PRELIMINARY DRAFT

Legal Analysis in Commercial Diplomacy

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CHAPTER 1.
INTRODUCTION

- Who should read this manual?

This manual is not just for trade professionals, those who work in governments to negotiate trade agreements and resolve trade-related disputes. It is also for those in the private sector whose jobs are affected by trade agreements and for those whose business relationships require that they know about international trade agreements and disputes. This includes government relations experts, customs experts, standards and certification professionals, supply management experts, human resources professionals, investment advisors, and a whole range of business professionals who deal every day with international trade and business problems.

- Why are legal instruments relevant to commercial transactions and everyday business dealings?

All commercial transactions are based on laws. Legal instruments govern how they work and what happens if something goes wrong. Domestic and international transactions and instruments are drafted and structured by lawyers, who are experts in the legal instruments and institutions that govern international trade and business law. Lawyers also represent companies and individuals when they need to resolve commercial disputes.

This manual will not make someone a lawyer, but it will help non-lawyers to understand the basic principles that govern international trade and business law and how commercial disputes with international implications are settled. It will also help them to have a more informed discussion with lawyers and other experts who can help them settle disputes, interpret technical legal language, or give them a formal legal opinion.

- What does a typical commercial diplomat and trade policy advocate need to know?

The basic legal toolbox for trade policy advocates and commercial diplomats includes the WTO agreements and their jurisprudence, a handful of other international agreements applicable to specific sectors, and the principles common to national laws that govern commercial relationships. These differ a bit as they are applied in different legal systems, but most legal systems incorporate the same basic principles. It is also important to have a basic understanding of where and how commercial disputes are settled.

- How does this manual help trade professionals?

It is important for trade professionals to know about laws and legal proceedings because they provide the framework within which commerce is conducted and commercial disputes are settled. Knowing about and using laws and legal proceedings can be critical to analyzing a dispute, and to settling it. It is also helpful to know when legal proceedings may not be the best course of action. Legal proceedings are not *always* helpful in settling disputes. Legal experts like to believe that their expertise and venues are preferable to other options, but much of the consuming public often think otherwise, finding legal solutions costly and cumbersome, and venues time-consuming and non-transparent.

Knowing about laws and where and how disputes are settled can be a critical tool in a many ways. A relevant legal instrument and an available venue can provide an excellent incentive for negotiating settlement of a commercial dispute. The prospect of legal proceedings can sometimes be more potent than the outcome of legal proceedings. Especially when legal instruments and venues are available, accessible, fair, transparent and binding, they can serve as valuable resources for commercial dispute settlement.

This manual will identify and describe relevant laws and legal proceedings so trade professionals can decide when and how they might be useful.

CHAPTER 2
THE BASICS FOR TRADE PROFESSIONALS – THE WTO and WTO "LAW"

The WTO. The most important laws that commercial diplomats will encounter are the WTO agreements signed in 1994 as the Final Act of the Uruguay Round and the Marrakesh Agreement Establishing the World Trade Organization. These are the basic building blocks of international trade law.

They came about after several years of negotiation under the auspices of the General Agreement on Tariffs and Trade, or the GATT. Since its founding as one of the Bretton Woods institutions in 1947, the GATT had conducted several "rounds" of multinational trade negotiations. The Uruguay Round followed the lead of the Kennedy Round and the Tokyo Round (1973-1979) by including new areas within its sphere of agreements. It also established the World Trade Organization (WTO), an institution to administer the agreements and to conduct negotiations on an ongoing basis.

In addition to including new areas of agreement within its remit, such as intellectual property rights, The Uruguay Round made fundamental changes in the nature of the GATT's dispute settlement process, establishing the Dispute Settlement Mechanism (DSM) to administer dispute settlement proceedings and an Appellate Body to hear appeals from Dispute Settlement Panels. The "law" administered by the DSM

derives from the principles established in "GATT, and the trade policy review mechanism, which conducts and publishes regular reviews of member countries' trade policies.

In the less than ten years since the conclusion of the Uruguay Round, three fundamental properties of the new WTO have become apparent;

- Its scope is unprecedented – its agreements touch on nearly every aspect of domestic law and regulation,
- Its Dispute Settlement Mechanism is a powerful and binding source of public international commercial law, and
- Its jurisprudence and scope will likely continue to expand in the future as new agreements are concluded and as the DSM renders new decisions

www.WTO.org The WTO as an institution administers over 60 agreements, hosts ongoing trade negotiations and dispute settlement panels, reviews trade policies of its members, and administers assistance and training programs. It does this through a small staff (in comparison to other international organizations) headquartered in Geneva, Switzerland. It is headed by a Director-General, who has several subordinate Deputies. The organization is administratively organized into Directorates, each of which serves the needs of one or more committees composed of WTO members. Unlike many other international institutions, the WTO's professional staff performs largely technical assistance functions; all of the decision-making is done by WTO members themselves.

Committees form the basis of WTO decision-making, deciding issues on their agendas by consensus (votes are theoretically possible but in practice very rarely used). Their mandates are formed and shaped by Ministers who meet every two years at Ministerial meetings. Between these sessions, a General Council (essentially a super-committee to which others report) oversees the overall performance of the WTO bodies, including its Dispute Settlement Mechanism and the Trade Policy Review Mechanism, which conducts and publishes regular reviews of member countries' trade policies. It directly oversees the Goods Council, the Services Council and the Intellectual Property Council, and a host of other committees that service individual agreements. Only member governments are members of the committees, but the WTO as an institution has cooperative relationships with other multilateral institutions, several of which participate as observers in committee meetings and other WTO functions.

At present, the WTO is hosting multilateral negotiations in a new "round" initiated by Ministers at the WTO's Doha Ministerial meeting in December of 2001 in Doha, Qatar. This round will include negotiations in tariff and non-tariff areas in both the "built-in" agenda, and new areas that are under consideration as topics for future agreements.

The "built-in " agenda consists of those topics on which the WTO was given ongoing hosting responsibility in the Uruguay Round, agriculture and services. New areas of WTO agreement are being considered (environmental standards, investment, competition policy, government procurement). In addition, there will be tariff negotiations on industrial products and consideration of adjustments and additions to some of the present WTO agreements, which range from specific functional obligations (subsidies, rules of origin, import licensing, safeguards) to specific sectoral ones (services, agriculture, textiles, intellectual property.) The progress of these negotiations, as well as the day-to-day operation of the Dispute Settlement Mechanism, the Trade Policy Review Mechanism, and the committees, can be followed on the WTO website at www.wto.org.

The nature of WTO "law." Although much has been written about whether the GATT, and the succeeding WTO dispute settlement mechanism, operates on a common law or a civil law model, it is probably fair to say that it operates as an amalgam of the two; that is, although each dispute settlement panel has reference to decisions of other panels in which similar arguments and facts have been presented, it is authorized to interpret the facts and arguments before it on its own authority as well as in light of prior, or similar cases. This has given rise to a series of cases in which the broad principles set forth in the WTO Agreements and GATT 1947 are generally agreed by specific panels to operate in specific ways, but panels are not formally bound by prior decisions or interpretations.

This means that the principles of public commercial law are evolving ones. However, since the WTO operates by consensus, WTO principles can also be new ones, agreed by the parties. With successive rounds of trade negotiations and the WTO's growth as an institution, it is likely that the GATT 1947 principles, now nuanced by the Uruguay Round Agreements, will be even more fully elaborated and new areas added as new negotiations take place. However, it is likely that even though new principles are agreed, most of the basic principles will remain in force.

WTO Legal Principles. The two founding principles on which the GATT and the WTO are based are "most-favored nation" treatment and "national treatment." The former is set forth in Article I of GATT 1947, and the latter in Article III. A third, corollary principle, a prohibition of quantitative restrictions, is set forth in Article 11 of GATT 1947, and a fourth, transparency, is captured in various places in the Agreement. There is a substantial body of literature and jurisprudence interpreting each of these fundamental principles, but each principle can for the purpose of brevity be summarized as follows:

- Most-favored nation treatment; GATT, and now WTO, members pledge to give to each other member of this agreement the same tariff and non-tariff treatment that they give to the nation they most favor; i.e., the lowest tariff rates and the most favorable treatment of non-tariff issues.

- National treatment: members pledge to treat imported goods and services no less favorably than domestically produced goods and services. This is a broad prohibition against discriminating against imports, if they are "like products," of the same general nature and purpose.
- Elimination of quantitative restrictions; members pledge not to erect barriers to trade.
- Transparency; members pledge to publish their laws and regulations and to give notice to other members of changes to them.

Of course, for each principle there are several qualifications and exceptions written into the text of the governing article of GATT 1947. And, since these principles are also individually set forth in many of the agreements, their iteration is somewhat differently conditioned in each.

There is also a general exception provided in Article XX of GATT 1947 that contains important conditions for the operation of the agreement. Article XX excepts from the operation of every part of the agreement several broad categories of measures, as long as they are not "disguised restrictions" on trade and do not constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." These include measures necessary to protect human, animal or plant life or health, and those "relating to the conservation of exhaustible natural resources." Also included are measures "necessary to protect public morals," and those "relating to the products of prison labor."

The reach of the WTO principles. Most national and sub-national measures affecting commercial conduct, whether laws, regulations, or standards, are arguably referenced in some WTO context. Many domestic policies not primarily aimed at commercial conduct also have relevance to WTO agreements. For instance, such measures as a law designed to protect dolphins caught in tuna nets, a human rights initiative including a ban on trade with Burma, a domestic harbor tax, and cultural content requirements in domestic publications have all been the subject of WTO dispute settlement. Applying WTO legal principles to these areas is controversial, but it is an increasing element of a globalized economy. Perhaps principles of public laws of other kinds (social, environmental) will be added, or overtake, the commercial dimension.

CHAPTER 3
THE WTO PRINCIPLES AND AGREEMENTS

The fundamental principles of WTO "law" were originally drafted not to apply to tariff arrangements, but to a wide-ranging collection of economic policies. The drafters of the Havana Charter, a predecessor of the GATT, originally intended to formulate rules to govern restrictive business practices, trade barriers, intergovernmental commodity arrangements and the international aspects of domestic

employment policies. Tariffs were to be the subject of a separate negotiation. The drafters of the GATT included some of the most influential economic and political personalities of the 20th century. Their debates on the original GATT provisions were active and interesting. The principles they made fundamental to the GATT and now WTO have proved to be viable and enforceable.

The fundamental principles – most-favored nation treatment, national treatment (non-discrimination), elimination of barriers to trade, and transparency, are replicated in detail in the present WTO agreements, with one exception. Most-favored nation treatment is a basic obligation of WTO membership and as such is not replicated in the WTO agreements.

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CHAPTER 4
OTHER SOURCES OF LAW

Commercial diplomats rarely deal in WTO law alone. Most commercial problems arise when domestic laws conflict with WTO obligations or other national laws. But disputes can also arise in a variety of other situations, for instance when national or international standards are interpreted in ways that adversely affect trade, when local laws or ordinances are WTO-inconsistent in countries that are otherwise complying with their WTO obligations in national laws, or when private sector groups, such as industry associations, are effectively administering a licensing system that effectively blocks market access to foreign competitors.

A huge number of legal instruments can potentially apply to commercial transactions since all commercial transactions are governed by law of some sort and most transactions have some sort of commercial element. Following are descriptions and examples of other sources of law, grouped by their origin (which kinds of bodies generated them) their object (to which parties they apply), and their effect (whether they are voluntary or mandatory).

Not all "law" is "legal". Important to commercial transactions is a large amount of "law" pertaining to regulation and oversight of private and public enterprise. Some of this "law" is made by governments, but much of it is made by quasi-governmental or private institutions acting as standards-setting organizations for some element of commercial activity. Sometimes such bodies as industry associations or cooperatives act as commercial arbiters. While much of this "law" is publicly available in some form, much of it is also non-transparent and less accessible.

A. Domestic Legal Instruments[1]

1. Constitutional provisions: A constitutional provision is one set forth in the governing constitution, or other document(s) of national application (such as a Bill of Rights). An example of a constitutional provision is set forth below. This example is from the Constitution of South Africa. Internet sources for constitutional provisions are http://www.sosig.ac.uk/roads/subject-listing/World- cat/conlaw.html, and http://www.nhmccd.edu/contracts/lrc/kc/constitutions-subject.html.

> Conflicts that cannot be resolved
> 148. If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.

2. Federal laws or decrees (of national scope and application). Federal laws are instruments whose effect is primarily national in scope, but they can also affect citizens, corporations and vessels of the nationality not physically present in the jurisdiction under some circumstances.

> Statutes, codes or other instruments enacted by parliamentary or congressional bodies. These are laws promulgated by national parliamentary or legislative bodies. The example provided is from an unofficial translation of Mongolia's Law on Unfair Competition. The web site referenced has links to national legislatures and parliaments of many countries.
> http://wc.wustl.edu/parliaments.html
>
> > Article 3. Dominance, Monopoly and Monopolistic Activities 1. Dominance exists when a single entity acting alone or a group of economic entities acting together account constantly for over 50 per cent of supply to the market of a certain good or similar goods, products or carried out works and provided services.

3. Regulations, Rules, Licenses granted or administered by federal or national administrative bodies with national effect. These are rules, licenses or guidance whose origin is not a national legislative or parliamentary body, but rather an administrative or regulatory body to which authority to promulgate regulations of national effect has been granted. Regulations and licenses are usually more specific and detailed than statutes or decrees, and relate to a single economic activity. The example below is from Canada's regulations pertaining to industrial design applications. National regulations are normally available on the Internet in many countries from sites such as this one in the United States.
http://www.access.gpo.gov/nara/cfr/cfr-table-search.html

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[1] A selected list of guides to legal research can be found at: http://library.law.columbia.edu/foreignguide.html#worldwide.

> Industrial Design Regulations: P.C. 1999-2135 2 December, 1999…Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to section 25a of the Industrial Design Act, hereby makes the annexed Industrial Design Regulations… 10 (1) An application must relate to one design applied to a single article or set, or to variants (2) If an application does not comply with subsection (1), the applicant or their agent must limit the application to one design applied to a single article or set, or to variants.

4. National court decision or judgments: These are decisions or judgments rendered by national courts with effect on those persons, corporations or properties deemed to be within the national jurisdiction of the court or tribunal. The below-referenced constitutional decision of the Estonian Supreme Court is an example. Many national court decisions are available in whole or in part on the Internet, on the web pages of national courts, such as Estonia's,
http://www.nc.ee/english/index.html.

> Petition of Tallinn Administrative Court to declare clause 4.6 of "Rules for trading in markets and streets" approved by resolution No 43 of Tallinn City Council of 10.12.1998, order No 386 of the Government of Centre district of Tallinn of 31.03.1995 and order No 123 of the elder of Centre district of Tallinn of 28.03.2000 invalid because of conflict thereof with Articles 3 (1), 31, 113 and 154 (1) of the Constitution.

5. Sub-national level. At the sub-national level there are a variety of legal instruments promulgated by sub-national entities, such as states, districts, provinces, or other units.

> Sub-national statutes, codes or decrees. An example of a sub-federal law is a small part of the Corporate Tax Act of the Province of Alberta in Canada.
>
> > (1) The Minister of Revenue may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Act by a corporation, notify in writing any corporation by whom a return of income for a taxation year has been filed that no tax is payable for the year, or determine the corporation's entitlement to and the amount, if any, of a refundable tax credit for a taxation year…
>
> Sub-national regulations, rules, ordinances, licenses. These are regulations promulgated by administrative bodies of sub-national units, such as states and provinces. They are less likely to be found on the Internet than either sources of sub-national law or sub-national jurisprudence. An example from the U.S. State of California, a very large sub-national (state) unit with a correspondingly large administrative sector, is below.

> Title 7. Harbors and Navigation….Division 2. State Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun. (a) The Board shall meet on a regular basis at least once each month on the date and at a time and place specified by the President. (b) Notice of the date, time and place of a meeting of the Board shall be given at least ten days in advance of the meeting …

Sub-national court decision or judgment. These are decisions of courts that are not at the highest national level, but rather at the subnational level. They normally interpret matters of state or federal law, but their competence varies from country to country. The example below is a notation from a decision (applying common law) of the Supreme Court of Tasmania, a state of Australia.

> West Coast Transport Pty Ltd & Anor v Adams Group Services Pty Ltd & Anor [2001] TASSC 94 (15 August 2001) 7 The considerations applicable to misleading and deceptive conduct under the Trade Practices Act (C'wealth) are similar to those under the Fair Trading Act. In James & Ors v Australia and New Zealand Banking Group Ltd & Ors (1986) 64 ALR 347 at 372, Toohey J said, in a series of propositions, that: "(2) The mere fact that representations as to future conduct or events do not come to pass does not make them misleading or deceptive: Bill Acceptance Corporation Ltd v GWA Ltd (1983) 50 ALR 242.

6. Quasi-governmental regulations, procedures or standards. These are regulations, procedures or standards that in some countries are produced by governmental bodies, and in others by private sector bodies that have been given some authority by government. They most often concern sectoral standards or very focused economic enterprise activity (export monopolies, for instance). The trends towards deregulated economies across the world may mean, however, that devolution of government functions to the private sector will increase, and spread to other areas of economic life.

Standards-setting bodies. Voluntary and mandatory standards are set around the world by both government and non-government bodies. A list of links to government standards-setting bodies can be found at:

http://www.nist.gov/oiaa/stnd-org.htm, and at
http://www.iso.ch/iso/en/ISOOnline.openerpage.

An example of a private-sector standard setting body in the U.S is the National Fire Protection Association (NFPA), which describes itself at http://www.nvfc.org/regs02.html as follows.

> The NFPA is a private organization based out of Quincy, Massachusetts. Although it has no regulatory enforcement powers, it serves an extremely important function by bringing together experts to write and update standards which affect firefighting and fire protection. The NFPA works through a consensus process, which means that experts and interested parties representing different points of view are assigned to a technical committee where they present and debate ideas and ultimately a free on the most reasonable language for each standard. Once the technical committee reaches agreement, the standard is considered by the NFPA membership and finally is reviewed by NFPA's Standards Council as a matter of quality control.

Industry association procedures/rules can serve the same functions as standards-setting bodies by promoting uniform procedures among their members. In some countries they are given authority to enforce adherence to the procedures by virtue of exclusive license coupled with membership: if a member does not comply, it can be expelled, and if it is no longer a member it cannot engage in business. In other cases, industry associations are given other authority. Below is an extract from a 1997 report by Philip Budwick, for the Economic Strategy Institute entitled "On the Waterfront: Japan's Restrictive Port Practices and Harbor Regulations." An Internet version of the report is available at http://www.econstrat.org/jport.htm.

> Japan Harbor Transportation Association (JHTA). The JHTA exercizes unilateral control over Japan's waterfront through its broad discretion to review and disapprove virtually all aspects of a carrier's operations in Japanese ports. As the sole negotiating intermediary between carriers and the providers of port services, the JHTA also controls the availability of maritime labor to serve ocean carriers, nor can they choose port terminals that might be cheaper or more efficient for loading and unloading. This system has made Japanese ports extremely expensive and inconvenient. Restrictive Port Practices. In 1989, the JHTA levied a port tax on all cargoes using Japanese ports and services in order to fund the Harbor Management Fund (HMF), which had been created to subsidize waterfront labor and to help finance the upgrading of port facilities to deal with rising imports. Carriers from around the world complained that the new port tax was an unfair trading practice and that the fee structure discriminated against foreign carriers. After formal complaints from the United States and the European Union, the port tax was discontinued in 1992, and the remaining funds were pledged for labor purposes only. However, as of 1994, only nominal amounts had been expended from the HMF, and the JHTA's plans for disposition of the remaining funds still remains unclear.

7. *Private/Commercial agreements.* These are written agreements between and among private entities or between private entities and public ones. Their clauses do not ordinarily have the force of law, but are enforceable in courts or arbitral proceedings. Some are matters of public record while others are not.

8. *Arbitral and mediated settlements.* These include arbitral awards. They are enforceable in courts of countries agreeing to do so through bilateral investment treaties (BITs) or other treaties (such as the New York Convention, described below)

B. International Legal Instruments. Laws and regulations that have their origin at the international level are governed by the Vienna Convention on the Law of Treaties, as well as a multitude of treaties and international agreements that may bear on any subject, including treaties and agreements covering private contractual agreements and dispute resolution. Although much of this law is properly described as public international law, and governs relations among states including in areas where they cooperate in mutually beneficial arrangements (such as the operation of intergovernmental organizations), this kind of law can also concern aspects of the state itself, including its relationship to its own nationals, both in terms of their economic and the social activities. It is also important to note that the "customary practices of states" can also attain the status of international law under certain circumstances.

1. Treaties governing the operation of treaties.

The pre-eminent treaty that governs the operation of treaties is the Vienna Convention, on the Internet at http://www.taiwandocuments.org/vienna01.htm. A later treaty, also intended to govern relationships between international organizations as well as states, has not yet entered into force. This is viewable at:
http://www.taiwandocuments.org/vienna03.htm

2. Resolutions of multinational bodies. This category is largely composed of United Nations Resolutions, but could also cover other consensual determinations of multilateral processes, such as WTO and other ministerial declarations. While not of the same weight, the latter are no more binding

3. *Treaties governing the creation and operation of non-global multinational organizations (EU).* The European Union is important because it is a customs union that is, through successive treaties and agreements, growing into a federal system. The treaties to which the member states of the European Union are party, including the Maastricht Treaty that creates the entity that is the European Union, are viewable on the Europa website at http://europa.eu.int/abc/obj/treaties/en/entoc.htm.

4. *Treaties and agreements (multilateral, regional and bilateral) governing commercial relationships*. There is a very large number of treaties and other kinds of agreements governing commercial relationships between states. A United States government agency listing the commercial treaties and agreements to which the United States is a party lists over 295 agreements. New agreements, bilateral, regional and multilateral, are being negotiated all the time. Multiplied by the number of countries in the world, this creates a huge body of law.

Treaties are contracts among or between states with special status in international law. Agreements have a different status than treaties, particularly in domestic law where in some states they are not automatically incorporated into the domestic legal regime. Protocols are or amendments to treaties that generally have the same force and effect as treaties but must be separately negotiated and ratified. There is a large and specialized body of law pertaining to treaties and international agreements; it is accessible on the internet from many sources, one of which is http://www.public-international-law.net/. A guide to treaty research can be found at: http://library.law.columbia.edu/ustreaty/ The texts of treaties are also available on the internet.

Neither the law of treaties nor collections of treaties distinguish between those that are important for commercial reasons and those that are not. However, commercial treaties and agreements can be grouped in a rough hierarchy, with the Marrakesh Agreements Establishing the World Trade Organization at the top, a second tier of regional agreements in the middle (such as NAFTA, EFTA, MERCOSUR), and bilateral free trade agreements at the bottom. Specialized, or sectoral agreements such as bilateral investment treaties or tax treaties, would be grouped in a separate category as would treaties establishing and operating the international institutions whose work contributes to the operation and intellectual capital of commercially-oriented treaties and regional. The latter category would include the institutions of the United Nations, (UNCTAD, FAO) multilateral institutions with regional origins (OECD, APEC) and multilateral institutions/conventions with more specialized roles (WIPO, IPPC).

A number of internet sites for commercial agreements and treaties are listed in Chapter 10. Some useful sites for treaty collections generally are:

U.S. Department of State, Treaties in Force at
http://www.state.gov/www/global/legal_affairs/tifindex.html

Richard Kimber's Political Science Resources: links to constitutions, treaties, and other official documents around the world at http://www.psr.keele.ac.uk/const.htm

World Constitutions and International Treaties Humanities & Social Sciences Services Texas A&M University General, http://library.tamu.edu/govdocs/workshop/

Australian treaties at http://www.austlii.edu.au/au/other/dfat/

4.*Treaties governing other kinds of relationships.* Treaties that govern other kinds of relationships sometimes have commercial implications that are often very important. Although most do not purport to alter or affect the obligations covered by the WTO Agreements, several have been the source of controversy and confusion because of their effect on commercial conduct. The WTO is at present examining the relationship between multilateral environmental agreements (MEA's) because of the potential implications of some of their trade provisions for conflict with WTO obligations. The relationship of other kinds of agreements to WTO obligations, such as those administered by the International Labour Organization, has also been discussed in several multilateral institutions although a formal linkage to WTO Agreements has not been established. Obviously, there is much room for overlap, as all conduct can be considered to affect commercial relationships in some sense. This was recognized by the drafters of the General Agreement on Tariffs and Trade (GATT 1947) when they drafted GATT Article XX, which provides a general exception to GATT provisions for matters that fall within ten separate categories, "subject to the general requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." This exception, along with the rest of GATT 1947, is incorporated in the Marrakesh Agreements Establishing the World Trade Organization.

The following is an illustrative list of the kinds of agreements in force in specialized sectors whose legal implications may at some point touch on the kinds of commercial obligations embodied in the WTO Agreements.

- Investment
- Taxation
- Environmental cooperation
- Energy provision and use
- Scientific and technical cooperation
- Fisheries
- Protection of endangered species
- Labor and social welfare
- Human rights
- Security arrangements

5. Decisions of subsidiary bodies within treaties. When a treaty or agreement establishes a Secretariat and an organizational structure, it also sets in motion a process that will generate subsidiary bodies such as scientific, technical or other

operational entities within the administrative organization. The decisions of these bodies have force and effect derived from the terms of the treaty. Since it is generally these bodies that generate decisions at the level of detail that states can implement, their decisions are relatively important. As an example, below is a press report of a decision by the Commission established by the International Whaling Convention, reported on its site at http://www.iwcoffice.org/2002PressRelease.htm.

In 1982, the Commission took a decision, which came into force from the 1986 and 1985/86 seasons, that catch limits for all commercial whaling would be set to zero. Norway has lodged objections to the ban and has exercised its right to set national catch limits for its coastal whaling operations for minke whales. As in previous years, the Commission did not adopt a proposal by Japan for an interim relief allocation of 50 minke whales to be taken by coastal community-based whaling (20 votes for, 21 against and 3 abstentions).

6. Decisions of international tribunals. Decisions of international tribunals, such as the International court of Justice, are binding on states that have agreed to their jurisdiction. Such international tribunals as the International Court of Justice and the Law of the Sea Tribunal are discussed briefly under venues, below.

As an example of such a decision, a summary of a decision by the International Court of Justice in a case brought by New Zealand against France in 1995 to compel France to end nuclear testing at Mururoa Atoll (provided by the NZ government) is viewable at http://www.executive.govt.nz/93-96/minister/pm/nuclear/history.htm

7. International agreements. International agreements that do not rise to the level treaties are frequent in the commercial world. Examples of such agreements are international commodity agreements and, at a bilateral level, mutual recognition agreements. Some kinds of bilateral agreements have been superceded by multilateral agreements that make the bilateral ones superfluous. For instance, both international commodity agreements and voluntary restraint agreements are relatively uncommon now, since the WTO and the NAFTA contain an agreement on safeguards and the WTO also deals with the conditions of international trade in some commodities. Other kinds of bilateral agreements, such as mutual recognition agreements, are becoming more common. Still others, such as bilateral investment treaties, are likely to become superfluous when multilateral ones are negotiated.

> An example of a commodity agreement is the International Rubber Agreement, described on its website at http://61.6.32.133/inro/.

An example of a mutual recognition agreement is the U.S.-E.U. Mutual Recognition Agreement on medical devices. This agreement is described in part on its website as follows (http://www.fda.gov/cdrh/mra/):

On June 20, 1997, the U.S. and the European Union signed a mutual recognition agreement (MRA) which covers a variety of product sectors including telecommunications, electrical safety, electromagnetic compatibility, recreation craft, pharmaceuticals and medical devices. The aim of this agreement is to facilitate transatlantic trade while reducing costs for compliance with regulatory requirements. This agreement became effective December 1, 1998 and initiated a three year transition period during which time both sides will engage in confidence building activities. An MRA implementation team was organized which drafted the goals and objectives of the agreement, and the necessary steps toward implementation of the MRA. After the three year period, the agreement would become operational if the confidence building activities are successfully completed.

8. Decisions resulting from Investor/state dispute settlement. The North American Free Trade Agreement provides for a procedure for investors to address investment issues in an arbitral dispute settlement proceeding with the state that agrees to be party to such a procedure. Reports of NAFTA Arbitral Tribunals are available as THE NAFTA ARBITRATION REPORTS edited by Chris Thomas & Cameron Mowatt, ISSN: 1477-3422 US$650/GBP£460. These authors report that:

Some NAFTA Parties have subsequently extended investment protections to other States through free trade agreements or bilateral investment agreements For example, Mexico has negotiated treaties with European States (such as the 1997 Mexico-Spain Agreement on the Protection and Promotion of Investment). States in Asia and Oceania have also agreed to investor-State arbitration of investment disputes. The recent Agreement Between the Republic of Singapore and Japan for a New-Age Economic Partnership and the Singapore-New Zealand Closer Economic Relations Agreement both provide for investor-State arbitration. Investor-State arbitration is thus a rapidly developing area of international law. To date, there have been five NAFTA awards on jurisdiction; five awards on the merits; six awards currently pending; one award has been partially set aside on judicial review; and judicial review of another is pending.

9. International Quasi-governmental - International Standardization Agreements. As sources of law, international standards can normally be assumed to be more advisory than binding on parties, unless they are made the subject of technical regulations (or requirements) by governments. However, those standards issued by international standards organizations recognized by the WTO perhaps have special status. A recent WTO Panel Report finding the EU to be acting inconsistent with its obligations under the Agreement on Technical Barriers to Trade because it had not adopted an international standard is perhaps a case in point. The Panel report is available from the WTO website at www.wto.org. It is at WT/DS231/R/, decided May 29, 2002.

The organizations recognized by the WTO as international standardizing bodies include the International Organization for Standardization, the Codex Alimentarius, the

International Organization of Epizootics, and the International Plant Protection Convention. All are multilaterally organized and administered, and have been credible sources of international standardizing processes for many years. It is an open question as to whether other organizations could or would want to achieve this status, since standards-making has become somewhat more politicized in the WTO-recognized organizations. Standards are made by many kinds of organizations, some international, some private, some public. A list of such organizations in the United States would number in the hundreds; a list worldwide would be far larger. In most countries worldwide, the government has a role in making national and international standards. In the United States, this is mostly done by the private sector.

Following are links to some of the larger organizations, from which individual examples of standards can be drawn;

> The International Organization for Standardizaton, describing itself as "The source of ISO 9000 and more than 13,000 International Standards for business, government and society" at http://www.iso.ch/iso/en/ISOOnline.openerpage
> American National Standards Institute ANSI) http://www.ansi.org/
> National Institute of Standards and Technology, http://www.nist.gov/
> European Committee for Standardisation, http://www.cenorm.be/
> Eouropean Organization for Conformity Assessment, http://www.eotc.be/
> Standards Council of Canada, http://www.scc.ca/

10. Rules of International Cartels/Regulated Industry Associations. The rules of cartels and regulated industry associations can become legally binding in much the same way as standards; i.e., when they are recognized as such by national governments. They are also de facto important considerations for businesses operating internationally. One of the better-known cartels is the Organization of Petroleum Exporting Countries. Part of a brief description of how it functions, from its website at http://www.opec.org/, is as follows;

> Representatives of OPEC Member Countries (Heads of Delegation) meet at the OPEC Conference to co-ordinate and unify their petroleum policies in order to promote stability and harmony in the oil market. They are supported in this by the OPEC Secretariat, directed by the Board of Governors and run by the Secretary General, and by various bodies including the Economic Commission and the Ministerial Monitoring Committee.

11. *Letters of Credit, other commercial instruments.* These function as sources of legal obligation in much the same way as do private contracts, which require enforcement by national jurisdictions to function. The rules by which nations deal with the commercial obligations conferred on parties by letters of credit generally are set forth in Article Five of the Uniform Commercial Code. An explanation of these requirements is set forth at http://www.law.cornell.edu/ucc/5/overview.html.

C. Legal Systems

No discussion of legal instruments is complete without reference to the multiplicity of legal systems that exist around the globe. The diversity of these systems is far greater than the difference in approach between civil and common law systems, which incorporate and use many of the same concepts and similar legal reasoning. Most countries that were colonized adopted and still use elements of legal systems closely resembling those of the colonizers, but these exist in many places side by side with indigenous and cultural systems. Although in recent years many additional countries have adopted western-style institutions and legal systems, these exist in many countries side by side with more traditional legal systems of religious or cultural origin that are very much alive and still much used, not only in nationalities but across regions.

For instance, the following description of Indonesian law is presented on the APEC web site at http://www.arbitration.co.nz/apec/indonesia/overview.htm

> Indonesia is a civil law jurisdiction having adopted Dutch laws and practice at independence. Pancasila is an overriding national philosophy illuminating the legal system which calls for confrontation to be avoided and for disputes to be resolved through deliberation and consensus. The Indonesian Constitution of 1945 provided that old Dutch laws not in conflict with the new Constitution would remain valid, if not fully binding - at least as guidelines, unless and until they were superseded by new laws of the Republic. A number of new laws have been passed and others are under consideration but parts of the Dutch Civil and Commercial Codes remain including the Reglement van de Burgelijke Rechtsvordering, (RV) which contains the legal basis for arbitration. Other sources of law include decrees and legislation. Adat law is applied for some disputes in some areas. Case law has no legal effect in subsequent court proceedings although courts may sometimes refer to jurisprudence. The reported case law is rather limited.

The most powerful and widespread non-Western legal system is probably the Shari'a, or Islamic law. It is often thought in Western countries to apply primarily to religious or social, rather than to economic, issues. It is very relevant, however, to economic issues, and its concepts have been explicitly recognized in the federal court systems of countries in which it is used. Background information on legal concepts in Shari'a pertaining to corporations and other topics can be found on the Internet, including at: http://gulf-law.com/uaecolaw_shariah.html

An equally cogent system is Judaic law, applied in Israel and also existing in other countries. An alternative conceptual system is socialist law. It has been for the most part superceded at the national level in most formerly socialist countries by western concepts, but it is still important in many places at a sub-national level. Conceptually, Confucian law and philosophy is still prominent in some parts of the Chinese and other Asian legal systems, as are remnants of the Napoleonic code in Latin countries.

Finally, in many countries where indigenous peoples have rights to land they also administer their own legal systems. These systems also are also sources of rights and remedies, often exclusively so in their own jurisdictions. They exist in both developed (U.S., Canada, Australia) and in developing countries.

The World Bank hosts an Internet site providing a shorthand description of legal systems existing around the world at
http://www.odci.gov/cia/publications/factbook/fields/legal_system.html.

CHAPTER 5
IDENTIFYING LEGAL INSTRUMENTS THAT APPLY TO THE PROBLEM

CHAPTER 6.
WHEN LAWS CONFLICT

Most commercial disputes arise when there is a conflict or apparent conflict between legal obligations. Sometimes disputes also arise from divergent interpretation of legal obligations. Interpretation is almost always a significant element in dealing with legal conflicts.

The working assumptions. Commercial diplomats harbor several working assumptions, derived for the most part from customary international law and practice, on the relationships between laws; briefly, they are the following

- International laws, treaties or agreements should not be interpreted to conflict
- International treaties supercede international agreements
- International law supercedes national law
- National constitutions supercede national laws
- National laws supercede regulations,
- National law and regulation supercedes sub-national law and regulation

- Sub-national law supercedes local law

These are generally good working assumptions, but they must be frequently reexamined in commercial disputes because;

- States implement treaties differently and accord them differing status nationally
- Many instruments, such as policy directives and executive decrees, do not fit neatly into this hierarchy
- Some jurisdictions give precedence to local laws over national ones in some situations (e.g., European "subsidiarity")
- Some jurisdictions, such as aboriginal or native preserves, have virtually autonomous status within nations
- Other legal systems may exist outside the national or subnational ones that are parallel to, not subordinate to, national or local laws
- There may not be any effective legal system in situ
- There are exceptions to everything

What to do when laws conflict? The first problem confronting commercial diplomats who are negotiators of trade agreements is often to try to ensure that it does not happen in the first place. Trade agreement negotiators should be fully armed well before the inception of the negotiation with a thorough understanding of the laws applicable to their jurisdiction and the ways in which they are interpreted and enforced.

Understanding why laws may conflict: It is ultimately necessary for legal and trade professionals who deal extensively with legal issues to understand how laws in other jurisdictions are made, interpreted and enforced. This can mean knowing and understanding its political system with some sophistication. It can also mean understanding its administrative and judicial systems, because they interpret and enforce the laws. Finally, it usually means understanding elemental jurisprudence – how courts interpret the laws, and how international agreements and treaties relate to national laws. For instance, when negotiating an international agreement with Latin countries it helps to know that in many Latin countries the agreement will be automatically incorporated into their domestic legal code.

Which law governs? Finally, the increasingly international nature of many commercial transactions often offers a choice not only between international, subnational and local law, but between laws of different nations and localities. Finding a route to resolving the dispute may mean tracking down the status of a transaction in different legal systems in different countries.
Following are common sources of legal conflicts.

A. Competitive National and Subnational Relationships

Competition between national and subnational entities can account for a good deal of commercial conflict. It can come either from inherent tension in the system, or from the challenge of responding to pressure from outside. Most federal systems have constitutional law that defines the relationship between federal and sub-federal legal systems. However, this relationship is a more or less uneasy one in almost every federal system, and is constantly being reinterpreted in most of them by supreme judicial powers, and by federal and sub-federal legislatures.

Most federal systems leave international relations to the federal power, and exclude sub-federal units from participating in them. But as global commercial activity begins to affect more aspects of local and regional commercial life there are increased pressures at the local and regional level to regulate it. This can create conflicts internally, as when U.S. states infringe on the authority of the national government to regulate aspects of international trade, or internationally, when trading partners see the actions of sub-federal units to be in conflict with the obligations of a national government under treaty or multilateral agreement.

Sometimes sub-national entities take the lead on an issue in which local political will is strong. Thus, the U.S. State of Massachusetts prohibited its residents from trading with Burma, and other local jurisdictions in the U.S. have outlawed smoking, prohibited gun ownership, and declared themselves nuclear-free zones. Leon T. Hadar argues in an article for the Cato Institute at http://www.cato.org/pubs/trade/tpa-001.html that

> Massachusetts and more than a dozen counties and cities, including New York City and Berkeley, California, have already adopted sanctions that bar government purchases from companies that do business in China, Burma, and Nigeria. California, Texas, New York, New Jersey, North Carolina, Connecticut, and Rhode Island all considered similar sanctions before rejecting or tabling them. In most of the cases in which sanctions have been imposed, they go beyond barring the political entity itself from dealing with the targeted country to imposing the dreaded secondary boycott on companies that do business in the targeted country.

This posed not only a constitutional problem at the national level in the United States, where the interstate commerce clause of the Constitution has been interpreted to give the federal government exclusive jurisdiction over interstate trade, but also an international one, as the EU and others argued that it violated the WTO obligations of the United States, specifically those of the Agreement on Government Procurement (GPO). The proceedings can be found on the WTO website at www.wto.org, as "United States – Measure Affecting Government procurement," WT/DSSS/ 9 Sept 1998. In its request for a WTO Dispute Settlement Panel, the EU argued in part that

> The Law (Massachusetts Act of 25 June, 1996, chapter 130, §1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, ch.7, §§ 22G-22M) forbids State agencies, State authorities and other State entities from procuring goods and services from any person currently doing business with the Union of Myanmar (formerly known as the Nation of Burma)…by imposing a 10% price increase on the basis of whether or not a company does business in or with Mynmar, the Law violates the basic GPA requirement embodied inter alia in Article XIII.4(b)… The Law also nullifies or impairs the benefits accruing to the European Communities ("EC") under this Agreement, particularly as it limits the access of EC suppliers to procurement by a sub-federal authority covered by the Government Procurement Agreement in such a way as to result in a de facto reduction of the US sub-federal offer under the GPA.

The Massachusetts statute is an example of where dispute was intentionally provoked by a subnational unit. More often a conflict is unintentional and arises from local or sub-national regulations or ordinances originally intended to control only local, regional or sub-national conduct, but which by virtue of commercial activity (importing or exporting goods or services) actually extend more broadly in terms of their impact. For instance, dual taxation by both national and subnational units can generate confusing duplicative, and sometimes opposing requirements for national commercially entities. And performance requirements imposed by localities to attract domestic investment may end up discriminating against foreign investors because of the conditions they impose.

B. Divergent National Standards

Divergent laws, regulations and standards at the international level are common, and are important sources of conflict leading to trade disruption and controversy. They are particularly troublesome at the standards level. An electrical appliance might fit the requirements for production and use in one country, but not in another country where different standards are applied.

As technology increases the opportunities for the growth of new industries and new products, divergent industrial standards are increasingly the source of commercial conflict in a number of situations. Industries affected by proliferation of standards can sometimes manage to organize themselves nationally and internationally to reconcile divergent standards, with national governments playing a supporting role. More often, however, the preferred course is to encourage governments or multinational standardizing institutions to harmonize standards or to negotiate and implement mutual recognition or equivalence agreements. A third alternative is to rely increasingly on private standardization, labeling and certification schemes. These have increasingly begun to play an important role not just in product standards but also with respect to how products are made.

As a global economy begins to take hold, international standards issues affect not only producers and traders of manufactured goods. International social and environmental standards are increasingly recognized and there are many efforts internationally to reconcile them. Divergent international food safety standards have also consumed huge amounts of time and energy, and new issues are always being raised. An Internet site specializing in them is www.just-food.com.

Conflicting laws within a country are also a source of conflict, particularly in periods when rapid commercialization is taking place. For instance, this comment from the "Legal 500" at http://www.legal500.com/as500/frames/vi_fr.htm illustrates the difficulty of sorting out commercial laws in Vietnam.

> The volume of new legislation pouring out of government and bureaucracy at every level creates a near-impenetrable regulatory maze. It is a problem compounded by the fact that in Vietnam there is no centralised procedure for drafting new legislation and few experienced legal draftsmen to undertake the work. Laws enacted are often over-simplified to begin with, only subsequently to become further elaborated by ordinances and decrees, regulatory and procedural guidelines, and circulars issued by different people in various ministries and departments, most of whom have little or no legal training. The result is that different laws and regulations often conflict and sometimes directly contradict each other, making effective implementation almost impossible.

C. Conflicts Between International Treaty Obligations and Domestic Laws

Conflicts between international treaty obligations and domestic laws can also give rise to commercial disputes. This is most often the case when there is little guidance on how to implement multilateral agreements, and in countries that do not automatically incorporate international agreements into domestic law. It can also be the case when countries do not have the means to implement an international agreement, or when changes to domestic law to implement an agreement are not politically feasible.

For instance, many of the treaties governed by the International Labour Organization to which the United States subscribes in theory, are neither part of U.S. administrative law, or implemented as such in the United States. This is because States administer most provisions of labor law, and deal with the rights of workers under state laws that differ in many substantive ways. Such inconsistencies, to the extent that they exist, could easily pose commercial problems, for instance for employers who would like to claim that they adhere to practices condoned by the International Labor Organization, but whose employees actually are governed by state laws that differ in some respect from the obligations of a treaty.

In many countries, including many in Latin America, international treaty obligations are automatically made a part of national law, sometimes conflicting with national laws already on the books. Most countries in which this is the case have determined which law takes precedence. For example, the Federal Code on Private International Law, which governs many areas of civil and commercial law including the recognition and enforcement of foreign decisions in Switzerland, is limited in scope of application because international treaties concluded by Switzerland take precedence over the Code of Public International Law (CPIL). The CPIL therefore applies only to the extent that no treaty exists.

Conflicts that arise when laws are unenforceable are particularly difficult to resolve because outsiders can rarely resort to means that effectively supplant those of the sovereign government. In such cases, incentives and capacity-building may ultimately be the most effective solution. For instance, China's non-enforcement of its intellectual property laws was for many years a source of conflict. Recently China has recently reworked its internal laws, has begun to develop a network of specialist intellectual property courts and has introduced judicial review of decisions of bodies such as the Trademark Review and Adjudication Board.

Conflicts can also arise when international treaty obligations conflict with domestic or regional social priorities. For instance, the WTO's TRIPs Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights) requires that a country engaged in compulsory licensing not export those products to another. However, African countries engaged in supplying drugs to their AIDs-affected populations do not all have the same manufacturing facilities and need to export them for a regional anti-AIDs effort to be effective. When problems like this are regional they are likely to rise to the level of concerted attention in the governing institution. Hence the International Centre for Trade and Sustainable Development (ITCSD) reported at http://www.ictsd.org/monthly/bridges/BRIDGES6-5.pdf

> At the May 25-27meeting of the Council for Trade-related Aspects of Intellectual Property Rights (TRIPs), Members put forward a number of potential solutions to the problems that countries with insufficient or no drug manufacturing capacities could face in making effective use of compulsory licensing, The difficulty stems from the TRIPs Article 31(f) requirement that production under compulsory licensing must be primarily for the supply of the domestic market. A country producing a generic version of a brand name medicine under a compulsory license cannot a priori export that drug to another country, even if the latter has also granted a compulsory license for the drug in question but cannot manufacture it domestically. Paragraph 6 of the Doha Declaration on TRIPs and Public health instructs Members to find an 'expeditious' solution to this problem by the end of the year.

D. Conflicts Between Parties and Non-Parties to International Agreements

Conflicts between parties and non-parties to international agreements are a common source of commercial disputes as international agreements dealing with commercial conduct proliferate. Such a conflict would be posed, for instance, if a country not party to the Biosafety Protocol of the Convention on Biological Diversity (http://www.biodiv.org/biosafety/) were to allow shipment of bioengineered commodities without requiring the documentation that will be required by the Protocol, or if a developed country not party to the Basel Convention (http://www.basel.int/) were to allow the shipment of goods deemed to be hazardous under the Convention to a non-OECD country (the Convention prohibits shipment of hazardous waste from OECD to non-OECD countries). A further conflict would be posed if the issue was deemed to be actionable under either the international agreement, or in WTO dispute settlement. Then, arguably, the litigant would be able to choose between dispute settlement mechanisms the one deemed most favorable to the case. This is an issue that will be examined by the WTO's Committee on Trade and Environment in the next few years, but only with respect to multinational environmental agreements to which all parties are party.

E. Conflicts Between International Obligations

A final source of conflict can be found in conflicting multinational, or international, obligations. Although this is has not been widely litigated, there are many situations where such conflict is possible and increasing situations where commercial problems are posed because of this ambiguity. Certainly the policy objectives of many international instruments are in direct conflict when applied to specific facts and circumstances. For instance, Norway and Japan are both engaged in whaling that has essentially been prohibited by the International Whaling Convention (IWC). The text of the convention is at (http://www.tufts.edu/departments/fletcher/multi/texts/BH200.txt). Both Norway and Japan could claim with some basis that their carefully defined rights and obligations as signatories to the Marrakesh Agreements establishing the World Trade Organization conflict with their responsibilities as signatories (albeit not without reservation) to the Convention. And it is interesting to speculate on the relationship between the decision of the International Court of Justice on Bluefin Tuna, on the Internet at (http://www.worldbank.org/icsid/bluefintuna/award080400.pdf) and the rights and obligations of parties to the WTO agreements.

The absence of actual instances of conflict, as opposed to potential ones, is perhaps as indicative of the absence of potential solutions as it is of the relatively responsible and politic behavior of most states when they unearth conflicts at this level. Most have discovered that it is infinitely more desirable to appear to seek to adhere to all international obligations than it is to seek to unencumber the state from some of them.

A final word about overlapping and duplicative international agreements might be in order; as bilateral free trade agreements proliferate, it will soon be possible for some states to claim multiple obligations with respect to some of the same parties. This will not only complicate life for those whose business is directly linked to tariff rates, but will make the actual conduct of trade in goods (with value-added concerns and transshipment to and through third parties) a very customs-intensive operation.

CHAPTER 8.
IDENTIFYING VENUES: WHERE COMMERCIAL DISPUTES CAN BE RESOLVED, AND HOW THESE PROCESSES WORK

Unlike a grouping of the many kinds of laws that can be applied, a grouping of the venues in which commercial disputes can be resolved could be organized on a continuum with binding adjudicative or judicial judgments at one end, arbitration in the middle and negotiated dispute settlement, or mediation, at the other end of the spectrum.

A. Binding, Adjudicative Dispute Settlement – Using a Court System to Resolve Commercial Disputes

Adjudication is a process leading to a judgment; a judicial decision. Binding adjudication is characterized by the power of a third party, usually the state, to enforce a judgment. A judgment is only binding if it can be enforced, usually by the power of a national government.

1. National Court Systems. Binding, adjudicative dispute settlement is common at a domestic level, and very rare at an international level. Of the many venues and process available to commercial dispute settlement, the most well-known are domestic judicial processes; those using a national court system. National courts normally consider issues and cases relating to both national and sub-national law and regulation of national, but most can also consider issues relating to public international law. Many countries have local or first-tier courts, regional or sub-federal courts to which decisions of first-tier courts are appealed, and finally supreme, or constitutional courts, to which decisions of second-tier courts are appealed, and which consider national constitutional issues. Japan, for instance, has five levels of courts; there are 438 (local) summary courts, 50 district and 50 family courts, eight high courts and a Supreme Court.

However, there are many variations on this pattern. Some countries, have more than one system of law and a court system for each legal system. Some countries have courts for specialized areas of law (for example, Sweden has environmental courts, and many countries have family courts and traffic courts). China is beginning to establish special courts for intellectual property rights, and many countries have separate courts for tax issues. Many countries also have national courts that administer a body of religious law, such as shariah.

Court systems increasingly work to enforce arbitral awards. For many commercial disputes, which are increasingly settled by means of arbitration, the most important

body of local or national law is that which allows local or national courts to enforce arbitral awards made by bodies other than the national court system of the country.

Binding, adjudicative dispute settlement also exists at a local, as opposed to a national, level in almost every country. Less well-known as venues for binding, adjudicative dispute settlement are semi-judicial, and administrative processes. Binding dispute settlement can also be conducted by tribal or religious courts, in addition to or in place of, secular ones. These also exist in most countries outside formal court systems.

Advantages and Disadvantages of Using a National Court System

National, and some local, court systems have some advantages over other kinds of dispute settlement for commercial disputes. Most have nationally recognized credibility as neutral, relatively transparent venues that are routinely accessible to citizens. They are normally conversant with commercial issues and some have a long history of deciding commercial issues according to well-established principles of civil and common law. Procedures are well-known and reliable and their judgments are more readily enforceable than those of private parties, since they are backed by the power of the state or national government.

However, they also have some disadvantages. In many countries, decisions are not routinely enforced or enforced in a timely manner, and settlement is protracted and difficult. Some systems are not transparent, and access to them is expensive and time-consuming. Some are accessible only to citizens or others who can prove a claim on their time and resources. The jurisdiction of many national courts is limited to property or persons within the territory of the state, absent reciprocal relationships with other governments. Many lack procedural flexibility, some lack the necessary level of expertise and some are corrupt. These are some of the reasons that commercial arbitration has begun to supplant recourse to national court systems.

As a hypothetical example, suppose that parties to a commercial dispute involving property located in Indonesia need to resolve it. Would they be likely to resort to arbitration or to choose to litigate it in Indonesian courts given the following description of the judicial system, (which is drawn from http://www.legal500.com./)?

> Four judicial systems operate in Indonesia: the state administrative system; the general system which deals with standard civil and criminal law matters; the military system and the Islamic system of personal status law.
>
> The general legal system is heavily influenced by the fact that Indonesia is a former Dutch colony. The Dutch court structure is evident here:

Indonesia has a three-tiered system comprising the District Court, High Court and Supreme Court. The courts also work on a regional basis: rights of audience in one court do not automatically confer rights of audience elsewhere. There are separate branches of the District Court that deal with specific cases, such as the Commercial Court which deals with bankruptcy.

The Indonesian profession is fused. Lawyers must qualify as advocates, which entitles them to rights of audience and to advise on domestic law following a period of academic and vocational training. Foreign lawyers do not have rights of audience

2. National Adjudicative Processes for Specialized Claims – Trade Remedies

Any discussion of venues for resolution of *commercial* disputes must also include reference to the national institutional structures that enforce national trade remedy laws: antidumping and countervailing duties. These are often a first-line option for industries that feel they have been the victims of unfair trade practices. Since the 1980's there has been tremendous growth in these laws, enacted to protect domestic industries against material injury or other damage from the global market. Fair or unfair, the U.S. laws have been the basis of much discussion internationally as similar laws are adopted in many countries. Efforts are now underway in the WTO to harmonize some aspects of the way they work.

In the U.S, antidumping and countervailing duty processes are initially administrative procedures that are initiated by a complaining industry by petition to the International Trade Administration of the Department of Commerce, which then makes a determination (after investigation) of whether there is injury or damage. A second agency, the International Trade Commission, then determines whether the dumping threatens material injury or whether it retards establishment of a U.S. industry. A finding of injury results in the assessment and collection of a special duty. Any interested party in the proceeding, including foreign governments, labor unions, businesses or trade associations can then seek judicial review in the U.S federal court system.

Action against export subsidies of foreign governments is taken using the same procedures, with the existence of the practice a factual issue for the ITA and the determination of injury and amount of countervailing duty an issue for the ITC. In essence, both procedures provide recourse by private sector entities to administrative processes, and ultimately to the court system, to address broad-based, sector-specific, commercial disputes.

3. International Binding Adjudication

Internationally, binding adjudication of commercial disputes is almost totally limited to courts that hear disputes between public bodies (governments), with one exception;

investor-state dispute settlement under the North American Free Trade Agreement (NAFTA). Binding adjudication is relatively rare even under the auspices of multilateral agreements because there is no guarantee that states party to the agreements will relinquish their sovereignty to judgments of international courts in specific instances. A host of other instruments, ranging from incentives to embargoes, are employed to settle disputes on an international scale between nations.

4. WTO Dispute Settlement

The primary venue for binding adjudication of commercial disputes at an international level is the World Trade Organization's Dispute Settlement Mechanism. This is binding in the sense that member states have agreed in advance that they will submit to decisions of Dispute Settlement Panels. Additionally, WTO members have agreed in principle that parties to disputes can levy retaliatory tariffs when authorized by Panels to compensate for damages resulting from breach ("nullification and impairment") of the agreement or to retaliate against a member failing to conform to Dispute Settlement Panel decisions. The WTO Dispute Settlement Mechanism stands alone in authorizing specific compensation for damage resulting from commercial conduct on an international level, and retaliation, or "sanctions."

The effectiveness of the "sanctions" authorized by the WTO agreement has raised its profile internationally and spawned many attempts at imitation by other trade agreements and by venues that are not primarily commercially-oriented, such as environmental agreements. This has raised two important issues; the first whether trade sanctions can or should be used for environmental or other purposes by multilateral bodies. The second is whether "forum-shopping" might occur when multiple agreements each offer access to dispute settlement covering the same conduct. Both issues are particularly relevant because some of the agreements that contain trade sanctions provisions and offer dispute settlement predate the WTO; under international law, the most recently-agreed text would govern settlement of a dispute where all disputants are parties to both agreements.

WTO Dispute settlement is covered more thoroughly below, in Chapters 5 and 9, and there is a large body of legal commentary on the "forum shopping" and trade sanctions issues. Three websites offering access to some of it are: http://www.llrx.com/, offering general research on the WTO and related trade issues, http://www.gets.org, offering articles and materials related to trade and environment, and http://www.law.cornell.edu/topics/international.html, offering general research materials on issues related to international trade. The WTO's website at www.wto.org is also helpful, as is that of the International Centre on Trade and sustainable Development, at http://www.itcsd.org/.

5. Other International Venues

Other treaties and agreements modeled on the WTO also contain provisions for binding dispute settlement. Among these, the North American Free Trade Agreement

is perhaps the most comprehensive. Its website, at http://www.nafta-sec-alena.org/english/index.htm, contains a good description of its dispute settlement mechanism. The Free Trade Area of the Americas (http://www.ftaa-alca.org/), currently being negotiated, may provide a similar mechanism.

The European Court of Justice (http://europa.eu.int/cj/en/pres/comp.htm) provides another model for binding adjudication of disputes among nations. As Europe's integration proceeds to further enlargement, this forum will become relevant not only to present EU members but to a host of newcomers. Its self-described mission is to "ensure that the law is observed in the interpretation and applications of the Treaties establishing the European Communities and of the provisions laid down by the competent Community institutions." As such, its dispute settlement mechanism is available only to member states and other institutions of the European Union.

Finally, the International Court of Justice deserves mention because it sometimes hears disputes with commercial significance, and a host of environmental and other non-trade-related treaties deserve mention because some have the capability to conduct dispute settlement that is quasi-binding, and others are considering adding such provisions.

The International Court of Justice was established in 1946 to hear cases between states and to deliver advisory opinions. It operates only when nations agree to accept its jurisdiction, which they can do by reference through another agreement or treaty. Nations can also agree to compulsory jurisdiction under the Court, and can exclude certain categories of dispute. Procedures followed by the court are known to be lengthy. There is a written phase, during which the parties file and exchange pleadings, and an oral phase with public hearings. The judgment is final and without appeal. The Security Council of the United Nations is the body to which a nation party to a dispute would take an issue of non-compliance with a judgment rendered by the court.

The Court applies as law first the treaties and conventions in force, then international custom, general principles of law, and finally judicial decisions and the teachings of highly qualified publicists. The Court's website gives a useful description of its history and functions and includes a database of decisions. It is found at http://www.icj-cij.org/.

Environmental and other treaties in which parties have consented to binding adjudication or that authorize use of trade sanctions for compensatory or retaliatory purposes are very rare. The Law of the Sea Convention has such dispute settlement, but it has been rarely used. Other treaties, such as CITES, and Montreal protocol, the Basel Convention and some regional fisheries treaties (ICCAT) authorize trade sanctions or supervise broad trade prohibitions in clearly defined circumstances.

An increasing number of multilateral agreements covering production, transport and use of hazardous or environmentally suspect materials are looking to more stringent enforcement mechanisms, including prior informed consent regimes. There is no question that these concern commercial activity, but none has as yet raised a clear conflict with the WTO dispute settlement process. However, the WTO's Committee on Trade and Environment is currently considering "clarification" of the relationship of the WTO with "MEA's, or Multilateral Environmental Agreements as the result of the Doha Ministerial Declaration (December, 2001). The process can be followed through the WTO website at www.wto.org, and also by the International Center on Trade and Sustainable Development (ITCSD), http://www.itcsd.org/.

B. Arbitration

Arbitration has been said to be an expression of liberty, in contrast to a civil court proceeding which is characterized as an expression of authority. It is distinguished from adjudication primarily in terms of its relationship to the state, although the state can also compel arbitration and is responsible for enforcement of arbitral awards. Essentially, arbitration is submission of a dispute to one or more impartial persons for a final and binding determination

Commercial arbitration is more often a process initiated by contractual arrangement than by a formal, state-given right or duty. Formalized arbitration has existed for many years, but is recently becoming the dominant method of dispute settlement as treaties that govern national enforcement of arbitral awards gain more signatories and as commercial transactions, disputes, and hence the need for agreed arbitral venues, becomes more globalized Arbitration takes place between states, between states and private parties, and between individuals. It is hosted by a number of institutions and practiced by a number of individual practitioners and attorneys.

Arbitration processes hosted by international institutions handle primarily state to state arbitration and investor-state processes, but are beginning to accommodate private ("ad-hoc") transactions as well. The Permanent Court of Arbitration in the Hague now handles both state to state and private proceedings (www.pca-cpa.org), while the International Center for the Settlement of Investment Disputes (ICSID, www.worldbank.org/icsid)) handles primarily investor-state disputes. Other major international institutions hosting arbitration include the International Chamber of Commerce (ICC, www.iccwbo.org), the London Court of International Arbitration (LCIA, www.lcia-arbitration.com/lcia). Regional centers are prevalent, for example, in central Europe the International Arbitral Centre of the Austrian Federal Economic Chamber, www.wko.at/arbitration, for the Western Hemisphere the NAFTA's Commercial Arbitration and Mediation Center for the Americas (CAMCA ,

http://www.sice.oas.org/), and the Inter-American Commercial Arbitration Commission (IACAC).

The Japan Commercial Arbitration Association is an example of a regional arbitration venue, describing itself at http://www.jcaa.or.jp/e/arbitration-e/kaiketsu-e/venue.html, as follows:

> Arbitral awards made in Japan have the same effect as final and conclusive judgments and the enforceability of such arbitral awards is guaranteed under the Japanese arbitration law. On the other hand, the enforcement in Japan of awards rendered in foreign treaty countries are also guaranteed by the multilateral treaties: "the Geneva Convention on the Execution of Foreign Arbitral Awards", known as "the Geneva Convention of 1927" and "the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards", commonly known as "the New York Convention of 1958", both of which Japan is a signatory to. Conversely, the enforcement of arbitral awards made in Japan is guaranteed in foreign treaty countries. Japan also has bilateral treaties with 13 countries and these treaties guarantee the enforcement in other treaty countries of arbitral awards rendered in Japan. They also guarantee the enforcement in Japan of arbitral awards made in other treaty countries. To date, there has been no case where Japanese court of law did not approve of and enforce foreign arbitral awards.

There are also specialized venues for certain kinds of arbitration, such as the World Intellectual Property Organization's Arbitration and Mediation Center (WIPO, (http://www.arbiter.wipo/) for arbitration involving intellectual property (copyright, patent and trademark) disputes, and the American Arbitration Institute (http://www.adr.org/) for construction industry disputes. Specialized arbitration can also be found for disputes on employment, financial services, franchising, manufacturing, oil and gas, and many other areas.

Arbitration is very Internet-friendly, and many websites, such as http://www.arbitration-icca.org/directory_of_arbitration_website.htm, provide good information on arbitral venues, model clauses, rules, and decisions, conventions and treaties.

One of the more important of these is the United Nations Commission on International Trade law (UNCITRAL, http://www.uncitral.org/en-index.htm), which has promulgated a model law intended for parties conducting arbitration without the use of an institution. It also has published model rules and notes on organizing arbitral proceedings. It oversees the operation of the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards, known as the "New York Convention," which has greatly promoted the use of arbitration worldwide as national

courts gain the jurisdiction to enforce such awards. Its model law is used by many countries and also by some U.S. states.

In addition to the New York Convention, the 1965 Convention on the Settlement of Investment Disputes, or the "Washington Convention", on the Internet at www.worldbank.org/icsi/constate/cstates-en.htm, together with the 1975 Inter-American Convention on International Commercial Arbitration, or the "Panama Convention," are also important to the increasing use of arbitration. A Hague Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters, http://www.hcch.net/e/workprog/jdgm/html, has also been proposed

Ad hoc, or privately-conducted, arbitration is effectively limited to those jurisdictions that are signatory to these conventions, although mutual recognition of arbitral awards can also be implemented by Bilateral Investment Treaties (BITs) and by Friendship, Commerce and Navigation treaties. It can also be further limited by states acceding to the conventions. For instance, when Korea acceded to the New York Convention it made two reservations, one specifying that it will apply the New York Convention only to recognition and awards made in the territory of other Contracting States, and the other specifying that it will apply the convention only to differences arising out of legal relationship, whether contractual or not, which are considered as commercial under Korean Law.

However, in many countries signatory to the conventions, arbitration remains the primary route to dispute settlement outside the courts. This is the case even in some regions where countries had previously been reluctant to enforce arbitral awards, such as Latin America. Most Latin American countries have now ratified the New York Convention. The majority of Latin American countries have also modified their national legislation on arbitration. In addition, some have gone as far as to recognize arbitration as a method of settlement of disputes in their national Constitutions.

Arbitration is also explicitly recognized in many treaties and trade agreements. For instance, Article 2022 of NAFTA specifically provides for the encouragement and use of arbitration and other alternative dispute resolution techniques as the desirable means of resolving controversies.

1. How Arbitration Works

Arbitration is most often initiated when a party decides to invoke the provisions of a clause in a contract or treaty providing for recourse to arbitration. A model clause for invoking arbitration provided by a particular institution might look like the following:

> The parties agree that they will endeavor to settle any dispute, controversy or claim arising out of or relating to this contract, which they are unable to settle through direct discussions, by mediation administered by the Commercial

Arbitration and Mediation Center for the Americas under its rules before resorting to arbitration, litigation or other dispute resolution procedure. The requirement of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.

The parties may also have specified the number of arbitrators, the place of arbitration, the substantive law to be applied and the language(s) to be employed.

The rules of the institution used provide the framework for the conduct of the process. Alternatively, parties can choose among model rules to be applied. A number of international organizations, both public and private, host arbitration services, and each works somewhat differently. One of the largest and most credible is the International Chamber of Commerce's Arbitration Court. The history, operation and rules of this body are described at www.iccwbo.org/court/english/arbitration.

Most rules provide for a process that begins with filing a request for a proceeding, including a description of the claim and the facts supporting it, the relief sought and amount claimed. Arbitrators are then selected or appointed, and they communicate with the parties. A defense is submitted, usually in writing, together with any counterclaims or set-offs, rebuttal to both claim and counterclaim are allowed, and discovery is conducted. This can include investigation, documentary evidence and evidence/testimony given under oath. There is usually an oral hearing, followed by a decision. Timelines for all of this are established by rule or at the direction of the arbitrator(s). An award is announced, and papers are finalized for possible future delivery to a court. Costs of the proceeding are usually agreed in advance, and are often jointly borne by both parties, except that parties calling witnesses and conducting discovery usually bear those costs. Many institutional rules provide that the costs of the proceeding be submitted in advance.

C. Mediation and Conciliation

Since the 1980s use of mediation (also known as conciliation) as a means of resolving commercial disputes has exploded. Users vary enormously: the four months of mediation in the Microsoft case confirmed that mediation is a viable alternative to litigation even for the largest commercial players.

1. What is Mediation?

Mediation is best understood as a non-binding, consensual procedure, facilitated by a neutral third party without any decisional power, that may or may not result in an agreed upon resolution to a dispute. It is different from arbitration in that arbitration is a binding decision to a dispute by a neutral third party. It is different from negotiation in that the pure negotiator presents each side's position to the other, while a mediator can suggest solutions of his or her own.

The authors of International Mediation: The Art of Business Diplomacy (American Review of International Arbitration, v. 10, 265-6, citing Carroll, Eileen and Karl Mackie, 2000 London: Kluwer Law International, 3), describe mediation using the metaphor of a bridge, saying that mediation "offers an interim structure to open up a traffic of dialogue, marks out lanes over which communications can pass with less risk of a head-on collision and adjusts traffic flow to give users a sense of managed risk, momentum and relative safety from which to explore the various views from the bridge."

2. How Mediation Works

Contracts most frequently provide for mediation in a so-called conciliation clause stating that parties are committed to first try and find an amicable settlement should a dispute arise. Such clauses are not without limits: generally, strict timelines are imposed or other means to ensure the possibility for arbitration should mediation prove unsuccessful.

Parties select, or a judge appoints a neutral, trained mediator. Parties exchange statements outlining their respective positions regarding the facts and issues, as well as their claims and defenses. Unless parties agree otherwise, these statements as well as all other mediation proceedings (including related materials such as depositions, accounts, production schedules, etc.) are confidential.

Mediation normally begins with a joint session where parties and sometimes their counsel are present. Each side presents their case to the mediator in the joint session and then the mediator will meet with the parties individually to determine better each parties' position. The parties then begin a "bargaining process" and the mediator acts as an intermediary for offering settlement proposals. Generally a mediator does not end the mediation until parties have come to agreement. As with the rest of the process, the settlement agreement or any other outcome is confidential.

Model law for the mediation in international disputes is often the United Nations Commission on International Trade Law (UNCITRAL, web link provided above). The Hong Kong International Arbitration Center (http://www.hkiac.org/), for example, uses UNCITRAL model laws for its international cases. Domestic disputes apply the relevant domestic laws.

The most frequently cited advantages of mediation include savings of time and cost. Often as important, however, is that the parties willingly accept the outcome because they themselves make the final decision. Such acceptance can be important if the parties work together in the future.

3. The Success of Mediation

Statistics for mediation are outstanding, and demonstrate why mediation has rapidly grown in popularity. While success rates vary depending on the parties and the type

of disputes, scholars cite a success rate of 80 to 85 percent of all disputes brought to mediation. Average mediation is also very quick: a typical international mediation event, even with multi-parties, lasts somewhere between 2-5 days. Across the board mediation has proved much less expensive than litigation.

4. Who Uses Mediation?
Mediation participants range from farmers from a small villager in Ghana before traditional leaders, to Microsoft in the United States before Judge Richard Posner.

In New York, for example, the federal courts are running a pilot program that encourage mediation before continuing the litigation process. In some cases use of mediation is entirely voluntary, in other cases the judges persuade parties to participate. In commercial disputes, the mediator is appointed by the court and has the power even to exclude the parties' lawyers from mediation.

In developing countries where the judicial systems are ineffective, mediation can substitute for formal legal procedures. The presence of such mediation may reduce opportunities for corruption because the judicial system will be in competition with new institutions, and thus less able to extract rents. Sometimes more importantly, foreign investors may feel more comfortable operating in an environment where some form of dispute resolution is available. Finally, the poorest members of society, who are the most likely to be affected adversely by corrupt or inefficient courts, also benefit greatly from mediation. All over the world mediation and other alternative dispute resolution mechanisms are being institutionalized. In the Ukraine, support for mediation centers is founded on the premise that mediation can serve economic development objectives by accelerating the resolution of commercial disputes. In Bolivia the Chamber of Commerce set up an independent Conciliation Center, and in Albania the Center for Out-of-Court Settlement of Commercial Disputes was established to hear voluntary and court-referred mediation and arbitration cases in commercial cases.

Many European countries, and other countries that have modeled their legislation on EU member state codes, have civil procedure codes with clauses that allow or in some instances require a judge to order a conciliation procedure. Until recently these clauses were used rarely for commercial disputes. In the past two decades, however, use of mediation (and arbitration) has increased enormously.

5. Mandatory Mediation
Increasingly, countries are enacting *mandatory* mediation statutes that require mediation as a first step in commercial disputes. In the United Kingdom, the laws known as the Woolf Reforms were passed in April 1999, requiring civil litigants to try either mediation or arbitration before resorting to litigation. Mediation has more frequently been chosen than arbitration.

Argentina enacted a similar statute in 1997 at the federal level, requiring parties to engage in mediation before going to court. While initially the law faced a challenge in the First Commercial Court of Appeals when the legislation was struck down as unconstitutional, the Supreme Court of Argentina upheld the statute, requiring only that other courses of action be available to parties should mediation prove unsuccessful. The rate of success is estimated at approximately 30 percent, but more importantly the culture has changed, as parties more often expect amicable settlements and trained mediators become more easily accessible.

In Panama, where the justice system is slow, complex and non-transparent and local and foreign businessmen complain that they have little confidence in the ability of the civil justice system to settle commercial disputes, mediation has also been introduced. Mandatory mediation was considered necessary to counter low court productivity: approximately 60% of all cases in the system (the majority in civil courts) have been pending for over a year, and 40% have been pending for over three years. While the mediation system is too young to be evaluated, initial impressions are very positive.

In Zambia, a mandatory arbitration clause was introduced and applies to all commercial contracts to relieve overburdened commercial courts. In the year 2000, more than 60 mediation cases were resolved under the United Nations' standards. Supporters of the new legislation say that it is increasing foreign investors confidence in Zambia's business environment.

Mediation is also Internet friendly. Many of the Internet cites listed under Arbitration, above, also provide useful information and model clauses for mediation. In addition to these, here are just a few of the many additional sites that contain information on mediation.

http://www.asil.org
http://www.llrx.com
http://www.lib.uchicago.edu
http://www.Internetmediator.com/medres/pg217.cfm
http://www.austlii.edu.au

The following account of the use of mediation, drawn from a U.S. AID report, is illustrative of its increased utility;

> The use of mediation as an adjunct to the formal court system has a long history in Sri Lanka, dating back to the pre-colonial era and extending into the period of British rule. Following independence in 1948, the government of Sri Lanka formally established conciliation boards to relieve congestion in the courts. The conciliation boards, however, became highly politicized, appointments were based on patronage and decisions were considered biased. Amid considerable controversy, Sri Lanka abolished conciliation boards in 1978.

By 1988, congestion in the courts -- a backlog of 365,000 cases pending in the lower courts and 17,000 cases in the appeal courts -- together with the high cost of litigation which limited access for the poor, forced reconsideration of alternative dispute mechanisms. Following the Mediation Boards Act of 1988, the Ministry of Justice set up 211mediation boards throughout the island except in the North and East Provinces, site of an ongoing separatist conflict.

Official records of the Mediation Board Commission indicate that by 1996, the boards had heard a total of approximately 470,708 cases with an average resolution rate of 66 percent. Without the mediation boards, many of these cases would have otherwise gone into the seriously backlogged court system. Cases brought to mediation boards are required by law to be decided upon in 90 days. Even simple cases in the court system can take years to be resolved. The mediation board program has proved so successful that Sri Lanka recently passed a law that cases below Rs. 25,000 ($500) be first submitted to a mediation board.

Disputes heard by the Mediation Boards range from land issues and grievances regarding road access or water use to family issues to commercial bank loan disputes.

CHAPTER 4.
INTERPRETING LAWS, TREATIES AND DECISIONS – AND THEIR RELATIONSHIP

Although many of the issues in commercial disputes are clear-cut, some of the legal niceties are not. Particularly with *international* commercial disputes, it is necessary to know as much as possible about how different systems of law function, and what common problems are likely to arise – and between - each. These are a few of the broad areas in which serious misunderstandings can arise.

A. Civil v. Common Law Jurisprudence

One of the more fertile areas for misunderstanding is the differing role of laws, precedents and institutions in common law and civil law jurisdictions. Common law employs juridical methods to reduce complicated and costly duplication of resources and time, whereas civil law systems, derived from ancient Roman Law, employ administrative methods to accomplish the same objectives. A University of Ottawa website at http://www.uottawa.ca/world-legal-systems/eng-civil.htm categorizes countries presently using some form of civil, or Roman, law. In addition to Roman Law, the Napoleonic Code is also an important element in the commercial law of many civil systems. The difference in approach is important not only in deciding which law will govern in an arbitration proceeding, for instance, but also in dictating which kind of solution to a commercial problem is likely to be more productive.

The doctrines of *stare decisis* and *res judicata* are both important common law principles. The doctrine of s*tare decisis*, literally meaning "let stand that which has been decided" ensures that precedent, or what has been decided before by a court where similar legal and factual circumstances prevail, is controlling. One need not employ novel reasoning to interpret laws as applied to facts each time a case is heard. Precedent makes a court's decision in particular legal and factual circumstances binding on all courts of equal or inferior rank, even if the lawsuit and the parties are completely different.

The doctrine of *res judicata,* literally "the thing (that) has been decided' dictates that courts will not allow relitigation of particular lawsuits after than have been decided. It is a narrower principle, applying only to the particular parties and factual issues raised in the first lawsuit.

A third common law legal technique, one not commonly used in civil law systems, is argument in the alternative. This allows a court to simultaneously examine two or more scenarios or legal rationales, either of which would if accepted lead to the same or similar result. This in practice means that a common law judge could hear without flinching an argument that a defendant is not guilty because he was not present to

commit the crime and even if he was, it is his corporation, and not himself that should be held responsible.

In contrast to common law systems, which rely on a body of law derived through *stare decisis* and *res judicata* from previous cases interpreting statutes and constitutional provisions, civil law also relies on a code to do the detailed work of applying law to fact, and leaves less discretion in the hands of those employed to interpret it. Consequently, it is more normative, more extensive and integrated, and has different trial procedures involving more use of state and administrative resources and less use of privately employed advocates. It is also not generally familiar with argument in the alternative.

B. Role of Constitutional Provisions

It is easy for those in many countries to assume that constitutional provisions always have a governing role in domestic law. But there are many differences between and among countries in this respect. For instance Chile lists its hierarchy of laws as follows (http://www.arbitration.co.nz/Chile/overview.htm);

- The Political Constitution of 1980: The Constitution must be respected above all laws, rules and regulations.
- Organic Constitutional Laws, Qualified Quorum Laws and Interpretative Laws: These laws require higher quorums in Congress than ordinary laws and are established in the Constitution for certain relevant issues, and for the interpretation of the Constitution.
- Other laws, including:
    - Ordinary laws: those approved by the legislature through the process established in the Constitution;
    - Decrees with the Force of Law: The Constitution provides that Congress can grant to the President, the power, during no more than one year, to enact rules on specific technical issues;
    - Law Decrees: enacted during emergency periods or "de facto" governments under which Congress was not functioning (1925, 1931 and 1973-81); and
    - International Treaties published in the Official Gazette of Chile

It should also be noted here that the assumed hierarchy among laws; with Constitutional provisions and international treaties trumping stautory law, which trumps local law, does not exist everywhere. This will be treated more thoroughly in Chapter 7.

C. Legal Interpretation

Negotiators of treaties, legislators and administrators often congratulate themselves for jobs well done when they conclude negotiation of a treaty, passage of legislation or implementation of regulations. All their careful work, however, can be undone by interpretation of treaties, legislation and regulations in ways their drafters never intended. The rules of interpretation are sometimes as important as the agreements or legislation they interpret.

The primary source of agreement on interpretation of treaties is the Vienna Convention on the law of Treaties, at http://archive.greenpeace.org/~intlaw/vien-tr.html. This is the authoritative source of customary interpretation of international law, which is applicable to most countries in the world even if they are not, technically speaking, parties.

There is also a substantial body of law concerning statutory interpretation. Its principles can be found at diverse Internet sites, including:

http://www.workinfo.com/mall/conlaw.html,
http://aix1.uottawa.ca/~resulliv/legdr/interp.html, and
http://www.law.uts.edu.au/~peteru/lph/f6931.htm.

Many of its principles, at least in common law systems, are articulated in language that is somewhat arcane, but the principles are still valid. For instance, from the UTSLAW website cited above,

> the grammatical and ordinary meaning of the words is to be used unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the document'

D. Interpretation

Linguistic confusion does not end with legal interpretation, but extends to interpretation of languages. Many practitioners of international commercial law must deal not only with statutory or treaty interpretation, but with interpretation per se. Language is a powerful uniting force, and also a powerful dividing one. Most treaties are in force in several languages, and each version is equally valid. Interpreting a contract in more than one language or culture is often a very tricky business, as the same words can have very different meanings.

In the commercial world, English is more often than not used as the basis of commercial transactions, both written and oral, but there are substantial variations. There are also substantial variations between and among English-speaking countries on usage and meanings of words. In addition to English, languages used in multilateral institutions where commercial law is discussed include Spanish, French, Portuguese, German, Russian, Japanese, Arabic and Mandarin Chinese.

E. Legal Philosophy

Since the demise of most Socialist systems of law, there has not been much variety in the stated purpose to which law has been put. Even though there is not presently any legal system that states as its primary purpose the distribution of wealth, it bears noting that each legal system differs somewhat in the legal philosophy it embraces. Religious systems can become dominant legal ones. Each system differs in relation to the importance it ascribes to individual freedom and social responsibility. Systems also differ in relation to the importance and power of the state. Two very diverse sites are referenced below, the first containing quotes, the second on Japanese.legal philosophy (in Japanese). http://www.commonlaw.com/, http://juria.law.kyushu-u.ac.jp/~jalp/

CHAPTER 6.
BASIC PRINCIPLES OF PRIVATE TRANSACTIONAL COMMERICAL LAW

Recent attempts to distill general principles of contract law across nations began in the 1960s when the late Rudolf B. Schlesinger engaged a dozen scholars from many parts of the world to investigate the formation of contracts, elements of agreement such as offer and acceptance, through case studies. The effort on existing core concepts is still underway and can be viewed at http://www.jus.unitn.it/dsg/common-core/.

The results of the contracts study were published as a two volume series. (Schlesinger, Rudolf B. (1968), Formation of Contracts: A Study of the Common Core of Legal Systems, New York: Oceana Publications and London: Stevens & Sons). They show that although courts use different techniques to resolve legal problems a certain harmony exists between legal systems in regard to the outcome of many problems. Schlesinger's study culminated in a proposed uniform law on the formation of contracts for the international sale of goods.

The next major effort was the United Nations Vienna Convention on Contracts for the International Sale of Goods (CISG), which was approved in 1980 and entered into force in 1988, currently ratified by 58 countries. It is available on the Internet from both http://cisgw3.law.pace.edu/, and http://joe.law.pace.edu/cisg/text/cisg. Commentary on it can be found at http://www.dms.dpc.vic.gov.au/l2d/S/ACT01162/0_1.html. Two factors separate the CISG from other works discussed here: first, it is an international treaty, and second it contains substantive rules for international sales contracts. While useful, the rules may not always be appropriate for contracts in general, contracts in services, for example, will pose problems. Still, the CISG informs much of the most recent work on general principles of contract law and the UNIDROIT principles discussed below. However, unlike UNIDROIT, the CISG is binding.

In 1994, a working group from the International Institute for the Unification of Private Law (UNIDROIT) published "Principles of International Commercial Contracts" ("UNIDROIT Principles" or "Principles"). The working group included representatives of all the major legal systems of the world, and was composed of leading experts in the field of contract law and international trade law. Although not a binding instrument, the Principles were designed to be an elaboration of an international restatement of general principles of contract law.

The sources, cited in the introduction to the Principles, "for the most part [they] reflect concepts to be found in many, if not all, legal systems" though "they also embody what are perceived to be the best solutions, even if not yet generally

adopted." The concepts are also drawn from a variety of sources such as the CISG, generally recognized principles of civil law systems, and generally recognized principles of common law systems, including the Uniform Commercial Code and the Restatement (Second) of Contracts.

Many provisions follow the CISG, but the Principles also differ, including on matters such as pre-contractual liability, hardship as an excuse for nonperformance, specific performance and stipulated damages. The Principles also are unique in directly stating a number of general principles: freedom of contract, *pacta sunt servanda*, fairness and good faith.

A. Principles

As it is the most recent work and deals with contracts generally, the general principles listed in the UNIDROIT principles are examined below. They can be found on the Internet at http://www.unidroit.org/english/principles/chapter-1.htm. These principles are among the most consistent across nations and appear in the above projects (and others including the Uniform Commercial Code and the Principles of European Contract Law). They include: freedom of contract ("parties are free to enter into a contract and determine its contents"), good faith, *pacta sunt servanda* (agreements are to be observed), and fairness (dealing with excessive advantage, for example).

There are differences in the way nations interpret these principles, and the section that follows attempts to highlight some of the differences that prevent the principles from being universal. It is not suggested, however, that the following section be considered an exhaustive examination of what may or may not hold across jurisdictions, rather it is illustrative of instances or means of differences across systems. Other differences clearly exist than those listed below. For example, freedom to contract is limited in many countries by age, and in some countries by gender, although these examples are not considered below.

1. Freedom of Contract

The classical Roman view (that only certain types of contracts should be enforced) had already been rejected by civil law nations prior to codification in Europe. Freedom of contract is found across civil and socialist law countries, for example in the French Civil Code at Art. 1134, the Swiss Code of Obligations at Art. 19, and at Art. 6 of the Civil Code for Mexico, etc. Freedom of contract in common law systems is limited by the requirement of consideration. Since consideration is broadly construed, however, the vast majority of court decisions on topics involving freedom of contract would be the same, even if as a principle freedom of contact is not universal. An example is the rare case of an agreement where one party promises to make an outright gift to the other. Common law countries would not recognize the agreement as a contract whereas civil law countries would.

2. Good Faith

The CISG avoided directly imposing a duty of good faith in the formation and performance of contracts, largely because nations such as the United Kingdom rejected it. Instead a compromise provision referring to a general duty was included, which many read to mean good faith. Since CISG, however, there is reason to believe that the use of the good faith doctrine is increasingly recognized across all jurisdictions. This is demonstrated in part by its inclusion in the UNIDROIT principles. In jurisdictions where the principle of good faith is not explicitly stated, it may be present in a variety of circumstances. In English law, which does not contain a general obligation to act in accordance with good faith, the results may not be different from cases on the continent. Lando explains "[M]any of the results achieved by requiring good faith in the continental systems have been obtained in English law by more specific rules. For example, a strict moral code has been imposed in fiduciary relationships, and good faith is required in contracts recognized as *uberrimae fidei*. …The duty of good faith is also required when the court is asked to grant equitable remedies. …New examples of cases where good faith has been invoked are constantly being added to the English case law." (Lando, Ole (2001), "Salient Features of the Principles of European Contract Law" in Sarcevic, Peter and Paul Voken (eds.) (2001), The International Sale of Goods Revisted, The Hague: Kluwer Law International, 181-2.) Thus, good faith could reasonably be considered a general principle across most jurisdictions.

3. Pacta Sunt Servanda

Pacta Sunt Servanda exists everywhere: this is a basic principle in the laws of all countries: a contracting party must be able to rely on the contract and exercise the freedom and rights granted to it under the contract. Exceptions to the rule, however, do differ across nations. In many civil law countries, for example, this rule is modified if there was a change of circumstances that meets the condition of *vis major* or hardship, for example.

4. Fairness

Article 2.20 of UNIDROIT Principles provides that "No term contained in standard terms which is of such a character that the other party could not have reasonably expected it, is effective unless it has been expressly accepted by that party." While English law, for example, may not contain such a general principle, there is a case law that supports this approach but in a more precise way. Bridge writes that it does so by "focusing on one party's reasonable response to behavior by the other party that is supposedly consistent with consent to oppressive terms. If I proffer to you standard terms that are unusual and onerous, and I cannot in the circumstances infer from your behavior a genuine intent to be bound by those terms or to be bound by the content of a writing no matter what it might contain, then I cannot claim that your failure to object to my terms or even your signing of a document means that you have agreed to them." (Bridge, Michael (2001), "The UK Sale of Goods Act, the CISG, and the UNIDROIT Principles" in Sarcevic and Voken (2001), 154).

B. Conclusion

Although many differences exist in contract law across jurisdictions, many principles remain the same. At times, terminology may be different but the result the same (as described above) or terminology may be the same but the use or interpretation different (for example, the use of good faith to make law in continental European countries compared to the way it is understood in the United States). Generally, however, harmony exists with respect to the principles examined above, or is approaching as requirements converge. Although it was not addressed in this section, many elements of contracts across systems are also the same. For example, an offer or acceptance may not required to be in writing to be enforced. Readers interested in these similarities should consult Professor Schlesinger's seminal work, Formation of Contracts, noted above.

CHAPTER 8.
RECENT TRENDS AFFECTING RESOLUTION OF COMMERCIAL DISPUTES

There are many new developments affecting resolution of commercial disputes, as globalization takes hold and international legal instruments become more important. The following are some general trends, and some specific developments in two legal areas where commercial law is rapidly evolving; antitrust and environmental law.

A. Proliferating International Agreements

Several new directions relevant to settling international commercial disputes deserve some mention. The first is the proliferation of international agreements in fields not directly related to commercial law, but which govern commercial activity. In the past ten years, dozens of new international agreements have been negotiated and are in some stage of ratification. Existing international agreements have been busy as well with new protocols and guidelines. The scope and scale of this activity is virtually unprecedented. On one side, it is rooted in economic expansion, introduction of new technologies, and economic deregulation. On the other side, it is rooted in global climate change, environmental degradation of many kinds, and globalized health, security, population and social problems. One cannot realistically or creatively deal with commercial activity without being aware of environmental, social and developmental concerns related to it.

B. WTO Dispute Settlement Mechanism and Jurisprudence

A second new direction involves a convergence of efforts to address the increased complexity of commercial activity in light of the concerns mentioned above. WTO dispute settlement has recently taken on the challenge of addressing issues that were once considered secondary to the trade agenda, and are now considered central to it. The breadth of the issues it has addressed in the context of WTO disciplines is very great. In the process, new and more transparent procedures have been adopted and more attention has been paid to creating a basis of credibility and trust in the WTO's Dispute Settlement Mechanism in both the developed and the developing world.

The WTO Website now includes downloadable Panel Reports and descriptions of WTO Committee activities that were very recently restricted to government employees with security clearances. The WTO dispute settlement process, the jurisprudence it has created and the transparency it has achieved, are laudable achievements.

C. Relative Importance of the Private Sector – Civil Society, Standards and Deregulation

Together with these developments, the WTO and other institutions have increasingly allowed "civil society" to play a role in decisions and processes previously restricted to the public sector and a handful of industry advisors. Civil society now has an institutionalized role in almost every international institution, and is increasingly playing a role in standardizing bodies as well.

Concurrent with these developments, more attention has been paid to standardizing activities that were once relatively obscure, and aimed primarily at domestic industry audiences. Globalized trade has brought the need for international standards harmonization into sharp focus in such areas as food safety, food security, telecommunications, transportation, water and air quality, customs procedures, accounting standards and many other areas.

Standardizing activity has in turn become more globalized, and now involves stakeholders from affected industries, consumers, environmental and social organizations and other sectors. It is still aimed at domestic regulation, but it is increasingly recognized that even the most local regulation can have global significance. The disciplines of the Sanitary and Phytosanitary Agreement and the Agreement on Technical Barriers to Trade have never been more relevant. As a result, the procedures of such institutions as the Codex Alimentarius, the World Customs Organization, and the International Standards Organization will be open to new and increased scrutiny by many groups not previously involved in their activities.

The WTO's recognition of the importance of international standards has recently been emphasized by the Panel report in a case brought by Peru and a number of other countries to challenge the EU's use of a standard to label sardines that was not based on an international one. The Panel found the EU standard to be inconsistent with its obligations under the Agreement on Technical Barriers to Trade, in that it was more trade-restrictive than necessary to achieve its legitimate objective of informing consumers as to what kind of fish is indicated by the label. The Penal report is available from the WTO website at www.wto.org. It is at WT/DS231/R/, decided May 29, 2002.

Much of the standardizing activity, and the actual implementation of many of the new agreements, will depend on the mobilizing ability of the private sector, rather than the public sector. In the last ten years, the private holdings of some individuals and many corporations have exceeded the wealth and holdings of public entities (individual economies, multilateral institutions, public trusts). The relative worth of private resources versus public ones has shifted the balance to the private sector in many processes relevant to the settlement of commercial disputes.

Deregulation has speeded the involvement of the private sector in many previously regulated sectors. Work on deregulation, also called "regulatory reform," has proceeded rapidly internationally, both bilaterally and in multilaterally in the Organization for Economic Cooperation and Development, APEC and other institutions. Beginning in the energy sector, it has spread rapidly to telecommunications and other regulated utility sectors. The following is a description of APEC's activity, drawn from its website at http://www.apecsec.org.sg/committee/deregulation.html.

> Unilateral deregulation by APEC economies makes an important contribution to trade and investment liberalization and facilitation. Transparency in regulatory regimes and the elimination of trade-impeding or unnecessarily restrictive regulations are the key objectives of APEC work in the deregulation area. This work is undertaken by the CTI. In 1996, the OAA work programs for Competition Policy and Law, and for Deregulation were combined, in view of the linkages between the two issues. (See Competition Policy update.) The main focus of the Deregulation Collective Action Plan (CAP) is to promote information sharing and dialogue, and increase the transparency of existing regulatory regimes and regulatory reform processes. The business/private sector and academia provide important input to APEC's work on deregulation, particularly through seminars and the analytical work done by PECC. Promoting dialogue with the business community on deregulation is a key focus for the future.

The deregulation work will make solutions for commercial disputes increasingly relevant to the private, as well as the public, sector.

D. Relative Importance of the Developing World to Resolving Commercial Disputes

Finally, although most trade and investment flows are still centered within the developed world, it is clear that the developing world intends to play an important role in whatever trade and investment liberalization follows from successive trade and economic ministerial agreements. The WTO Doha Ministerial Declaration has initiated what some call the "development round." It is increasingly clear that meaningful liberalization cannot take place without the full and fair participation of developing countries, and thus that the legal considerations ancillary to resolving commercial disputes must increasingly be relevant in this context if they are to be meaningful.

Much of the capacity building taking place in the WTO and in other institutions is aimed at strengthening legal regimes so developing countries can better deal with the global marketplace and the demands it makes on their legal systems.

E. Recent Trends in International Antitrust Law

Recent trends in antitrust law are going to be important to capture as the WTO begins to consider whether, and what internationally-applicable disciplines on competition policy are desirable.

In March 2002, the United States Court of Appeals for the Second Circuit held that the United States antitrust laws were applicable to conduct directed at foreign markets. The two largest auction houses in the world were alleged to have entered into an agreement to fix prices they charge their clients for their services. The court said that the effect, and not the location of the conduct, determined whether the antitrust laws applied, and that found that the defendants' agreement to fix prices would qualify as conduct that violated a US antitrust law, the Sherman Act.

This case and a multitude of other recent developments suggest a blurring of borders where antitrust is concerned. At present, over 80 countries in the world have antitrust laws in place, most of which were passed in the past five to 10 years. A further 25 or so countries are in the process of drafting such laws. While a comprehensive international antitrust regime has failed to emerge, international antitrust has developed at three levels: convergence, bilateral agreements, and multilateral agreements.

1. Convergence

In countries with competition laws, there is a sort of a core of merger law where almost all countries at least have laws that prevent mergers that will create a monopoly or a merger to single firm dominance: when there is a single firm with dominant market power that is illegal. There has been less convergence after this level. For example, the EU was frequently criticized for allowing a merger that entrenches oligopoly, for preferring politics to economic considerations. However, the recent case of Kali und Salz seems to imply that EU regulation applies to oligopolistic dominance, suggesting convergence with the US in this area. The EU recently adopted explicit efficiency standards for judging mergers and both the US and the EU are moving away from national assessments of the effects of corporate welfare towards a transatlantic assessment of corporate practices. More recently, at the bilateral level, the US and EC formed a joint merger working group. They are currently discussing substantive aspects of conglomerate mergers as well as a number of procedural issues.

A second area of convergence between the US and the EU is in product market definition: The European Commission adopted the SSNIP (small but significant and non-transitory increase in price) test that US agencies have long used to define product market. The Commission also made it clear that to determine likely consumer responses to price changes, it will evaluate using the same kinds of empirical

evidence that US agencies use (historical data about consumer responses to price changes, econometric studies, surveys, etc.)

More than substantive convergence, there has been a growing transatlantic cooperation between the US and the EU competition authorities for procedural harmonization. Cooperation in recent mergers such as MCI-WorldCom and Halliburton-Dresser Industries even extended to exchange of confidential information. Despite the few direct conflicts (Boeing-McDonnell Douglas and GE/Honeywell), the transatlantic agencies are working together on a daily basis.

2. Bilateral Agreements

During the 1980s and 1990s, countries began forging bilateral agreements on competition policy. Today, the United States has agreements with Germany, Australia, Canada, Brazil, Israel, Japan, Mexico and the European Union. The US-Japan agreement, for example, is the Enhanced Initiative on Deregulation and Competition Policy, which established a bilateral forum for addressing deregulation and market access issues in Japan. The Initiative seeks to eliminate bottlenecks that inhibit Japanese structural change and economic adjustment and focuses on market access and regulatory issues in seven sectors: telecommunications, housing, financial services, medical devices, and information technology. The European Union has negotiated many agreements with third countries as well.

A principle objective of the bilateral agreements has to been to promote discovery and information exchange between antitrust authorities. Coordination mechanisms are also provided for in the agreements, both traditional comity mechanisms, and positive comity between the European Union and the United States.

3. Multilateral Agreements

The prominent form of international antitrust is antitrust norms incorporated into trade agreements. The OECD, UNCTAD, WTO and NAFTA all have attempted, to varying degrees, to create international antitrust laws.

In 1998, the OECD issued a recommendation on hardcore cartels to encourage co-operation among competition authorities, so that together they could combat restrictive trade practices internationally. UNCTAD has produced a set of guidelines for national competition policy, but its brief falls short of international rules. At the WTO, agreements have been made that incorporate competition clauses. For example, the General Agreement on Trade in Services (GATS) requires member states of the WTO to punish monopolistic abuse, the Agreement on Trade-Related Intellectual Property Issues (TRIPs) authorizes certain forms of antitrust to prevent abuse, and the Agreement on Trade-Related Investment Measures (TRIMs) provides that competition and investment issues should be considered to determine if they should be a part of TRIMs. The North American Free Trade Agreement (NAFTA) goes further, providing for cooperation on competition law enforcement policy,

including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area. The furthest multilateral agreement to date is the European Union, where a transnational competition law exists.

Article VIII of the GATS prevents unfair cross subsidies from closed to open markets. Further, the behavior of private firms is included if their monopoly status is granted by law. Article IX says: 'Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services. Each member shall, at the request of any other member, enter into consultations with a view to eliminating such practices." The annex on telecommunications services explicitly requires infrastructure providers to offer non-discriminatory terms to foreign service providers, also concerning the private sector.

The agreement on 'trade related intellectual property' issues (TRIPs) states "Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effect on trade and may impede the transfer and dissemination of technology." Then the agreement charges members with responsibility for providing "full and sympathetic considerations to, and . . . adequate opportunity for, consultations" relating to positive comity requests on restrictive business practices. TRIMs requires members to "consider whether the Agreement should be complemented with provisions on investment policy and competition policy."

4. Conclusion and the Way Forward

While an international antitrust "hard law" remains aspirational, the developments cited above suggest that a certain level of harmonization already exists. Most recently international antitrust made a decisive development in moving beyond trade agreements in the form of the International Competition Network ("ICN"). The ICN was formed this Fall, in order to provide a forum for the competition authorities to discuss both similarities and differences. The ICN is structured to be inclusive, open to assistance and input from members of the private sector, business law, and the academic community. One of the first two projects of ICN is merger process in a multi-national setting that will focus on procedural issues, on notification, on analytical framework and investigative techniques.

On another level, cross fertilization has never been stronger, as countries with nascent competition laws dialogue with countries that have long established competition regimes.

F. Relationship of International Environmental Law to Commercial and Trade Law

The interface of trade and environmental law was propelled into the General Agreement on Tariffs and Trade in 1990 with the Tuna Dolphin case, brought by Mexico against the United States. The U.S. Marine Mammal Protection Act required that the U.S. impose an embargo on Mexican tuna when it was caught by Mexican vessels whose dolphin mortality (number of dolphins killed) exceeded that of the U.S. fleet. Mexico argued that the ban was WTO-inconsistent. Mexico argued that the import prohibition was a quantitative restriction that was not justified by any exception to the GATT (now WTO). A GATT Panel ruled in favor of Mexico, but Mexico did not pursue the case. A subsequent challenge was brought to the same law by the European Union, which also won its case against the United States. This time, a WTO Panel also ruled in favor of the European Union and against the United States.

The bases of the Panel's reasoning in both cases caused a furor in the environmental community, which saw the WTO as a threat to national sovereignty and to environmental protection. Since then, a series of WTO cases has somewhat clarified the relationship between WTO disciplines and environmental provisions, and an information industry has grown up around the environmental and social issues raised by the trading system. Much has been written about these cases and their evolving jurisprudence. Several Internet sites contain useful information about these developments from the point of view of stakeholders in the broader issues raised by them; food safety, national sovereignty, the relationship of global trading rules to global environmental rules, and the general effects of global economic developments on the global environment. See http://www.iatp.org/, http://cuts.org/citee-pub.htm , http://www.american.edu/projects/mandala/TED/ted.htm

Institutional responses to the environmental and social issues implicit in the regulation of global trade and commercial activity have also spawned a number of new institutions and processes. In several countries environmental reviews of trade agreements are under way or have been completed. Many countries have private sector advisory groups to educate trade officials about environmental issues they may confront, and to educate environmental officials about trade issues they might encounter.

The WTO has created a Committee on Trade and Environment, which according to the WTO website (www.wto.org) is now (among other topics) charged with

> negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements. The negotiations will address how WTO rules are to apply to WTO members that are parties to environmental agreements.

Other "environmental" issues have also been introduced into the fabric of WTO rules deliberations. For instance the WTO's Committee on Rules is to discuss disciplines

on fishery subsidies, largely because of their alleged role in promoting global overcapacity and overfishing.

The growing and changing interface between the trade and the environmental policy arenas, and the many implications for other subject areas such as intellectual property rights, is tracked by the Internaitonal Centre for Trade and Sustainable Development and other organizations. Some relevant websites are; http://www.itcsd.org/, http://www.consumerscouncil.org/, and http://sdgateway.net/webring/default.htm.

CHAPTER 9.
PREPARING TO RESOLVE A COMMERCIAL DISPUTE

A. General Principles for Preparing to Resolve a Commercial Dispute

Preparing to resolve a commercial dispute is no different than preparing to resolve any other kind of dispute, except that more venues may be available and issues will normally include quantitative estimates of damages, sometimes economic theory, and often an assessment of the politics of the dispute in addition to the legal issues.

The first step is an analysis of the legal principles at issue and the facts supporting an argument under them. This may involve research into how similar situations were decided in relevant venues, and research to bring forward additional facts in support of a claim.

A second step is to decide on a venue, or method of resolving the dispute. This may mean choosing either to proceed toward a negotiated result, or to bring a case into a formal arbitral or adjudicatory setting.

A third step is assessment of the extent of damage actually caused or potentially arising from the situation. If the amount is de minimis compared to the cost of the effort to resolve the dispute, this may mean choosing between taking a case forward on principle, or settling it as a matter of priority.

A final step is an assessment of whether resort to legal proceedings of any sort will act to resolve the dispute or whether they will complicate or prolong it. In some situations the threat of legal action can be far more potent to prompt resolution of a commercial dispute than the proceeding itself, and instituting legal proceedings can stiffen positions and make compromise more difficult.

Once it is resolved to proceed, finding and employing the appropriate expertise is normally a priority. Every venue has its own cadre of experts, and specialized knowledge is sometimes essential. On the other hand, a great variety of resources are available to assist in handling commercial disputes, some of them easily accessible to those who are not experts in the field.

B. WTO Dispute Settlement

In brief, a WTO dispute settlement procedure is initiated by a request for consultations, followed by the consultations and, if unsuccessful in resolving the dispute, a request for a dispute settlement Panel. Three panelists are appointed subject to the agreement of the parties. A written complaint is made and answered by the responding government. Its counter-arguments are responded-to by the

complainant. A hearing is held at which parties present their facts and arguments, and intervening governments may also present arguments and written briefs. A second round of rebuttal arguments is briefed and heard by the Panel, after which it meets to consider the arguments and to write the report. The Panel can consult with, or hear testimony from, experts at any time. A report is issued, first the facts in draft to the parties so they can make corrections, and then the legal conclusions are issued on an "interim" basis to the parties. About three weeks after that the report is made public. The Panel report can then be appealed to the Appellate Body. A final round of arbitration can also be requested.

WTO Dispute settlement is markedly different from GATT dispute settlement in several major respects. It is binding and compulsory. It moves according to agreed timetables that are strictly adhered-to. Decisions of Panels can be appealed to an Appellate Body that did not exist in the GATT. There is ample opportunity for expert testimony and other submissions from the public to be made to the Panel, which is empowered to hear them. Timelines, methods and procedures for compliance with panel reports are becoming clarified. Panel and Appellate Body reports are made public and available on the WTO website.

The WTO website, www.wto.org, now contains an excellent introduction to the WTO's Dispute Settlement Mechanism (DSM) and its processes. Its chapter on dispute settlement contains a flow chart of the procedure, rules of which are set forth in the Dispute Settlement Agreement, and a case study. It also contains a description of the panel process and the appeals function.

Panel reports are retrievable and downloadable from the WTO database. The WTO sells a CD-Rom with analyses of indexed cases (GATT and WTO). This "Analytical Index" is also available from many public libraries as reference material. A body of legal analysis has also grown up around WTO dispute settlement proceedings. Much of this is also accessible electronically.

With all of this information available, this manual will focus on some of the lesser-known elements of preparing a case for WTO dispute settlement along the procedural lines suggested above.

1. Analysis of legal principles

Perhaps more important than the substantive principles involved in any WTO case are the process-related principles of the WTO's DSM. The DSM operates as a hybrid, somewhere between a common law and a civil law system. This means that there is no formal agreement that the principle of *res judicata* applies, but panelists are usually eager to find resonance for their reasoning in decisions of prior panels on the same principles.

In some cases, such as in interpreting some of the general exceptions of Article XX of GATT 1947 and their relationship to the text, there is virtual agreement that certain principles of interpretation should be adhered-to. Therefore, it is important to seek support for the legal principles advanced by the argument in reports of other panels that have examined the same issues. As is the case in common-law jurisdictions, it is also wise to be able to differentiate the reasoning employed by each panel, and to be able to frame the reasoning a panel should pursue in relation to the facts of the case that is being contemplated.

Different WTO agreements also have slightly different rationales and procedures. It is necessary to understand the procedural rules before you begin.

2. Analysis of facts

It is very important in a WTO proceeding to be able to present clear and convincing facts supporting the legal argument. Visual aids can be important, but cannot be substituted for a clearly articulated factual presentation to which panelists can refer when they meet together to discuss the case. Facts should support not only the case in general, but each aspect of the case. A logical argument should make it clear which facts are necessary to present at which stage.

It may be necessary to use experts to present facts. They should make sure that their expertise does not detract from their presentation. Panelists are normally not experts in the facts of the cases they hear and may need to be assisted to understand the details of what is being presented.

3. Using available expertise

The WTO, since it is a government-to-government institution, is understandably reluctant to acknowledge the huge role played by the private sector in using the DSM. However, it is often important and sometimes necessary to be able to supplement the contributions of government-employed specialists with those of private-sector experts. In such cases, non-government personnel can be used in almost any capacity except to present an oral argument before a panel. Experts are mostly used to draft legal analyses and to present facts

Panels are also allowed to choose to view information submitted to them by private sector and NGO groups, and to choose to access any other information they may find relevant. It may be useful to present to Panels a wide variety of information they can view at their discretion, but it is always necessary to focus most clearly on those facts that support the argument.

4. Deciding on a Venue

In this instance the venue (i.e., WTO dispute settlement) is assumed, but a few notes are in order. There are in fact different proceedings offered in the WTO. Consultation initiates a proceeding and it is always available, during and afterward, so it is up to

the complaining or initiating party as to how much of it will likely prove fruitful. It is possible to have consultations that are not followed by a request for a panel. Sometimes the treat of action is more potent than the action itself, so the consultation approach should not be viewed lightly. It can also prove to be successful in resolving the dispute.

Selecting a panel is in the WTO equivalent to selecting a venue, since panels can differ so much in composition, outlook and expertise. It is very common for panels to be guided by the Secretariat, and if the matter is one on which the Secretariat is known to have an opinion, this should be kept in mind. Independence is a virtue for panelists in some cases, and a deficit in others. Despite its status as a world class institution, the WTO is really a rather small community, and reputations are always accessible. Prospective panelists should therefore be scrutinized closely, since they can be rejected in advance by parties to the proceeding. They may have decided prior cases in ways that might influence the present one, they may have very little expertise in the subject matter, they may come from countries known not to be neutral on the subject, or they may have personalities that are not disposed to neutrality. Panel proceedings, since they involve small numbers pf people, can be relatively informal and personalities do count – usually against an advocate, so presenters should also be chosen with care.

5. Assesements of damage, economic injury or harm
These should be both prepared and presented by experts, unless government personnel are able to present a convincing and factual story involving considerable mathematical dexterity. There are also different tests for injury among and between different WTO Agreements, so care should be taken to find experts who know the subject area and the agreement, as well as the economic theory and the math. Of course, the WTO also has its own economists and a good database, and these should both be utilized if time and resources allow.

Ultimately, if successful, a party will need to decide whether to proceed to extract compensation or retaliation for damage if a non-complying party has not conformed its law or practice to the findings of a panel. Usually by this time, the case has passed from the economic sphere into the political one. It is important to know and understand that this will happen at some point and for the practitioners to be prepared to relinquish control. What is litigation to them is foreign policy leverage for their political colleagues, who usually have the last word.

6. Whether to bring the case
What is often the first decision in normal litigation is sometimes the last phase in the WTO. There are other institutional means of resolving most trade disputes, some through the institutional mechanisms of the WTO itself. Is it really preferable to ask a Panel to decide an issue that peer pressure exerted through the Committee on Technical Barriers to Trade, could possibly resolve? Would public pressure be

effective? The Geneva negotiating process leaves many decisions to informal means of settlement, and those are readily available most of the time (except in August). Deciding whether to employ them is perhaps best left to the end, when the merits of a case can be articulated with conviction.

C. Arbitration

Preparing for arbitration largely depends on what arrangements have been made in advance to govern how it will be conducted. Parties make their own rules for arbitration by contract. In the contact they describe the applicable rules for arbitration, including choice of law where necessary. They may also provide for other details, such as the language in which the arbitration will be conducted, where it will take place, number and nationality of arbitrators, etc. Arbitration clauses almost always provide that notices or other communications be in writing and delivered to the address specified in writing by the recipient. Time periods are provided for in the arbitration clause or in the applicable rules, but generally start to run on the day following the day when a notice or communication is received. Unless the parties agree otherwise all of the proceedings are confidential. At any point during the proceedings, either party may propose settlement negotiations to the other party at any time. The CPR Rules for Non-Administered Arbitration of International Disputes (200) set forth the following general procedures, but other systems of rules follow the same general outlines.

1. Commencement of arbitration

The party commencing arbitration (the "Claimant") addresses to the other party (the "Respondent") a notice of arbitration. Most often, arbitration is considered to start on the date on which the Respondent receives the notice of arbitration. The notice of arbitration, and all other correspondence between parties, should be in writing. The notice normally would include the full names, descriptions and addresses of the parties; a demand that the dispute be referred to arbitration pursuant to the governing rules provided for in the arbitration clause; the text of the arbitration clause; a statement of the general nature of the Claimant's claim; the relief or remedy sought; and the name and address of the arbitrator or arbitrators appointed by the Claimant, if that is what the parties have agreed to.

Within 30 days after receipt of the notice of arbitration, the Respondent would deliver to the Claimant a notice of defense. If no notice of defense is given, all claims set forth in the demand would be deemed to be denied. The notice of defense would include; any comment on issues raised by the notice of arbitration that the Respondent finds appropriate; a statement of the general nature of the Respondent's defense; and the name and address of the arbitrator appointed by the Respondent. Counterclaims can also be raised. If a counterclaim is asserted, within 30 days after receipt of the notice of defense, the Claimant would deliver to the Respondent a reply to it that follows the same rules and content of the notice of arbitration.

2. Representation
The parties may be represented or assisted by persons of their choice. Each party has to communicate their name(s), address(es) and function(s) in writing to the other party and to the Tribunal.

3. Selection of arbitrators
Parties often agree on one of three combinations for arbitrators. Parties decide to have a single arbitrator or three arbitrators. Parties select the arbitrators jointly or, if there are three arbitrators, each party appoints one arbitrator and the Tribunal appoints a third. The amount of time parties have to appoint an arbitrator or jointly select an arbitrator is limited in time, often 30 days. Parties can also designate a neutral organization to select arbitrators. In this case, the organization submits a list of arbitrators from which parties can choose.

4. Qualifications of arbitrators
In all arbitration, arbitrators must be independent and impartial. When an arbitrator accepts an appointment that arbitrator is bound by the governing rules of the arbitration agreement. The appointment and any conflicts of interest must be made in writing. If there is doubt about an arbitrator's impartiality, parties may challenge an appointment.

Parties or anyone acting on their behalf are generally not allowed to have *ex parte* communications concerning any matter of substance relating to the proceeding with any arbitrator or arbitrator candidate.

5. Challenges to the jurisdiction of the tribunal
The Tribunal chosen by the parties has the power to hear and determine challenges to its jurisdiction, including any objections to the existence, scope or validity of the arbitration agreement. The Tribunal has the power to determine the existence, validity or scope of the contract that includes the arbitration clause, but if the jurisdiction of the Tribunal is challenged, the arbitration clause is not considered part of the challenge. Challenges to the jurisdiction of the Tribunal should be made at the time of the defense, or counterclaim.

6. Applicable laws and remedies
The Tribunal should apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. If they have not designated one, the Tribunal would apply the law(s) or rules of law that it determines to be appropriate, taking the terms of the contract and trade usage into account.

For remedies, the parties usually waive any right to punitive, exemplary or similar damages. A monetary award would be in the currency specified by the contract unless

the Tribunal considers another currency more appropriate. The Tribunal may award interest, and generally decides a reasonable period of time for compliance.

7. Disclosure

The Tribunal may require and facilitate any disclosure it determines appropriate to the circumstances, taking into account the needs of the parties and the desirability of making disclosure expeditious and cost-effective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed.

8. Evidence and hearings

The Tribunal will determine the manner in which the parties shall present their cases. The presentation of a party's case would normally include the submission of a pre-hearing memorandum that includes: a statement of facts; a statement of each claim being asserted; a statement of the applicable law and authorities upon which the party relies; a statement of the relief requested, including the basis for any damages claimed; and the evidence to be presented, including documents relied upon and the name, capacity and subject of testimony of any witnesses to be called, the language in which each witness will testify, and an estimate of the amount of time required for the party's examination of the witness.

9. The award

The Tribunal makes the award in writing that also provides the reasoning for the award. The award is usually made where the arbitration takes place, and specifies the time and date it is issued. The Tribunal delivers executed copies of awards and of any dissenting opinion to the parties. If the arbitration law of the country where the award is made requires the award to be filed or registered, the Tribunal complies with this requirement or arranges for compliance. The Tribunal can be requested by any party, with notice to the other party, to interpret or correct the award. The request and the correction or interpretation would take place within specified time periods. The award is final and binding on the parties, and the parties must undertake to carry out the award without delay.

The arbitral process normally takes about nine months from the initial pre-hearing conference to the time it is submitted to the Tribunal. In most circumstances the final award should be rendered within three months after that.

Chapter 10. Links – Internet legal resources for commercial disputes

The internet is proving to be an invaluable tool for research. Below are some of the links that will be of use in researching legal aspects of commercial diplomacy. Each one opens a number of search options and other links.

Trade-related institutions and agreements

The Website of the Bureau of Export Affairs of the U.S. Department of Commerce contains the texts of 295 agreements to which the United States is a party
http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?205:64:54352440:0.
The World Trade Organization
www.wto.org
North American Free Trade Agreement
http://www.nafta-sec-alena.org/english/index.htm?home.htm
Free Trade Area of the Americas
http://www.ftaa-alca.org/Alca_e.asp
Organization for Economic Cooperation and Development (OECD)
http://www.oecd.org/EN/home/0,,EN-home-0-nodirectorate-no-no-no-0,FF.html
Asia Pacific Economic Cooperation (APEC)
http://www.ustr.gov/regions/asia-pacific/apec.shtml
Association of South East Asian Nations (ASEAN)
http://www.asean.or.id/
European Union
http://europa.eu.int/comm/index_en.htm
Mercosur
http://www.idrc.ca/lacro/investigacion/mercosur.html
Trade Agreements and information in the Western Hemisphere
http://www.sice.oas.org/
United Nations Conference on Trade and Development
http://www.unctad.org/
European Free Trade Association (EFTA)
http://www.efta.int/structure/main/index.html
Treaty Establishing the African Economic Community
http://www.dfa.gov.za/for-relations/multilateral/treaties/aec.htm
Common Market for Eastern and Southern Africa (COMESA)
http://www.comesa.int/

Arbitration and Mediation resources

United Nations Commission on International Trade Law
http://www.uncitral.org/
Hague Conference on Private International Law
http://www.hcch.net/index.html
International Centre for Settlement of Investment Disputes
http://www.worldbank.org/icsid/
International Chamber of Commerce
http://www.iccwbo.org/
Organization for Harmonization of African Business Law (OHADA)
http://www.ohada.com/

Generally useful resources

LLRX.com, a free Internet web journal posting legal news and resources
http://www.llrx.com/features/wto2.htm#I_C
Cornell Law School Legal Information Institute
http://www.law.cornell.edu/topics/trade.html
Lex Marcatoria
http://lexmercatoria.org/
Juris International
http://www.jurisint.org/pub/
Index to Foreign Legal Periodicals
http://www.law.berkeley.edu/library/iflp/
American Society of International law
http://www.asil.org/
Austral-Asian Legal Information Institute
http://www.austlii.edu.au/
British and Irish Legal Information Institute
http://www.bailii.org/