyết các tranh chấp thương mại quốc tế. Những tranh chấp này sẽ thuộc thẩm quyền xét xử sơ thẩm của toà án nhân dân cấp tỉnh. Ngoài ra, khoản 1 Điều 29 Bộ luật tố tụng dân sự 2011 cũng quy định tranh chấp phát sinh trong hoạt động kinh doanh, thương mại giữa các cá nhân, tổ chức có đăng kí kinh doanh với nhau và đều có mục đích lợi nhuận. Như vậy, nếu một bên tham gia hợp đồng không nhằm mục đích lợi nhuận, tranh chấp giữa bên đó với bên kia sẽ không được coi là tranh chấp về kinh doanh, thương mại thuộc thẩm quyền của toà án. Chúng sẽ trở thành các tranh chấp dân sự thông thường.

Theo quy định tại Điều 3 Luật Tổ chức Tòa án nhân dân năm 2014, hệ thống thống tòa án Việt Nam gồm bốn cấp, theo đó Tòa án nhân dân tối cao là cơ quan xét xử cao nhất của nước Cộng hòa xã hội chủ nghĩa Việt Nam; dưới đó là Tòa án nhân dân cấp cao; rồi đến Tòa án nhân dân tỉnh, thành phố trực thuộc trung ương; và cuối cùng Tòa án ở cấp thấp nhất là Tòa án nhân dân huyện, quận, thị xã, thành phố thuộc tỉnh và tương đương. Nếu như pháp luật về tổ chức Tòa án nhân dân trước đó chỉ quy định hệ thống Tòa án Việt Nam gồm 3 cấp thì điểm mới nổi bật của hệ thống tòa án từ ngày 01/6/2015[86] chính là sự bổ sung của Toà án nhân dân cấp cao. Nhiệm vụ, quyền hạn của Tòa án nhân dân các cấp được quy định cụ thể trong Luật Tổ chức Tòa án nhân dân năm 2014.[87]

[86] Luật Tổ chức Tòa án nhân dân năm 2014 có hiệu lực kể từ ngày 01/6/2015.

[87] Điều 20, Điều 29, Điều 37 và Điều 44 Luật Tổ chức Tòa án nhân dân năm 2014.

Về cơ cấu tổ chức, pháp luật về tổ chức tòa án nhân dân có quy định Tòa án nhân dân cấp cao và Tòa án nhân dân tỉnh, thành phố trực thuộc trung ương phải có phân chia thành các tòa chuyên trách, bao gồm: Tòa hình sự, Tòa dân sự, Tòa hành chính, Tòa kinh tế, Tòa lao động, Tòa gia đình và người chưa thành niên. Trường hợp cần thiết, Ủy ban thường vụ Quốc hội quyết định thành lập Tòa chuyên trách khác theo đề nghị của Chánh án Tòa án nhân dân tối cao.[88] Còn đối với Tòa án nhân dân huyện, quận, thị xã, thành phố thuộc tỉnh và tương đương thì việc thành lập Tòa chuyên trách không phải là yêu cầu bắt buộc.[89]

Đối với các tranh chấp thương mại, các tòa chuyên trách có thể tiến hành xét xử bao gồm Tòa hình sự, Tòa dân sự, Tòa hành chính và Tòa kinh tế.

Thẩm quyền của Tòa án trong việc giải quyết các tranh chấp thương mại được quy định cụ thể trong pháp luật tố tụng dân sự hiện hành.

Điều 30 Bộ luật Tố tụng dân sự năm 2015 đã khẳng định những tranh chấp về kinh doanh, thương mại, nếu không thuộc thẩm quyền giải quyết của các cơ quan, tổ chức khác theo quy định của pháp luật, thì thuộc thẩm quyền giải quyết của Tòa án. Để làm rõ hơn về vấn đề này, khoản 1 Điều 30 cũng quy định tranh chấp phát sinh trong hoạt động kinh doanh, thương mại giữa các cá nhân, tổ chức có đăng ký kinh doanh với nhau và đều có mục đích lợi nhuận. Như vậy, nếu một bên tham gia hợp đồng không nhằm mục đích lợi nhuận thì tranh chấp giữa bên đó với bên kia sẽ không được coi là tranh chấp về kinh doanh, thương mại thuộc thẩm quyền giải quyết của Tòa án. Chúng sẽ trở thành các tranh chấp dân sự thông thường.

Về việc phân định thẩm quyền giải quyết tranh chấp của Tòa án theo cấp xét xử, Điều 35 Bộ luật Tố tụng dân sự năm 2015 quy định:

> Tòa án nhân dân cấp huyện có thẩm quyền giải quyết theo thủ tục sơ thẩm những tranh chấp sau đây:
>
> a) ...;
>
> b) Tranh chấp về kinh doanh, thương mại ...
>
> 3. Những tranh chấp, yêu cầu quy định tại khoản 1 và khoản 2 Điều này mà có đương sự hoặc tài sản ở nước ngoài hoặc cần phải ủy thác tư pháp cho cơ quan đại diện nước Cộng hòa xã hội chủ nghĩa Việt Nam ở nước ngoài, cho Tòa án, cơ quan có thẩm quyền của nước ngoài không thuộc thẩm quyền giải quyết của Tòa án nhân dân cấp huyện, ...

Như vậy, khoản 3 Điều 35 đã loại bỏ thẩm quyền của Tòa án nhân dân cấp huyện trong việc giải quyết các tranh chấp về kinh doanh, thương mại có yếu tố nước ngoài. Những tranh chấp này sẽ thuộc thẩm quyền xét xử sơ thẩm của Tòa án nhân dân cấp tỉnh. Ngoài ra, Điều 37 Bộ luật Tố tụng dân sự năm 2015 còn quy định Tòa án nhân dân cấp tỉnh có thẩm quyền giải quyết theo thủ tục sơ thẩm những tranh chấp về kinh doanh, thương mại trừ những tranh chấp thuộc thẩm quyền giải quyết của Tòa án nhân dân cấp huyện; hoặc những vụ việc mà Tòa án nhân dân cấp tỉnh tự mình lấy lên để giải quyết khi xét thấy cần thiết hoặc theo đề nghị của Tòa án nhân dân cấp huyện.

Ở cấp quận, huyện, thị xã, Tòa dân sự thuộc Tòa án nhân dân cấp huyện có thẩm quyền giải quyết theo thủ tục sơ thẩm những vụ việc về kinh doanh, thương mại thuộc thẩm quyền của Tòa án nhân dân cấp huyện đó. Đối với Tòa án nhân dân cấp huyện chưa có Tòa chuyên trách thì Chánh án Tòa án có trách nhiệm tổ chức công tác xét xử và phân công Thẩm phán giải quyết vụ việc thuộc thẩm quyền của Tòa án nhân dân cấp huyện.[90]

Ở cấp tỉnh, thành phố trực thuộc trung ương, Tòa dân sự thuộc Tòa án nhân dân cấp tỉnh có thẩm quyền giải quyết theo thủ tục sơ thẩm những tranh chấp về dân sự nói chung thuộc thẩm quyền của Tòa án nhân dân cấp tỉnh đó; giải quyết theo thủ tục phúc thẩm những vụ việc mà bản án, quyết định dân sự chưa có hiệu lực pháp luật của Tòa án nhân dân cấp huyện bị kháng cáo, kháng nghị theo quy định của pháp luật tố tụng dân sự hiện hành.[91] Bên cạnh đó, Tòa kinh tế thuộc Tòa án nhân dân cấp tỉnh có thẩm quyền giải quyết theo thủ tục sơ thẩm những tranh chấp kinh doanh, thương mại thuộc thẩm quyền của Tòa án nhân dân cấp tỉnh; giải quyết theo thủ tục phúc thẩm những vụ việc mà bản án, quyết định kinh doanh, thương mại chưa có hiệu lực pháp luật của Tòa án nhân dân cấp huyện bị kháng cáo, kháng nghị theo quy định của pháp luật tố tụng dân sự hiện hành.[92]

Về việc phân định thẩm quyền giải quyết tranh chấp của Tòa án theo lãnh thổ, Điều 39 Bộ luật Tố tụng dân sự năm 2015 quy định:

[88] Điều 30 và Điều 38 Luật Tổ chức Tòa án nhân dân năm 2014.

[89] Khoản 1 Điều 45 Luật Tổ chức Tòa án nhân dân năm 2014.

[90] Điều 36 Bộ luật Tố tụng dân sự năm 2015.

[91] Khoản 1 Điều 38 Bộ luật Tố tụng dân sự năm 2015.

[92] Khoản 3 Điều 38 Bộ luật Tố tụng dân sự năm 2015.

1. Thẩm quyền giải quyết vụ án dân sự của Tòa án theo lãnh thổ được xác định như sau:

a) Tòa án nơi bị đơn cư trú, làm việc, nếu bị đơn là cá nhân hoặc nơi bị đơn có trụ sở, nếu bị đơn là cơ quan, tổ chức có thẩm quyền giải quyết theo thủ tục sơ thẩm những tranh chấp về kinh doanh, thương mại...;

b) Các đương sự có quyền tự thoả thuận với nhau bằng văn bản yêu cầu Tòa án nơi cư trú, làm việc của nguyên đơn, nếu nguyên đơn là cá nhân hoặc nơi có trụ sở của nguyên đơn, nếu nguyên đơn là cơ quan, tổ chức giải quyết những tranh chấp về kinh doanh, thương mại...;

c) Đối tượng tranh chấp là bất động sản thì chỉ Tòa án nơi có bất động sản có thẩm quyền giải quyết...

3. Trường hợp vụ án dân sự đã được Tòa án thụ lý và đang giải quyết theo đúng quy định của Bộ luật này về thẩm quyền của Tòa án theo lãnh thổ thì phải được Tòa án đó tiếp tục giải quyết mặc dù trong quá trình giải quyết vụ án có sự thay đổi nơi cư trú, trụ sở hoặc địa chỉ giao dịch của đương sự.

Trong một số trường hợp nhất định, việc xác định thẩm quyết giải quyết tranh chấp về kinh doanh, thương mại còn được căn cứ theo sự lựa chọn của nguyên đơn hoặc của người yêu cầu.[93]

Trong quá trình giải quyết tranh chấp bằng Tòa án, nếu vụ việc dân sự đã được thụ lý mà không thuộc thẩm quyền giải quyết của Tòa án đã thụ lý thì Tòa án đó ra quyết định chuyển hồ sơ vụ việc dân sự cho Tòa án có thẩm quyền và xóa tên vụ án đó trong sổ thụ lý. Quyết định này phải được gửi ngay cho Viện kiểm sát cùng cấp, đương sự, cơ quan, tổ chức, cá nhân có liên quan. Đương sự, cơ quan, tổ chức, cá nhân có liên quan có quyền khiếu nại, Viện kiểm sát có quyền kiến nghị quyết định này trong thời hạn 03 ngày làm việc, kể từ ngày nhận được quyết định. Trong thời hạn 03 ngày làm việc, kể từ ngày nhận được khiếu nại, kiến nghị, Chánh án Tòa án đã ra quyết định chuyển vụ việc dân sự phải giải quyết khiếu nại, kiến nghị. Quyết định của Chánh án Tòa án là quyết định cuối cùng. Tranh chấp về thẩm quyền giữa các Tòa án nhân dân cấp huyện trong cùng một tỉnh, thành phố trực thuộc trung ương do Chánh án Tòa án nhân dân cấp tỉnh giải quyết. Tranh chấp về thẩm quyền giữa các Tòa án nhân dân cấp huyện thuộc các tỉnh, thành phố trực thuộc trung ương khác nhau hoặc giữa các Tòa án nhân dân cấp tỉnh thuộc thẩm quyền giải quyết theo lãnh thổ của Tòa án nhân dân cấp cao thì do Chánh án Tòa án nhân dân cấp cao giải quyết. Tranh chấp về thẩm quyền giữa các Tòa án nhân dân cấp huyện thuộc các tỉnh, thành phố trực thuộc trung ương khác nhau hoặc giữa các Tòa án nhân dân cấp tỉnh thuộc thẩm quyền giải quyết theo lãnh thổ của các Tòa án nhân dân cấp cao khác nhau do Chánh án Tòa án nhân dân tối cao giải quyết.[94]

[93] Điều 40 Bộ luật tố tụng dân sự năm 2015.

B. *Nguyên tắc xét xử*

Nguyên tắc xét xử tại toà án được quy định từ Điều 3 đến Điều 25 của Bộ luật Tố tụng dân sự 2015. Bên cạnh những nguyên tắc chung giống như pháp luật của các nước khác, pháp luật Việt Nam cũng có một số nguyên tắc đặc thù. Về nguyên tắc, toà án xét xử công khai. Tòa án chỉ xét xử kín trong những trường hợp đặc biệt theo quy định của pháp luật. Toà án có trách nhiệm tiến hành hoà giải và tạo điều kiện để các đương sự thoả thuận với nhau về việc giải quyết vụ việc dân sự theo quy định của Bộ luật này.

Trong quá trình xét xử, toà án không tiến hành xác minh, thu thập chứng cứ. Các bên có nghĩa vụ cung cấp chứng cứ, chứng minh cho yêu cầu của mình.

Nhìn chung, toà án xét xử và quyết định theo đa số, tức là hội đồng xét xử gồm 1 hoặc 3 đến 5 thẩm phán.

Tiếng nói và chữ viết sử dụng trong tố tụng dân sự là tiếng Việt. Nghĩa là, bên nước ngoài trong tranh chấp phải tự thuê phiên dịch và biên dịch tài liệu cho mình.

Toà án thực hiện chế độ hai cấp xét xử. Bản án/quyết định sơ thẩm của toà án có thể bị kháng cáo. Nếu bản án/quyết định sơ thẩm không bị kháng cáo, kháng nghị theo thủ tục phúc thẩm trong thời gian do Bộ luật tố tụng dân sự quy định, thì có hiệu lực pháp luật. Nếu bản án/quyết định sơ thẩm bị kháng cáo, kháng nghị, thì vụ án phải được xét xử phúc thẩm. Bản án/quyết định phúc thẩm có hiệu lực pháp luật. Nếu bản án/quyết định của toà án đã có hiệu lực pháp luật mà phát hiện có vi phạm pháp luật hoặc có tình tiết mới, thì được xem xét lại theo thủ tục giám đốc thẩm hoặc tái thẩm theo quy định của pháp luật.

[94] Điều 41 Bộ luật tố tụng dân sự năm 2015.

C. *Thủ tục tố tụng*

Việc khởi kiện được thực hiện khi một bên gửi đơn kiện bằng văn bản đến toà án. Đơn kiện có thể do đại diện theo ủy quyền của nguyên đơn, *ví dụ,* luật sư, hoặc bản thân nguyên đơn nộp. Nguyên đơn phải tạm ứng án phí. Thời gian trung bình để giải quyết một vụ tranh chấp khoảng một năm, tùy thuộc vào từng vụ tranh chấp cụ thể.

Trong trường hợp pháp luật không quy định khác về thời hiệu khởi kiện, thì thời hiệu khởi kiện để yêu cầu toà án giải quyết vụ án dân sự là hai năm, kể từ ngày quyền và lợi ích hợp pháp của cá nhân, tổ chức bị xâm phạm.

Bản án, quyết định của Tòa án giải quyết các vụ án dân sự nói chung và các tranh chấp về kinh doanh, thương mại nói riêng ở cấp sơ thẩm có thể bị kháng cáo, kháng nghị trong một khoảng thời gian nhất định. Bản án sơ thẩm, quyết định của Tòa án cấp sơ thẩm hoặc những phần bản án sơ thẩm, quyết định của Tòa án cấp sơ thẩm bị kháng cáo, kháng nghị thì chưa được đưa ra thi hành, trừ trường hợp pháp luật quy định cho thi hành ngay.

Ở phiên tòa cấp phúc thẩm, ngay sau khi nhận được hồ sơ vụ án, kháng cáo, kháng nghị và tài liệu, chứng cứ kèm theo, Tòa án cấp phúc thẩm phải tiến hành thụ lý vụ án dân sự. Chánh án Tòa án cấp phúc thẩm thành lập Hội đồng xét xử phúc thẩm và phân công một Thẩm phán làm chủ tọa phiên tòa[95]. Bản án, quyết định của Tòa án giải quyết các vụ án dân sự nói chung và các tranh chấp về kinh doanh, thương mại nói riêng ở cấp phúc thẩm có hiệu lực pháp luật kể từ ngày tuyên án.

D. *Công nhận và cho thi hành bản án/quyết định của toà án nước ngoài ở Việt Nam*

Đơn yêu cầu công nhận và cho thi hành bản án/quyết định của toà án nước ngoài ở Việt Nam phải được gửi đến Bộ Tư pháp Việt Nam. Bộ Tư pháp, trong thời hạn bảy ngày, phải chuyển hồ sơ đến toà án có thẩm quyền cùng toàn bộ tài liệu có liên quan. Toà án có thẩm quyền là toà án nhân dân cấp tỉnh như quy định tại Điều 37 và Điều 39 Bộ luật tố tụng dân sự năm 2015. Trong thời hạn năm ngày làm việc, kể từ ngày nhận được hồ sơ do Bộ Tư pháp chuyển đến, toà án có thẩm quyền phải thụ lí và thông báo cho viện kiểm sát cùng cấp biết.

Trong thời hạn chuẩn bị xét đơn yêu cầu, toà án có quyền yêu cầu người gửi đơn hoặc toà án nước ngoài đã ra bản án phải giải thích những điểm chưa rõ trong hồ sơ. Văn bản yêu cầu giải thích và văn bản trả lời phải được gửi thông qua Bộ Tư pháp. Việc xét đơn yêu cầu được tiến hành tại phiên họp do một hội đồng xét đơn yêu cầu gồm ba thẩm phán, trong đó một thẩm phán làm chủ tọa theo sự phân công của chánh án toà án.

Lưu ý rằng kiểm sát viên của viện kiểm sát cùng cấp phải tham gia phiên họp. Nếu kiểm sát viên vắng mặt thì phải hoãn phiên họp.

Cơ sở từ chối đơn yêu cầu công nhận và cho thi hành bản án/quyết định của toà án nước ngoài tại Việt Nam bao gồm: (i) Bản án/quyết định chưa có hiệu lực pháp luật theo quy định của pháp luật của nước có toà án đã ra bản án/quyết định đó; (ii) Người phải thi hành hoặc người đại diện hợp pháp của người đó đã vắng mặt tại phiên toà của toà án nước ngoài do không được triệu tập hợp lệ; (iii) Vụ án thuộc thẩm quyền xét xử riêng biệt của toà án Việt Nam; (iv) Cùng vụ án này, đã có bản án/quyết định dân sự đã có hiệu lực pháp luật của toà án Việt Nam, hoặc của toà án nước ngoài đã được toà án Việt Nam công nhận, hoặc trước khi cơ quan xét xử của nước ngoài thụ lí vụ án, toà án Việt Nam đã thụ lí và đang giải quyết vụ án đó; (v) Đã hết thời hiệu thi hành án theo pháp luật của nước có toà án đã ra bản án/quyết định dân sự đó hoặc theo pháp luật Việt Nam; và (vi) Việc công nhận và cho thi hành bản án/quyết định dân sự của toà án nước ngoài tại Việt Nam trái với nguyên tắc cơ bản của pháp luật Việt Nam.

4. Giải quyết tranh chấp thương mại quốc tế bằng phương thức trọng tài

A. *Thẩm quyền*

Khi các bên muốn giải quyết tranh chấp thương mại quốc tế bằng trọng tài, các bên phải thể hiện ý chí này bằng thoả thuận trọng tài. Theo quy định của pháp luật Việt Nam, thoả thuận trọng tài phải bằng văn bản. Văn bản được hiểu là sự trao đổi giữa các bên, có thể do một bên đề xuất và bên kia không phản đối. Thoả thuận trọng tài có thể được lập trước hoặc sau khi tranh chấp phát sinh.

Khi các bên trong tranh chấp có thoả thuận trọng tài và một bên gửi đơn kiện ra toà án, toà án phải từ chối vì không có thẩm quyền, trừ trường hợp thoả thuận trọng tài vô hiệu hoặc không thể thực hiện được.

[95] Xem thêm tại Điều 286, 287 Bộ luật tố tụng dân sự năm 2015.

Theo pháp luật hiện hành, các bên có thể thoả thuận hình thức trọng tài ('thiết chế' hay 'vụ việc'), ngôn ngữ xét xử, địa điểm xét xử (ở Việt Nam hay nước ngoài) cũng như thủ tục trọng tài trong trường hợp trọng tài 'vụ việc'.

B. *Các nguyên tắc*

Giải quyết tranh chấp bằng trọng tài được tiến hành không công khai, trừ trường hợp các bên có thoả thuận khác.

Các bên có thể tự mình tham gia quá trình giải quyết tranh chấp hoặc ủy quyền cho người đại diện tham dự; các bên có quyền mời nhân chứng và người bảo vệ quyền và lợi ích hợp pháp của mình. Hội đồng trọng tài cho phép người khác tham dự quá trình xét xử, nếu các bên đồng ý.

Ngôn ngữ sử dụng trong xét xử bằng trọng tài do các bên thoả thuận. Nếu các bên không có thoả thuận, thì hội đồng trọng tài sẽ quyết định ngôn ngữ được sử dụng trong quá trình xét xử.

Hội đồng trọng tài sẽ ra phán quyết trên cơ sở biểu quyết theo nguyên tắc đa số. Nếu biểu quyết không đạt được đa số thì phán quyết trọng tài được lập theo ý kiến của chủ tịch hội đồng trọng tài.

C. *Thủ tục trọng tài*

Một bên sẽ gửi đơn kiện bằng văn bản tới trung tâm trọng tài trong trường hợp trọng tài được sử dụng là trọng tài thiết chế, hoặc gửi tới bên bị kiện trong trường hợp trọng tài được sử dụng là trọng tài 'vụ việc'.

Trừ trường hợp có thoả thuận khác giữa các bên, hoặc thủ tục trọng tài của trung tâm trọng tài có quy định khác, trong thời gian mười ngày kể từ ngày nhận được đơn khởi kiện cùng các tài liệu kèm theo và chứng từ tạm ứng phí trọng tài, trung tâm trọng tài phải gửi cho bị đơn bản sao đơn khởi kiện của nguyên đơn và những tài liệu kèm theo.

Bị đơn có quyền kiện lại nguyên đơn về những vấn đề liên quan đến tranh chấp. Đơn kiện lại của bị đơn phải gửi cho trung tâm trọng tài. Trong trường hợp trọng tài được sử dụng là trọng tài 'vụ việc', thì đơn kiện lại phải được gửi cho hội đồng trọng tài và bị đơn. Đơn kiện lại phải được nộp cùng thời điểm với bản tự bảo vệ.

Hội đồng trọng tài gồm một hoặc nhiều trọng tài viên, tùy theo sự thoả thuận của các bên. Nếu các bên không thoả thuận về số lượng trọng tài viên, thì hội đồng trọng tài sẽ gồm ba trọng tài viên.

Phán quyết trọng tài phải bằng văn bản. Phán quyết trọng tài được gửi đến các bên ngay sau ngày ban hành. Phán quyết trọng tài là chung thẩm và có hiệu lực pháp luật ngay từ ngày ban hành.

D. *Cưỡng chế thi hành*

Các bên tự nguyện thi hành phán quyết trọng tài. Hết thời hạn thi hành phán quyết trọng tài mà bên phải thi hành phán quyết không tự nguyện thi hành, và cũng không yêu cầu hủy phán quyết trọng tài theo quy định của pháp luật, thì bên được thi hành phán quyết trọng tài có quyền làm đơn yêu cầu cơ quan thi hành án dân sự có thẩm quyền thi hành phán quyết trọng tài.

E. *Phán quyết của trọng tài nước ngoài*

Việc cưỡng chế thi hành phán quyết của trọng tài nước ngoài chỉ có thể thực hiện được khi toà án Việt Nam công nhận và cho thi hành theo quy định của Bộ luật Tố tụng dân sự. Việt Nam là thành viên của Công ước New York từ năm 1995, do đó, theo Công ước, phán quyết của trọng tài của bất kì một nước thành viên nào của Công ước cũng sẽ được thi hành tại Việt Nam và ngược lại. Đối với những nước không phải thành viên của Công ước và không tham gia các hiệp định song phương có liên quan với Việt Nam, thì phán quyết của trọng tài phải được công nhận và thi hành trên cơ sở có đi có lại và sự công nhận này phải không trái với các nguyên tắc cơ bản của pháp luật Việt Nam.

Thủ tục công nhận và cho thi hành phán quyết của trọng tài nước ngoài tại Việt Nam được quy định từ Điều 364 đến Điều 374 Bộ luật Tố tụng dân sự. Theo đó, đơn xin công nhận và cho thi hành phán quyết của trọng tài nước ngoài tại Việt Nam phải được gửi lên Bộ Tư pháp Việt Nam. Đơn viết bằng tiếng nước ngoài phải được dịch sang tiếng Việt và có hợp pháp hoá lãnh sự. Trong thời gian 7 ngày kể từ ngày nhận được đơn và các chứng từ kèm theo, Bộ Tư pháp sẽ chuyển đơn và các tài liệu này cho toà án nhân dân cấp tỉnh. Trong vòng ba ngày làm việc kể từ ngày nhận được hồ sơ từ Bộ Tư pháp, toà án có thẩm quyền phải thụ lí và thông báo cho các bên phải thi hành và viện kiểm sát cùng cấp biết. Trong thời hạn hai tháng kể từ ngày thụ lí, toà án có thẩm quyền sẽ đưa ra một trong

các quyết định sau, tùy từng trường hợp cụ thể: (i) Tạm đình chỉ việc xét đơn yêu cầu, trong trường hợp nhận được thông báo bằng văn bản của Bộ Tư pháp về việc cơ quan có thẩm quyền của nước ngoài đang xem xét quyết định của trọng tài nước ngoài; (ii) Đình chỉ việc xét đơn yêu cầu, nếu bên phải thi hành phán quyết tự nguyện thi hành phán quyết, hoặc bên được thi hành là tổ chức bị giải thể hoặc phá sản, mà quyền và nghĩa vụ của bên được thi hành này đã được giải quyết theo quy định của pháp luật, hoặc cá nhân phải thi hành đã chết mà quyền và nghĩa vụ của cá nhân này không được thừa kế; (iii) Đình chỉ việc xét đơn yêu cầu, trong trường hợp nhận được thông báo bằng văn bản của Bộ Tư pháp về việc cơ quan có thẩm quyền của nước ngoài đã hủy bỏ hoặc đình chỉ thi hành phán quyết của trọng tài nước ngoài; (iv) Đình chỉ việc xét đơn yêu cầu và trả lại hồ sơ cho Bộ Tư pháp, trong trường hợp không đúng thẩm quyền, hoặc bên phải thi hành phán quyết không có trụ sở tại Việt Nam, hoặc không xác định được địa điểm nơi có tài sản liên quan đến việc thi hành tại Việt Nam; (v) Mở phiên họp xét đơn yêu cầu.

F. *Toà án và phán quyết trọng tài ở Việt Nam*

Toà án có quyền hủy phán quyết trọng tài, nếu một bên có đầy đủ bằng chứng chứng minh rằng không có thoả thuận trọng tài, hoặc thoả thuận trọng tài vô hiệu, hoặc thành phần của hội đồng trọng tài, hoặc thủ tục xét xử trọng tài không đúng theo thoả thuận của các bên hoặc trái với quy định của pháp luật, hoặc tranh chấp không thuộc phạm vi thẩm quyền của trọng tài, hoặc bằng chứng do các bên cung cấp làm cơ sở ban hành phán quyết của trọng tài là giả, hoặc phán quyết của trọng tài trái với các nguyên tắc cơ bản của pháp luật Việt Nam.

TÓM TẮT CHƯƠNG 7

Các bên trong hợp đồng thương mại quốc tế thường quan tâm trước tiên đến việc làm thế nào giải quyết được tranh chấp, khi nó có thể phát sinh bất cứ lúc nào. Ngoài phương thức trọng tài được coi là chiếm ưu thế nhất, những phương thức giải quyết tranh chấp quen thuộc khác cũng thường được các bên dự liệu, bao gồm thương lượng, trung gian/hoà giải, và tranh tụng trước toà án. Cần lưu ý rằng, chỉ có kết quả của phương thức trọng tài và phương thức tranh tụng trước toà án là có tính ràng buộc pháp lí đối với các bên, trong khi đó các phương thức thương lượng, trung gian/hoà giải chỉ có thể tạo thuận lợi cho các bên tự giải quyết tranh chấp của mình bằng thiện chí. Mặc dù các phương thức này thường có thể cho ra kết quả là cả hai bên 'cùng thắng' ('win-win'), nhưng thực tế cho thấy chỉ có rất ít tranh chấp thương mại quốc tế được giải quyết chỉ bằng các phương thức không ràng buộc này. Thay vào đó, các phương thức này có thể được sử dụng với sự hỗ trợ của phương thức trọng tài và/hoặc phương thức tranh tụng trước toà án để giải quyết tranh chấp, theo cách đáp ứng tối đa lợi ích của các bên tranh chấp.

Quy trình và kết quả của phương thức trọng tài hoặc phương thức tranh tụng trước toà án có khả năng phụ thuộc nhiều vào các câu hỏi: luật nào (cả luật tố tụng và luật nội dung) được áp dụng cho một tranh chấp cụ thể? và cơ quan tài phán nào có thẩm quyền giải quyết tranh chấp? Theo nguyên tắc tôn trọng quyền tự định đoạt của các bên trong hợp đồng, các bên được phép chọn luật áp dụng và cơ quan tài phán cho tranh chấp của họ. Trong nhiều trường hợp, các bên phải tìm ra câu trả lời cho các câu hỏi nêu trên bằng cách áp dụng các điều ước quốc tế có liên quan, tập quán quốc tế, hoặc các quy định tư pháp quốc tế theo luật quốc gia của các nước có liên quan.

Ở giai đoạn cuối của quy trình giải quyết tranh chấp, các cơ quan tài phán thường tuyên phán quyết (của trọng tài) hoặc bản án/quyết định (của toà án). Điều tối quan trọng đối với bên thắng kiện là phải cố gắng đạt được sự thi hành phán quyết, bản án/quyết định đó. Nhờ có Công ước New York, việc thi hành phán quyết của trọng tài nước ngoài được sự ủng hộ rộng rãi của gần 160 nước kí kết Công ước. Theo Công ước này, những lí do của việc không thi hành phán quyết trọng tài nước ngoài sẽ được giải thích theo nghĩa rất hẹp. Ngược lại, thực tiễn thi hành bản án/quyết định của toà án nước ngoài lại rất hạn chế. Có một số quy tắc ở tầm khu vực điều chỉnh việc thi hành bản án của toà án nước ngoài, nhưng lại không có các thỏa thuận ở tầm toàn cầu về vấn đề này. Phía trước vẫn là chặng đường dài để phấn đấu cho các bản án của toà án nước ngoài được thi hành như các phán quyết của trọng tài nước ngoài.

Chương này cũng giới thiệu ngắn gọn về cơ chế giải quyết tranh chấp thương mại quốc tế theo quy định của pháp luật Việt Nam, nhằm giúp người đọc có cái nhìn so sánh. Điều đó cũng có nghĩa là Việt Nam đang rất cần tăng tốc trong việc hoàn thiện pháp luật theo hướng tương thích với pháp luật quốc tế, để trở thành nơi có cơ quan tài phán thuận lợi cho giải quyết tranh chấp thương mại quốc tế.

CÂU HỎI/BÀI TẬP

1. Thế nào là thương lượng, trung gian/hoà giải, trọng tài và tranh tụng trước toà án? Các phương thức giải quyết tranh chấp này khác nhau như thế nào?
2. Nêu điểm khác nhau giữa trọng tài 'ad hoc' và trọng tài thiết chế.
3. Toà án hỗ trợ hội đồng trọng tài trong việc giải quyết tranh chấp thương mại quốc tế bằng cách nào?
4. Theo anh/chị, pháp luật của các nước common law có ảnh hưởng như thế nào đối với việc giải quyết tranh chấp thương mại quốc tế trên thế giới?
5. Việc chọn địa điểm trọng tài có thể tác động như thế nào đối với quy trình và kết quả của tố tụng trọng tài?
6. Nêu sự khác biệt giữa nguyên tắc tôn trọng quyền tự định đoạt của các bên trong hợp đồng trong bối cảnh tố tụng trọng tài và cũng nguyên tắc này trong bối cảnh tranh tụng trước toà án.
7. Bên thắng kiện cần phải được công nhận và thi hành phán quyết trọng tài ở đâu?
8. Cần phân biệt 'công nhận' và 'thi hành' phán quyết trọng tài nước ngoài trong trường hợp nào?
9. Anh/chị có đồng ý với giả thiết cho rằng 'bản án của toà án nước ngoài không có hiệu lực ở nước khác'? Theo anh/chị, cần phải ủng hộ việc thi hành bản án của toà án nước ngoài trong trường hợp nào?
10. Trình bày về Công ước La Haye về lựa chọn toà án. Anh/chị có tin tưởng vào sự thành công của Công ước này trong tương lai không? Tại sao?
11. Anh/chị có cho rằng một bản án của toà án nước ngoài có thể được thi hành dễ dàng hơn ở nước có hệ thống pháp luật theo common law? Bản án này có thể được thi hành bằng cách nào?
12. Trình bày ưu điểm và hạn chế của tố tụng toà án ở Việt Nam.
13. Trình bày ưu điểm và hạn chế của tố tụng trọng tài ở Việt Nam.

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